No. 18-71928

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

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 a Writ of Mandamus to the United States District Court
for the District of Oregon (No. 6:15-cv-1517-TC)

REPLY IN SUPPORT OF EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL UNDER CIRCUIT RULE 27-3

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INTRODUCTION

When this litigation last came before this Court, the district court had erroneously denied the government's motion to dismiss, but as this Court repeatedly emphasized, little else had occurred. No order concerning discovery had issued. The government had not yet moved for a protective order. It had not yet moved to dismiss the President or moved for summary judgment. In this Court's view, there remained the opportunity for the government to raise and re-raise legal objections to Plaintiffs' claims and for the district court to reconsider its prior decisions, including whether this litigation must be "focus[ed] . . . on specific governmental decisions and orders." Petition Exhibit 2 at 15. This Court made clear that it expected Plaintiffs' claims to be "vastly narrowed as litigation proceed[ed]." *Id.* at 17. Against that backdrop, the Court declined to intervene at that "very early stage" of litigation. *Id.* at 15.

In opposing the government's request for a stay pending its current mandamus petition, Plaintiffs largely repeat the refrain that this Court denied the government's request for mandamus and that nothing has changed. That is simply not true. Following this Court's prior decision, the government took every step contemplated by this Court in that decision. The government moved for a protective order against all discovery (including expert discovery), explaining that discovery is categorically inappropriate because it would violate the APA's comprehensive regulation of

agency decisionmaking and the separation of powers. The government restated its prior objections to Plaintiffs' standing and to the merits of their claims in the context of summary judgment, permitting the district court to reconsider those rulings on the basis of a more developed record, including the 17 expert reports served by Plaintiffs as well as the affidavits and documentary evidence produced by Plaintiffs in opposition to the motion. The government moved to dismiss the President and made two additional arguments for why Plaintiffs' claims are not justiciable in their current form. Yet Plaintiffs did nothing to narrow their claims or focus them on specifically identified agency actions. And the district court summarily dismissed the government's motion for a protective order and denied the government's request for stay pending consideration of the two dispositive motions that would obviate the occasion for any discovery at all. Moreover, the court has repeatedly stated its expectation that, absent intervention from a higher court, trial will begin in just over three months' time and will likely proceed for 50 trial days.

Respectfully, we do not think that is what this Court had in mind or what settled law allows. The Court's prior opinion assured the government it would remain free to "seek[] mandamus in the future" from this Court "if circumstances justify it." *Id.* at 17. Circumstances justify such relief now. This litigation can no longer reasonably be described as in the early stages. It is barreling toward an extremely compacted period of discovery that, in one form or another, will force the

government to violate its obligations under the APA and the separation of powers, followed immediately by what Plaintiffs have touted as a 50-day "Trial of Century," which the government contends would itself violate the same constraints. Absent this Court's intervention, there is no reasonable likelihood that this case will be terminated or that Plaintiffs will be required to narrow their manifestly overbroad claims in time to have any meaningful effect on that discovery or trial. Accordingly, this Court should grant a stay to allow the Court to consider the government's renewed request to dismiss this unfounded suit.

ARGUMENT

Whether to issue a stay turns on four factors: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The first two factors are "the most critical." *Id.* at 434. The balance of equities and consideration of the public interest merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, all factors counsel strongly in favor a stay of discovery and trial pending consideration of the government's mandamus petition.

I. The government is likely to succeed on the merits of its mandamus petition.

A. This Court is likely to direct the district court to dismiss this case.

This Court is likely to direct the district court to dismiss this case. *See* Petition 20-48. As explained in the petition, Plaintiffs' claims are deeply flawed for three independent reasons. First, this litigation is not remotely a "Case" or "Controversy" within the meaning of Article III because (1) Plaintiffs do not have standing to assert generalized grievances against the diffuse effects of climate change that are not tied to any particular action or inaction by Defendants and not redressable by any order within the authority of a federal court, Petition 20-25; and (2) in any event, Plaintiffs' attempt to redirect federal environmental and energy policies through litigation is not the sort of dispute that is within a federal court's constitutional authority to entertain, Petition 25-29. Second, even if this suit could proceed, the APA would require it to be targeted at specifically identified agency actions or alleged failures to act. Petition 29-34. Third, Plaintiffs' claims of a fundamental right to a particular climate system and a never-before-recognized public trust obligation on the federal government are frivolous. Petition 34-41.

Permitting these fatally defective claims to proceed through discovery and trial would violate bedrock limitations on agency decisionmaking imposed by the APA and intrude on the executive authority to consider and formulate federal policy

in a manner that cannot be corrected on appeal. Petition 41-48. When this Court previously declined to direct dismissal, it did so with the expectation that Plaintiffs' claims would be "vastly narrowed as litigation proceed[ed]," Petition Exhibit 2 at 17, and that the district court would reconsider whether those claims were "too broad to be legally sustainable," *id.* at 14. On remand, however, Plaintiffs have failed to narrow their claims *at all*. The district court's setting of a October 29 trial date combined with its denial of a protective order and refusal to stay discovery pending resolution of the government's dispositive motions make clear that the court will not reconsider the viability of Plaintiffs' claims or require any narrowing before subjecting the government to unlawful discovery or the burden of preparing for the sprawling trial envisioned by Plaintiffs.

Contrary to Plaintiffs assertion (Response 11-12), this Court did not resolve the merits of the government's arguments in its prior decision. Rather, it focused on the "very early stage" of the case and the government's "ample opportunity to raise and litigate any legal objections" as the litigation proceeded. Petition Exhibit 2 at 15. The Court thus "declined to . . . review preliminary legal decisions made by the district court or otherwise opine on the merits," other than noting the absence of controlling Ninth Circuit authority on Plaintiffs' "unprecedented" theories. *Id.* Yet the district court now refuses even to pause this litigation long enough to consider the government's legal objections in a timely way.

In the government's prior petition, it made two arguments for dismissal: (1) Plaintiffs fail to adequately allege standing, Response Exhibit A at 11-21; and (2) Plaintiffs' constitutional claims fail on the merits, *id.* at 21-31. Because this Court did not resolve those questions, the government reasserts both arguments here. But it also makes two additional arguments for dismissal: (1) even if Plaintiffs could establish standing, Plaintiffs' claims are not of the sort cognizable in an Article III court, Petition 25-29; and (2) if permitted at all, Plaintiffs' constitutional claims must be asserted under the APA, targeted at specifically identifiable agency actions or inactions, Petition 29-34. Any of these arguments is fatal to the continuation of this lawsuit, yet Plaintiffs offer no substantive response to any of them.

Contrary to Plaintiffs' assertion (Response 13), the government does not claim that it is "exempt from normal litigation practice or appellate procedure." The government regularly engages in litigation after the denial of a motion to dismiss. But "[t]his is no ordinary lawsuit." Petition Exhibit 1 at 3. In the unique circumstances of this case, the very process of discovery and trial contemplated by the district court would *themselves* violate constitutional and statutory limits on agency decisionmaking. Petition 41-48. The Supreme Court and this Court have held that mandamus relief is appropriate to prevent such harms. *See Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 382 (2004) ("[M]andamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal

branch's ability to discharge its constitutional responsibilities."); *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997) ("Requiring [litigants] to choose between being in contempt of court and violating [the governing] law clearly constitutes severe prejudice that could not be remedied on direct appeal."). Plaintiffs offer no response.

B. At a minimum, this Court is likely to direct the district court to stay discovery and trial pending consideration of the government's dispositive motions.

Even if this Court were not inclined to immediately direct outright dismissal of this case, it is likely at least to direct the district court to stay discovery and trial until the government's pending motion for judgment on the pleadings and motion for summary judgment are resolved. Both motions were contemplated by this Court's prior opinion in this case. *See* Petition Exhibit 2 at 13 (suggesting that Defendants "move[] . . . to dismiss the President"); *id.* at 14 (noting that Defendants can "seek[] summary judgment on the claims"). Both motions will soon be ripe for review. *See* Response 4, 7.

As explained in the petition, the Supreme Court recently reversed this Court's denial of mandamus relief in another case challenging the constitutionality of agency action, directing this Court to ensure that a district court resolve the government's threshold arguments for dismissal and consider certifying any adverse order for interlocutory appeal *before* requiring the government to supplement the record. *See*

In re United States, 138 S. Ct. 443, 445 (2017). The similarities between this case and that one are striking. Here, as in *In re United States*, the government "makes serious arguments" that supplementing the record is unnecessary and unlawful. 138 S. Ct. at 445. Here, as in *In re United States*, the government presents arguments in pending motions that this case is not justiciable or otherwise should be dismissed, which, "if accepted, likely would eliminate the need" for factual development. *Id*. And here, as in *In re United States*, the district court nevertheless has refused a stay while the government's threshold arguments are resolved. *Id.* at 444. That error warranted mandamus relief in *In re United States* and, indeed, reversal of this Court's refusal to grant such relief. It warrants at least the same relief here.

II. The balance of the equities counsels in favor of a stay.

The remaining stay factors also weigh strongly in favor of staying discovery and trial pending the resolution of the government's mandamus petition.

A. Without a stay, the government will be irreparably harmed.

Absent a stay, the government will be forced to proceed with burdensome discovery in a highly-compressed timeframe and to prepare for (and eventually participate in) a fast-approaching 50-day trial while, at the same time, violating its obligations under the APA and the Constitution. Most immediately, the government must identify experts tomorrow (July 12) and by August 13 must produce expert reports rebutting Plaintiffs' 18 expert witnesses. And while the specific discovery

requests with which the government will be required to comply are yet to be determined, the government's contention is that *all* discovery in this case is unlawful and unnecessary. The district court's rejection of that contention and refusal to stay discovery pending resolution of the dispositive motions all but guarantees such unlawful discovery will occur.

Plaintiffs attempt to deny the likelihood of harm to the government by making a series of misleading claims about the course of discovery. Plaintiffs cite, for example, their request to hold in abeyance the pending deposition notices. Response 12-13. But Plaintiffs made clear in that motion that they plan to "substitut[e] contention interrogatories for [the] depositions" seeking the same information, ECF No. 247 at 2, and that if the parties cannot "reach agreement" on such substitutions, they may simply "reinstate the [prior] requests," *id.* at 4. Contrary to Plaintiffs' bizarre claim (Response 15-16), the government did not *invite* that Sword of Damocles; it made clear that, if Plaintiffs wanted to pursue alternative discovery tactics, they "could and should unilaterally . . . withdraw[] the pending discovery requests." Response Exhibit 2. Plaintiffs have not done so. ECF No. 247.

Plaintiffs claim (Response 3-4) that Defendants "have not objected to expert discovery" and, in fact, agreed to the schedule for producing expert reports. That is simply wrong. Defendants have repeatedly and consistently objected to *all* discovery in this case. *See, e.g.*, ECF No. 196 at 8 ("The Court Should Grant a

Protective Order Precluding All Discovery"); Transcript 13:7-8 (Apr. 2, 2018) ("From our position, if there's any case at all, it's going to be an administrative record review case."). While the government obviously worked with the district court on the deadlines it set for expert discovery, the court set that schedule over the government's objection, not at its invitation.

Finally, Plaintiffs misleadingly suggest (Response 16) that the parties agreed to request a 50-day trial. The government has consistently maintained that a trial on Plaintiffs' claims is improper. More specifically, following this Court's prior decision, the government objected to the district court's setting a trial date *at all* before considering the government's motions for dismissing or narrowing Plaintiffs' claims. *See id.* at 18:7-9 ("We believe that summary judgment can narrow the litigation prior to trial . . . as the Ninth Circuit itself noted."); *id.* at 17:24-19:7. The government did agree that, as this sprawling litigation currently stands—with potentially 21 fact witnesses and up to 36 expert witnesses—50 trial days would likely be required if a trial were actually held. But there could be no confusion that the government objected to every one of those days.

More fundamentally, Plaintiffs' contention (Response 14) that there is no likelihood of irreparable harm to the government because they are working to "narrow discovery" and "accommodate Defendants' concerns" mischaracterizes the government's objections. The government's concern is not solely (or even

principally) the time or effort required of government officials to respond to overly burdensome discovery requests. Rather, regardless of the time required, the very process of requiring agency officials to articulate factual assessments and positions regarding national environmental and energy policies through discovery followed by a 50-day trial to make district court findings about the same would itself violate the provisions for public input and other procedures imposed by the APA on agency factual assessments and decisionmaking, the APA's provision for judicial review, and the separation of powers that bars a court from requiring the President and Executive agencies to develop and implement policy proposals outside the limitation imposed by their organic statutes and the APA. Such violations are not the sort that can be accommodated by choosing one unlawful discovery device over another, and they cannot be remedied on appeal. *See Credit Suisse*, 130 F.3d at 1346.

B. Plaintiffs will not be harmed by a stay.

Plaintiffs can make no credible claim that a relatively brief stay to decide the government's petition will cause them irreparable harm. Plaintiffs claim (Response 20 n.7) that even a modest further delay in court-ordered relief "could substantially injure" them. But Plaintiffs make no effort to actually tie any of Defendants' actions to the harm they claim to suffer from the diffuse effects of global climate change. In any event, one of Plaintiffs' own experts concedes that climate change "is not something that can be stopped in the near term." Wanless Declaration (ECF

No. 275) ¶ 18; *see also* Rignot Report (ECF No. 262-1) at 2 ("It is not clear how much of this sea level rise can be avoided by slowing down climate warming or even cooling the planet again.").

CONCLUSION

For the foregoing reasons, this Court should grant a stay of discovery and trial in the district court while it considers the government's petition for mandamus.

Dated: July 11, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the length limits permitted by Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 2,722 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Appellate Rule 32(a)(5) and (6).

s/ Eric Grant
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 11, 2018.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Eric Grant
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