C. Marie Eckert, OSB No. 883490
marie.eckert@millernash.com
Suzanne C. Lacampagne, **OSB No. 951705**
suzanne.lacampagne@millernash.com
MILLER NASH GRAHAM & DUNN LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 224-5858
Facsimile: (503) 224-0155

Mark D. Hopson
mhopson@sidley.com
Frank R. Volpe
fvolpe@sidley.com
Benjamin E. Tannen
btannen@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Attorneys for Intervenor-Defendants
American Fuel & Petrochemical Manufacturers
American Petroleum Institute
National Association of Manufacturers

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No. 6:15-cv-01517-TC

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' SEPARATE MOTIONS TO WITHDRAW

REPLY BRIEF

Plaintiffs' responses to the intervenor-defendants' succinct motions to withdraw are one long distraction.[1] Clearing aside all of the diversions, plaintiffs *agree* that the intervenor-defendants "should be allowed to withdraw" from this case; they just want the Court to impose "conditions" on that withdrawal. Dkt. 169 at 33. Plaintiffs' concession on the motions' ultimate disposition—*i.e.*, grant, not deny—should be the beginning and the end of the matter: intervenor-defendants have the right to withdraw, *no* party is calling for them to remain in the case, and the Court has ample authority to grant the motions in full. *See* Dkt. 163.

Plaintiffs' requests for "conditions" on the withdrawal are all baseless. Plaintiffs do not cite a single relevant authority for imposing any conditions on an intervenor's subsequent decision to withdraw from a case. And that is hardly surprising: the "conditions" plaintiffs seek are irreconcilable with the limited nature of the relief requested and are wholly inappropriate for decision at this time. The motions should be granted in their entirety and without conditions.

I. THE COURT SHOULD GRANT THE MOTIONS TO WITHDRAW IN FULL.

Intervenor-defendants' motions to withdraw explained that the Court has authority to grant withdrawal and that there are good reasons—including judicial economy—for doing so. Dkt. 166. Plaintiffs do not take issue with any of that. They do not contest that the Court has authority to grant the requests and, in fact, "do not outright oppose [the intervenor-defendants'] withdrawal from this case." Dkt. 169 at 6. Nor do plaintiffs contend that withdrawal would

[1] In most respects, the plaintiffs' responses to the motions to withdraw, Dkts. 169, 173, 175, are virtually identical to each other, and thus the Intervenor-Defendants the National Association of Manufacturers ("NAM"), American Fuel & Petrochemical Manufacturers ("AFPM"), and American Petroleum Institute ("API") (collectively, "intervenor-defendants") have chosen to file a combined reply for the sake of brevity and efficiency. Citations are limited to one of the plaintiffs' three responses or one of the intervenor-defendants' three motions to withdraw unless otherwise noted.

disrupt proceedings or would burden anyone going forward. Because "withdrawal should be freely granted so long as it does not seriously interfere with the actual hearings," *Dowell v. Bd. of Educ. of Okla. City Pub. Sch.*, 430 F2d 865, 868 (10th Cir 1970) (per curiam), and because there is no dispute that withdrawal would not interfere with these proceedings, much less "seriously" do so, the motions should be granted—full stop.

Plaintiffs nevertheless seek to hedge their position with the argument that "withdrawal should only be granted with conditions." Dkt. 169 at 6. But plaintiffs offer no authority for their request and do not cite any case imposing conditions on an intervenor's withdrawal. Plaintiffs' position, moreover, is flatly inconsistent with how courts typically handle such motions—*i.e.*, simply granting them in full without attaching conditions. *See, e.g.*, Order, *Brown v. Detzner*, No. 3:12-cv-00852, Dkt. 58 (MD Fla Apr. 29, 2013); Order, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co.*, No. 1:13-cv-01582, Dkt. 60 (SDNY Apr. 1, 2013); Minute Order, *South Carolina v. United States*, No. 1:12-cv-00203 (DDC May 24, 2012); Order, *Bogaert v. Land*, No. 1:08-cv-00687, Dkt. 65 (WD Mich Apr. 14, 2009). This Court should follow the same course.

A. There Is No Obligation to Provide a Justification for Withdrawal.

First up on plaintiffs' wish list is that the Court require the intervenor-defendants to "provide a justification" for their decision to withdraw from the case. Dkt. 169 at 18-19. Because intervenor-defendants had to demonstrate why intervention was appropriate, plaintiffs reason, intervenor-defendants should likewise have to "justify" withdrawal. *Id.*

Plaintiffs are mistaken. Both the federal rules and associated case law provide a legal standard for intervention, and the intervenor-defendants' original motion therefore endeavored to show how they satisfied that standard. But plaintiffs do not point to any comparable standards

for withdrawal, and they do not contest that withdrawal, unlike intervention, should "be freely granted so long as it does not seriously interfere with the actual hearings." *Dowell*, 430 F2d at 868; Dkt. 163 at 4-5. In other words, the only "justification" intervenor-defendants need is that withdrawal would not seriously interfere with proceedings. *See, e.g.*, Motion to Withdraw, *South Carolina v. United States*, No. 1:12-cv-00203, Dkt. 72 (DDC May 24, 2012) (simply requesting withdrawal); Minute Order, *South Carolina v. United States*, No. 1:12-cv-00203 (DDC May 24, 2012) (granting motion). That particular, and singularly relevant, justification is beyond dispute. There are no claims asserted against intervenor-defendants, and as plaintiffs have propounded expansive and largely irrelevant discovery demands against intervenor-defendants, it has become increasingly clear that, unlike the unified and substantial legal challenges to plaintiffs' theories, the factual and scientific challenges to plaintiffs' case would require intervenor-defendants to address many issues on which they had never taken a position. After careful consideration, the intervenor-defendants are convinced that the case would be more streamlined and efficient, and impose fewer burdens on all involved—the Court and the parties—if intervenor-defendants simply withdraw.

B. There Is No Basis for Granting Withdrawal "With Prejudice."

Plaintiffs next request that withdrawal be "with prejudice, precluding [intervenor-defendants] and [their] members from any participation in this case going forward," and "finding that [intervenor-defendants] no longer meet[] the requirements of FRCP 24." Dkt. 169 at 7, 21-27, 34.

This misconceives the relevant inquiry for several reasons. First, plaintiffs do not cite any case in which an *intervenor's* request *to withdraw* was granted with such conditions but instead point to cases in which *a plaintiff's* claims are *dismissed with prejudice*. Here, however,

there are no claims: plaintiffs assert no claims against intervenor-defendants, and intervenor-defendants have not filed any claims against plaintiffs. There is therefore nothing to dismiss, let alone anything to dismiss "with prejudice." The question before the Court is simply whether to grant the intervenor-defendants' motions to withdraw, and that is all the Court needs to do.[2]

Second, there is no reason or authority for deciding, as a condition of withdrawal, that intervenor-defendants no longer meet the requirements of Rule 24. The Court has already decided that multi-factored question, and it need not and should not be revisited at this juncture. Once the Intervenors withdraw from the case, if there were to be a future attempt to intervene, such a request would be decided at that time pursuant to Rule 24. *See Legal Aid Soc. of Alameda Cnty. v. Dunlop*, 618 F2d 48, 50-51 (9th Cir 1980).

Third, and related, plaintiffs incorrectly point to authorities concerning a party's motion to intervene as relevant to imposing conditions on a motion to withdraw. In particular, plaintiffs cite to *United States v. Oregon*, 839 F2d 635, 638-39 (9th Cir 1988), and *Greene v. United States*, 996 F2d 973, 977-78 (9th Cir 1993), to argue that withdrawal "with prejudice" is required. Those cases say no such thing. Instead, the decisions stand for the limited point that the potential (not automatic) *stare decisis* effect of a final decision in a case, "when upheld by an appellate ruling," can be relevant to the initial Rule 24(a) determination on intervention. That is

[2] It is true, as plaintiffs note, that the motions to withdraw stated that an intervenor may choose to withdraw "just as a plaintiff has the right to decide she no longer wishes to pursue a particular claim filed in a particular case." Dkt. 166 at 3. But that does not mean that intervenors are effectively in the same position as plaintiffs for any and all purposes—including that withdrawal, unlike dismissal *of claims*, can be made "with prejudice." Intervenor-defendants' statement simply reflects the modest point that intervenors affirmatively seek involvement in a case—and are in that sense more like plaintiffs than defendants—and can subsequently decide they no longer wish to participate just like a plaintiff can drop a claim or forego a lawsuit after it has been filed.

perfectly sensible: deciding whether to allow a party to intervene should take into account whether a final judgment in the case could (not must) bind that party in the future. *See Oregon*, 839 F2d at 638. But that does not mean, as plaintiffs' argument necessarily assumes, that an intervening party's subsequent decision to withdraw long before any final judgment issues in the case becomes automatically binding as to that intervening party and should be made "with prejudice."

C. There Is No Basis for Precluding Intervenor-Defendants or Their Members From Future Litigation Prematurely.

Plaintiffs also request a far more drastic version of their "with prejudice" condition—namely, that *this Court* order that intervenor-defendants *and their members* are precluded for all time from litigating "these claims" in this case or in some unknown "future lawsuit." *See, e.g.*, Dkt. 169 at 31-34. That request is premature and inappropriate.

To begin with, the preclusive effect of this litigation on the intervenor-defendants in the future is not something that this Court can or should determine. Preclusion is an affirmative defense and thus an issue that is decided (if ever) in a second, later-filed case. Indeed, all of plaintiffs' cases discussing the doctrine of non-party preclusion do so in the context of a later case. *See id.* at 31-33. The preclusive effect of a decision granting the motions to withdraw, therefore, is a question to be decided in the future, if and when it ever arises. Courts simply do not preordain the potential later preclusive effects of their decisions.

Equally unavailing is plaintiffs' argument that the Court should impose binding conditions on intervenor-defendants' members. *See, e.g., id.* at 7. Plaintiffs once more cite no authority for this sweeping request—a tacit recognition that they have found none. The intervenor-defendants' members are not and never have been parties to this case. Trade

associations, like environmental or other non-governmental organizations, sometimes participate in litigation to advance the interests of their members. But that does not expose the members, in their individual capacities, to binding obligations by way of a litigation to which they are not even parties. *Cf. Sherwin Williams Co. v. Spitzer*, No. 1:04-cv-185, 2005 WL 2128938, at *10, *17 (NDNY Aug. 24, 2005) ("in order to enforce the Defendants' Request for Documents Related to Individual Members of [association], the Defendants will have to seek the information from the non-party individual members by subpoena"); *New Hampshire Motor Transp. Ass'n v. Rowe*, 324 F Supp 2d 231, 236 (D Me 2004) (recognizing that discovery to members of an association which is a party to case should be via subpoena to the members). The Court should reject plaintiffs' request to turn intervenor-defendants' short intervention in this litigation into a perpetual burden on their tens of thousands of members.

II. THERE IS NO BASIS FOR SANCTIONING THE INTERVENOR-DEFENDANTS.

Plaintiffs' request for attorneys' fees is effectively a request for sanctions, and it should be roundly rejected.

Federal courts of course have "inherent authority" to "sanction a litigant for bad-faith conduct by ordering it to pay the other side's legal fees." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S Ct 1178, 1183-84 (2017); *see also Beaudry Motor Co. v. Abko Props., Inc.*, 780 F2d 751, 756 (9th Cir 1986) ("An award of fees to the prevailing party is proper if . . . the court finds that the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."). But such circumstances represent one of the "very narrow exceptions to the American rule preventing an award of attorney's fees" and should be used "only in exceptional cases and for dominating reasons of justice." *United States v. Standard Oil Co. of Cal.*, 603 F2d 100, 101, 103 (9th Cir 1979) (citation omitted). The Ninth Circuit has thus awarded fees for bad

faith, for example, when a party refuses to abide by an arbitrator's decision without any justification or files a complaint in which it "should have been aware" that its claims were clearly barred by the statute of limitations. *Int'l Union of Petrol. & Indus. Workers v. W. Indus. Maint., Inc.*, 707 F2d 425, 428 (9th Cir 1983); *Beaudry Motor*, 780 F2d at 756-57.

Plaintiffs' argument that intervenor-defendants should be sanctioned is spurious for a number of reasons. First, as a practical matter and as plaintiffs tacitly recognize, fees are available, when appropriate, to a "prevailing party." Dkt. 169 at 29 (quoting *Beaudry Motor*, 780 F2d at 756). Plaintiffs, however, are not a prevailing party vis-à-vis the intervenor-defendants (or anyone else). All that has happened at this early, pre-trial stage is that plaintiffs' complaint has survived a motion to dismiss—nothing more.

Second, plaintiffs suggest in places that intervenor-defendants' "participation in this case [was] in bad faith" and done "solely for the purpose of harassment and delay." *See* Dkt. 169 at 9-18, 31. That assertion is frivolous. The Court *granted* intervenor-defendants' motion to intervene and participate in this case, over plaintiffs' opposition. Dkts. 48, 50. Surely the intervenor-defendants' decision to seek intervention as of right, relief that this Court in fact granted, is not a "very narrow" or "exceptional" circumstance warranting sanctions.

Elsewhere, plaintiffs contend that the intervenor-defendants' conduct during the case itself was somehow sanctionable. *See* Dkt. 169 at 9-18. This accusation is similarly groundless, as intervenor-defendants have complied fully with the rules in all of their filings. A would-be intervenor, for instance, is required by Rule 24(c) to file a pleading along with the motion, and, like the federal defendants, intervenor-defendants rightfully chose to file a motion to dismiss here. Dkts. 19, 20. As the Court is aware, the federal defendants have now petitioned the United

Court of Appeals for the Ninth Circuit for a writ of mandamus raising many of the issues articulated by all defendants in their dismissal pleadings.

In any event, the fact that plaintiffs spent time contesting that motion does not mean that it was filed in bad faith. By the same token, after the decision on the motion to dismiss, intervenor-defendants filed an answer—again complying with all applicable requirements and rules. Dkt. 131 at 3. Indeed, after plaintiffs complained about intervenor-defendants' answer, the Court offered a "word to the wise"—not to file the draft Rule 11 motion because doing so "is just a red flag that's not going to help us advance the ball in this case at all" and would not be "helpful."[3] Transcript at 47, *Juliana v. United States*, No. 6:15-cv-1517 (Mar. 8, 2017). Plaintiffs conveniently neglect to mention this aspect of the case's history. Nor do plaintiffs mention *why* intervenor-defendants came to appreciate that the requests for admission were ill-suited to the task of narrowing the issues in dispute. Instead, plaintiffs catalogue what they describe as intervenor-defendants' "refusal" to narrow the issues, Dkt. 169 at 11-17, but the *plaintiffs'* requests simply reflected *their* (extremely broad and subjectively worded) allegations from the complaint, which intervenor-defendants had already answered, and which the plaintiffs refused to narrow in any meaningful way.

Finally, plaintiffs protest over certain discovery disputes, but those disputes are entirely of the plaintiffs' own making. Plaintiffs are the ones who (1) chose to issue substantial discovery requests to parties against whom they made no claims and from whom they sought no relief and (2) chose to make those discovery requests exceptionally burdensome and unreasonably broad.

[3] In their responses to the motions to withdraw, plaintiffs attached the draft Motion for Rule 11 sanctions. *See, e.g.*, Dkt. 170-1. This is improper and inconsistent with the parties' discussions with the Court.

Dkt. 131 at 12-14. Plaintiffs' *own* decision, for example, to notice the deposition of now-Secretary of State Rex Tillerson consumed almost a full month of this case's attention. Dkts. 101-107. More generally, too, this Court has repeatedly noted the breadth of plaintiffs' discovery requests on irrelevant issues and urged plaintiffs to narrow them. *See, e.g.*, Transcript at 22, *Juliana v. United States*, No. 6:15-cv-1517 (Apr. 7, 2017). Plaintiffs nevertheless continue to press forward, seeking some documents that date back more than 50 years and on issues that have no relevancy to any claim or defense in the lawsuit. Intervenor-defendants, for their part, have neither sought a single page of discovery nor any admissions from plaintiffs.

In short, intervenor-defendants' participation in this case was not sanctionable and their later decision to withdraw does not make it so. The Court should grant the motions to withdraw unconditionally.

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CONCLUSION

For all of the foregoing reasons, as well as those stated in the intervenor-defendants' motions to withdraw, the Court should grant the motions to withdraw unconditionally from the case.

DATED this 22nd day of June 2017.

MILLER NASH GRAHAM & DUNN LLP

/s/ C. Marie Eckert
C. Marie Eckert, OSB No. 883490
marie.eckert@millernash.com
Suzanne C. Lacampagne, OSB No. 951705
suzanne.lacampagne@millernash.com
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 224-5858

SIDLEY AUSTIN LLP

/s/ Frank R. Volpe
Mark D. Hopson
mhopson@sidley.com
Frank R. Volpe
fvolpe@sidley.com
Benjamin E. Tannen
btannen@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Attorneys for Intervenor-Defendant American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and National Association of Manufacturers

I hereby certify that I served the foregoing Reply in Support of Intervenor-Defendants' Separate Motions to Withdraw on:

Julia A. Olson
Wild Earth Advocates
1216 Lincoln Street
Eugene, Oregon 97401
E-mail: juliaaolson@gmail.com

Attorney for Plaintiffs

Daniel M. Galpern
Law Offices of Daniel M. Galpern
1641 Oak Street
Eugene, Oregon 97401
E-mail: dan.galpern@gmail.com

Attorney for Plaintiffs

Philip L. Gregory
Cotchett, Pitre & McCarthy, LLP
840 Malcolm Road
Burlingame, California 94010
E-mail: pgregory@cpmlegal.com

Attorney for Plaintiffs

Sean C. Duffy
Marissa Piropato
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
E-mail: sean.c.duffy@usdoj.gov

Attorney for Defendants

Charles M. Tebbutt
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence
Eugene, Oregon 97401
E-mail: charlie@tebbuttlaw.com

Attorney for Amici Curiae Global Catholic Climate Movement and Leadership Council of Women Religious

Michelle A. Blackwell
Blackwell Law PC
P.O. Box 10326
Eugene, Oregon 97440
E-mail: mblackwell@blackwell.law

Attorney for Amicus Curiae John Davidson

Courtney B. Johnson
Crag Law Center
917 S.W. Oak St., Suite 417
Portland, Oregon 97205
E-mail: courtney@crag.org

Attorney for Amici League of Women Voters of the United States/League of Women Voters of Oregon

by the following indicated method or methods on the date set forth below:

☒ **CM/ECF system transmission.**

DATED this 22nd day of June 2017.

/s/ C. Marie Eckert

C. Marie Eckert, P.C., OSB No. 883490

Of Attorneys for Intervenor-Defendants American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and National Association of Manufacturers