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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

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

DECLARATION OF JULIA A. OLSON in Support of Plaintiffs' Motion for Reconsideration of November 21, 2018 Court Ordered Stay of Proceedings

Expedited Consideration Requested

Oral Argument Requested

DECLARATION OF JULIA A. OLSON IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF NOVEMBER 21, 2018 COURT ORDERED STAY OF PROCEEDINGS

I, Julia A. Olson, hereby declare and if called upon would testify as follows:

1. I am an attorney of record in the above-entitled action. I make this Declaration in support of Plaintiffs' Motion for Reconsideration of November 21, 2018 Court Ordered Stay of Proceedings. I have personal knowledge of the facts stated herein, except as to those stated upon information and belief, and if called to testify, I would and could testify competently thereto.
2. Discovery and pretrial matters in this case are almost entirely complete. As of writing, the only remaining discovery and pretrial matters are: (a) the depositions of three rebuttal and sur-rebuttal experts and five Plaintiffs; and (b) completion of the briefing on the pending pretrial motions. None of these obligations requires disclosure of any confidential or privileged information nor do they require Defendants to take any policy positions. The Joint Report on the Status of Discovery and Relevant Pretrial Matters filed with the Ninth Circuit on November 23, 2018 sets forth the remaining discovery and pretrial obligations in detail and is attached as **Exhibit 1** to my Declaration.
3. Proceeding with trial would not lead to any alleged separation of powers intrusions or institutional injury not correctable on appeal. In fact, recently in a similar case procedurally, the Department of Justice concurred with Plaintiffs' position, asserting that, even after final judgment, "the Court still could order effective relief, including the exclusion of improperly admitted extra-record evidence and a prohibition on deposing Secretary Ross in any further proceedings." **Exhibit 2** (Letter from Noel J. Francisco, Solicitor General, U.S. Dep't of Justice, to Honorable Scott S. Harris, Clerk, Supreme Court of the United States, regarding *Department of Commerce, et al. v. United States District Court for the Southern District of New York, et al.*, No. 18-557 (Nov. 26, 2018),

https://www.supremecourt.gov/DocketPDF/18/18-557/73266/20181126163620791_18-557%20Letter.pdf).

4. This case is more than three years old. More months of delay in this case will lead to the need for supplementation of expert reports, due to the constantly growing body of scientific information on climate change that is pertinent to expert testimony in this case. That in turn could lead to Defendants seeking to re-depose Plaintiffs' experts, which they have indicated they would seek to do in the event Plaintiffs tender supplemental reports. Audiovisuals including spatial analysis, 3D modeling, and animation demonstratives and other exhibits Plaintiffs have prepared for trial may become outdated as carbon dioxide levels continue to rise dramatically, climate impacts worsen, and the very harms suffered by the youth Plaintiffs continue to grow and require new factual documentation so that this Court has the most up to date evidence at trial.

5. On November 23, 2018, after this Court's order certifying interlocutory appeal and staying all proceedings, Defendants released the Fourth National Climate Assessment ("NCA4"), https://nca2018.globalchange.gov/, a comprehensive report on climate change and its impacts in the United States. On the same day, Defendants released the Second State of the Carbon Cycle Report ("SOCCR2"), https://carbon2018.globalchange.gov/, which focuses on the carbon cycle across the United States, Mexico, and Canada and assesses major elements of the global carbon cycle and key interactions with climate forcing and feedback components. Counsel for Plaintiffs have spent considerable time reviewing both of these publications. Given the length of these federal government reports and their interactive nature, Plaintiffs are not attaching them to this Declaration but request that this Court take judicial notice of them.

6. On November 30, Defendants petitioned the Ninth Circuit for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b). *Juliana v. United States*, No. 18-80176, Dkt. 1-1 (9th Cir. Nov. 30, 2018). Plaintiffs have until December 10 to file their answer to the petition. Plaintiffs will oppose interlocutory appeal and believe there should not be any further stay of these proceedings in this Court absent an injunction in place to protect Plaintiffs from the further endangerment to the status quo of their substantive due process rights under the Constitution.

7. To illustrate the prejudicial delay and the gross inefficiency of any further stay of pretrial or trial proceedings, I had prepared the attached timeline chart, **Exhibit 3**, which depicts the projected timeline to trial and appellate review if the stay is lifted (Column A) and if the stay is not lifted and the case is reviewed on interlocutory appeal (Column B). We depicted an expedited schedule in Column B for interlocutory appeal before the Ninth Circuit, which Plaintiffs would move for if the stay remained in place and interlocutory appeal were granted. We also made the assumption that the Supreme Court would issue a writ of certiorari to review the Ninth Circuit's decision before remanding back to the District Court for trial, should Plaintiffs prevail, and maintain the stay of trial proceedings. If the Ninth Circuit expedited its proceedings, lifted the stay after interlocutory review, and the Supreme Court did not grant Defendants a stay pending its review (or denied review), then trial could commence sooner, but still not likely until 2020. Under the Column B scenario, each appellate court could have three separate appellate processes before the conclusion of the case whereas under the Column A scenario there would be only one final appellate review by each of the appellate courts.

8. Pursuant to Local Rule 7-1, I contacted counsel for Defendants via email on December 4, 2018 to determine the position of Defendants. Counsel for Defendants communicated that they oppose this Motion.

DATED this 5th day of December, 2018.

/s/ Julia A. Olson

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Exhibit 1

No. 18-73014

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-01517-AA)

JOINT REPORT ON THE STATUS OF DISCOVERY AND RELEVANT PRETRIAL MATTERS

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This Court's Order of November 8, 2018 directed the parties within 15 days to "file a joint report on the status of discovery and any relevant pretrial matters." On November 21, 2018, the district court found that each of the factors set forth in 28 U.S.C. § 1292(b) have been met regarding the district court's "previously mentioned orders" (ECF Nos. 83, 172, 238, and 369), exercised its discretion to immediately certify this case for interlocutory appeal, and stayed this case pending a decision by this Court. ECF No. 444.

In light of the district court's actions, and given that Defendants are today filing a reply brief that suggests holding these mandamus proceedings in abeyance, Defendants believe that a joint report is no longer necessary or appropriate.* Nevertheless, Defendants have agreed to the following as an accurate statement of the status of discovery and other relevant pretrial matters. Plaintiffs believe the status of the case is still pertinent to the issues of mandamus and whether this Court should accept interlocutory appeal given the current posture of the proceedings below.

I. Status of discovery

A. Expert Reports

All expert reports of disclosed experts in this case have been served.

*At the specific request of counsel for Defendants, their names "do not appear on the document."

Pursuant to the district court's order, Plaintiffs served 17 expert reports for their 18 expert witnesses on Defendants on April 13, 2018. ECF No. 189. On August 10, 2018, Plaintiffs served the expert report of James Gustave Speth on Defendants.

Pursuant to the district court's order, Defendants disclosed the identity of their eight expert witnesses to Plaintiffs on July 12, 2018. ECF No. 192. On August 13, 2018, Defendants served their expert reports on Plaintiffs. *Id.*

On September 19, 2018, Plaintiffs served five rebuttal expert reports on Defendants, including two reports by two new rebuttal experts. ECF No. 337. On October 12, 2018, Defendants served a single sur-rebuttal expert report. On November 9, 2018, Defendants served two rebuttal expert reports to the expert report of James Gustave Speth.

B. Depositions

To date, the parties have completed 30 expert depositions: 22 depositions of Plaintiffs' 21 expert witnesses (one was deposed twice) and eight depositions of Defendants' eight expert witnesses. The only remaining expert depositions of disclosed experts are of three of Defendants' experts, one of whom served a sur-rebuttal report and two of whom served rebuttal reports in response to one of Plaintiffs' experts. Thus, all depositions of the parties' disclosed experts have been taken or will be taken if and when the current stay is lifted.

In addition, Defendants have deposed 15 of the 21 Youth Plaintiffs. There remain nine additional depositions as described below:

- Defendants' expert Dr. Jeffrey Sugar, regarding his sur-rebuttal expert report.
- Defendants' expert Dr. James Sweeney, regarding his rebuttal expert report.
- Defendants' expert Dr. David Victor, regarding his rebuttal expert report.
- Plaintiff Nathaniel B.
- Plaintiff Kiran Issac Oommen.
- Plaintiff Sahara V.
- Plaintiff Journey Z.
- Plaintiff Levi D.
- Plaintiff Jaime B.: There are no plans to depose this Plaintiff as Plaintiffs have indicated that this Plaintiff is currently unavailable to testify at trial. If Plaintiffs decide that this Plaintiff will testify at trial, Defendants will notice this Plaintiff's deposition.

As discussed below, Defendants have moved to exclude the following witnesses, identified on October 15, 2018. If the witnesses are not excluded, Defendants will notice their depositions. These witnesses were designated as fact witnesses by Plaintiffs on their Witness List. ECF No. 387. Specifically:

- Plaintiffs' witness Jamescita Peshlakai (mother of Plaintiff Jaime B.) or Mae Peshlakai (grandmother). Plaintiffs have indicated that only one of these witnesses will testify.
- Plaintiffs' witness Sharon Baring, mother of Plaintiff Nathaniel B.
- Plaintiffs' witness Marie Venner, mother of Plaintiff Nick V.

- Plaintiffs' witness Leigh-Ann Draheim, mother of Levi D.
- Plaintiffs' witness Jessica Wentz, Sr. Fellow & Associate Researcher, Sabin Center for Climate (Columbia University).
- Plaintiffs' witness Stephen Seidel, a former employee of the Council on Environmental Quality and of the Environmental Protection Agency.
- Plaintiffs' witness Susan Ying, who worked in aerospace and aeronautical industries.

Rule 30(b)(6) Depositions: Pursuant to Federal Rule of Civil Procedure 30(b)(6), Plaintiffs served deposition notices on the Departments of Agriculture (May 4, 2018), Interior (May 4, 2018), Transportation (May 11, 2018), Defense (June 4, 2018), and Energy (June 4, 2018). The parties agreed to hold these depositions in abeyance while they pursued interrogatories. Plaintiffs no longer intend to pursue their pending Rule 30(b)(6) depositions.

C. Interrogatories

Both Plaintiffs and Defendants have served interrogatories, and both parties have responded to the interrogatories. Both parties have also indicated an intent to provide supplemental responses to certain interrogatories.

As discussed below, Plaintiffs have moved to compel responses to the interrogatories that Plaintiffs served on Defendants. Both the motion and the response have been filed in the district court.

D. Requests for Admission

Plaintiffs served Requests for Admission ("RFAs") on the Departments of Agriculture (May 4, 2018), Interior (May 4, 2018), Transportation (May 11, 2018), Defense (June 4, 2018), and Energy (June 4, 2018). The parties agreed to hold the RFAs in abeyance until the district court decides Plaintiffs' motions for judicial notice, which are listed below. Plaintiffs do not intend to pursue their pending RFAs.

E. Protective Orders

Defendants have sought two protective orders in this case. ECF Nos. 196, 217. Defendants' first motion for a protective order, which sought to preclude all discovery in this action, was filed on May 9, 2018; that motion was denied by the district court. ECF Nos. 212, 300.

Defendants' second motion for a protective order, which sought relief from Rule 30(b)(6) depositions and RFAs, was filed on June 4, 2018 and held in abeyance by the district court upon agreement of the parties. ECF No. 249. Plaintiffs will not pursue their pending Rule 30(b)(6) depositions or their pending RFAs, and as such, Defendants' second motion for a protective order is moot.

To avoid protracted discovery and to simplify authentication of government records, and based upon guidance from the district court, Plaintiffs moved for judicial notice of publicly available documents, largely including documents generated by Defendants. ECF Nos. 254, 340, 380. Defendants have also filed a

motion seeking judicial notice of 456 Congressional Hearing Reports comprising over 80,000 pages of material. ECF No. 375. Plaintiffs did not oppose this motion. The parties agreed to substitute contention interrogatories in lieu of Rule 30(b)(6) depositions. ECF No. 389, ¶¶ 6-7.

Other than what has been described above, no further discovery is anticipated by the parties.

II. Status of pretrial motion practice

A. Pending motions

The following 14 motions are either fully briefed and pending a decision by the district court or are currently being briefed by the parties.

- On June 4, 2018, Defendants filed a Motion for Protective Order seeking relief from Plaintiffs' Requests for Admission (RFAs) and Rule 30(b)(6) depositions. ECF No. 217. On June 27, 2018, the district court ordered that this motion should be held in abeyance "until the Court decides Plaintiffs' motions to seek judicial notice of the documents referenced in Requests for Admissions and to give the parties the opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions." ECF No. 249. Plaintiffs no longer intend to pursue Rule 30(b)(6) depositions or RFAs.

- On August 24, 2018, Plaintiffs filed a Second Motion *in Limine* seeking judicial notice of 609 documents, together with a supporting declaration. ECF Nos. 340, 341. Defendants filed a response on September 28, 2018. ECF No. 357. Plaintiffs filed a reply on October 12, 2018. ECF No. 366.

- On October 15, 2018, Defendants filed a Motion *in Limine* to exclude the testimony of six of Plaintiffs' scientific experts. ECF No. 371. Plaintiffs filed an opposition and a declaration in support on November 2, 2018. ECF Nos. 409, 410. On November 15, 2018, Defendants filed a motion seeking an extension of time until November 23, 2018 to respond. ECF No. 434.

- On October 15, 2018, Defendants filed a Motion *in Limine* to strike the rebuttal report and exclude the testimony of Dr. Akilah Jefferson. ECF No. 372. Plaintiffs filed an opposition and a supporting declaration on November 2, 2018. ECF Nos. 407, 408. Defendants filed a reply on November 16, 2018. ECF No. 436.

- On October 15, 2018, Defendants filed a Request for Judicial Notice of 446 Congressional hearing reports. ECF No. 375. On November 2, 2018, Plaintiffs filed a response indicating they do not oppose the motion. ECF No. 406. Defendants do not intend to file a reply.

- On October 15, 2018, Defendants filed a Motion *in Limine* to exclude the expert testimony of Plaintiffs' expert Professor Catherine Smith. ECF No. 379. Plaintiffs filed an opposition and a supporting declaration on November 6, 2018. ECF Nos. 421, 422. Defendants filed their reply on November 20, 2018. ECF No. 442.

- On October 15, 2018, Plaintiffs filed a Third Motion *in Limine* seeking judicial notice of 452 documents. ECF No. 380. Defendants filed a response on November 13, 2018. ECF No. 431. But for the stay, Plaintiffs' reply would have been due November 27, 2018.

- On October 17, 2018, Plaintiffs filed a Motion to Compel Responses to Interrogatories. ECF No. 388. On November 15, 2018, Defendants filed an opposition. ECF No. 433. Unless otherwise directed by the court, no reply is permitted under the Local Rules. LR 26-3(c).

- On October 18, 2018, Defendants filed a Motion to Strike Plaintiffs' proposed pretrial order. ECF No. 395. Plaintiffs filed a response on November 2, 2018. ECF No. 409. Defendants filed a reply on November 16, 2018. ECF No. 438.

- On October 19, 2018, Defendants filed a Motion to Strike Plaintiffs' Trial Exhibit List or, in the alternative, Objections to Plaintiffs' Trial Exhibit List. ECF No. 397. Plaintiffs filed an opposition on November 2, 2018. ECF No. 411. Defendants filed a reply on November 16, 2018. ECF No. 435.

- On November 2, 2018, Plaintiffs filed a Motion for Reconsideration of the district court's Opinion and Order on Plaintiffs' First Motion in Limine seeking judicial notice of 364 documents. ECF No. 415. Defendants filed a response on November 16, 2018. ECF No. 437. But for the stay, Plaintiffs' reply would have been due November 30, 2018.

- On November 5, 2018, Defendants filed a Motion to Reconsider the district court's denial of Defendants' previous requests to certify for Interlocutory Review its orders on Defendants' motions to dismiss and for judgment on the pleadings and summary judgment. ECF No. 418. Plaintiffs filed an opposition on November 9, 2018. ECF No. 428. Defendants filed a reply on November 14, 2018. ECF No. 432.

- On November 5, 2018, Defendants filed a Motion to Stay this litigation in the district court pending the district court's resolution of Defendants' Motion to Reconsider its denial of previous requests to certify its orders for interlocutory review or resolution of Defendants' Petition for Mandamus filed in the Ninth Circuit. ECF No. 419. Plaintiffs filed an opposition on November 9, 2018. ECF No. 429. But for the stay, Defendants' reply would have been due November 23.

- On November 20, 2018, Defendants filed a Motion to Exclude the testimony of seven witnesses identified by Plaintiffs in their Witness List filed on October 15, 2018, ECF No. 382, in accordance with the schedule set by the district court. ECF No. 440. But for the stay, Plaintiffs' response would have been due December 4, 2018.

B. Anticipated motions

Plaintiffs intend to file a motion for judicial notice of facts within approximately 20 authenticated government documents listed on Plaintiffs' Exhibit List.

III. Other relevant pretrial matters

On October 15, 2018, pursuant to the district court's order (ECF No. 343), the parties filed their witness lists (ECF Nos. 373, 382), trial memoranda (ECF Nos. 378,

384), and motions *in limine* (ECF Nos. 371, 372, 379, 380). On October 15, 2018, Plaintiffs filed a proposed pretrial order (ECF No. 383), which Defendants moved to strike on October 18, 2018 (ECF No. 395). On October 19, 2018, the parties filed their trial exhibit lists (ECF Nos. 396, 402) and their respective objections and motion to strike exhibits. (ECF Nos. 397, 400).

If and when the stay (ECF No. 444) is lifted, the parties will meet and confer with each other regarding objections to exhibit lists. ECF Nos. 400, 401, 423, 424. In addition, the parties have continued to narrow the exhibits intended to be presented at trial.

In response to the temporary stay ordered by the Supreme Court, the District Court vacated the pretrial conference set for October 23, 2018 and the trial date set for October 29, 2018. ECF Nos. 403, 404. On November 21, 2018, and pursuant to its Order certifying this case for interlocutory appeal, ECF No. 444, the District Court stayed consideration of pending motions in this case. ECF No. 445. Further, the district court denied Defendants' Motion for Reconsideration (ECF No. 418) and Motion for Stay (ECF No. 419) as moot. *Id*.

Dated: November 23, 2018.

/s/ Philip L. Gregory
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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 November 23, 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.

Respectfully submitted this 23rd day of November, 2018.

/s/ Philip L. Gregory
PHILIP L. GREGORY

Exhibit 2

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 26, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Department of Commerce, et al. v. United States District Court for the Southern District of New York, et al., No. 18-557

Dear Mr. Harris:

The petition for a writ of certiorari in the above-captioned case was granted on November 16, 2018, and the Court will hear argument on February 19, 2019. In light of the Court's grant of certiorari, the government respectfully suggests that the Court may wish to reconsider staying further trial proceedings, which are ongoing. Although entry of a final judgment in the district court would not, in the government's view, moot the question presented in the petition, a stay would avoid the need to litigate mootness and would protect this Court's jurisdiction to review the issue on which it granted certiorari.

1. This case involves challenges to the decision by Secretary of Commerce Wilbur L. Ross, Jr. to reinstate to the decennial census a question asking about citizenship, as had been asked of at least a sample of the population on every decennial census from 1820 to 2000 (except in 1840). See 315 F. Supp. 3d 766, 776-777. Finding respondents to have made a "strong showing" that Secretary Ross acted in "bad faith" in reinstating the question, the district court in a series of orders permitted respondents to seek discovery outside the administrative record to probe the Secretary's mental processes, and eventually compelled the depositions of two high-level Executive Branch officials: Acting Assistant Attorney General (AAG) John M. Gore and Secretary Ross himself. See Pet. App. 9a-23a, 24a-27a, 93a-100a.

2. a. On October 22, 2018, this Court stayed the district court's order compelling the deposition of Secretary Ross. 18A375 slip op. 1. That stay "will remain in effect until disposition of [the government's] petition [for a writ of certiorari] by this Court." *Ibid.* The Court declined to stay the district court's orders compelling the deposition of Acting AAG Gore and allowing discovery beyond the administrative record, but made clear that the denial "[did] not preclude the applicants from making arguments with respect to those orders" in its petition for a writ of certiorari. *Ibid.* Justice Gorsuch, joined by Justice Thomas, would have taken "the next logical step and

simply stay[ed] all extra-record discovery pending [this Court's] review." *Id.* at 3. Among the reasons "weighing in favor of a more complete stay" was "the need to protect the very review [this Court] invite[s]." *Ibid.*

b. The district court did not stay the trial, in part because this Court had stayed only the deposition of Secretary Ross and not the district court's order "authorizing extra-record discovery in the first place." 18-cv-2921 D. Ct. Doc. 405, at 7 (Oct. 26, 2018) (Pet. App. 118a), as amended, D. Ct. Doc. 485, at 7 (Nov. 5, 2018). The Second Circuit declined to stay the trial in a summary order. 18-2856 C.A. Doc. 75 (Oct. 26, 2018).

c. On November 2, 2018, this Court denied the government's application to expand the stay to include a stay of the trial. 18A455 Order. Justice Thomas, Justice Alito, and Justice Gorsuch would have granted the application. *Ibid.* A bench trial commenced on November 5, the taking of evidence closed on November 16, and post-trial briefs were submitted on November 21. Closing arguments will be held tomorrow, November 27.

3. a. On November 16, 2018, this Court granted the government's petition for a writ of certiorari. The case is set for oral argument on February 19, 2019, following an expedited briefing schedule. The question presented in the petition is not limited to the deposition of Secretary Ross, but encompasses all "discovery outside the administrative record to probe the mental processes of the agency decisionmaker." Pet. I.

b. In light of this Court's grant of certiorari and its expedition of the briefing and argument schedule, the government moved the district court to stay further trial proceedings. 18-cv-2921 D. Ct. Doc. 540 (Nov. 18, 2018). The district court denied the motion. 18-cv-2921 D. Ct. Doc. 544 (Nov. 20, 2018). The court did not believe that this Court's grant of the government's petition for a writ of certiorari constituted a "significant change in circumstances" to warrant reconsideration of its previous denial. *Id.* at 2-3 (citation omitted). And the court concluded that its entry of final judgment before this Court's review "would aid, not hinder, the Supreme Court's task—as the Supreme Court may be able to avoid deciding a thorny legal question altogether." *Id.* at 4.

c. The Second Circuit declined to stay further trial proceedings "substantially for the reasons set forth in the District Court's brief opinion." 18-2856 C.A. Doc. 93 (Nov. 21, 2018).

* * * * *

In light of this Court's grant of the government's petition for a writ of certiorari, the government respectfully suggests that the Court may wish to reconsider staying further trial proceedings. A stay of further trial proceedings could "protect the very review [this Court] invite[d]" and has now granted. 18A375 slip op. 3 (opinion of Gorsuch, J.). A stay pending the disposition of a petition for a writ of certiorari is

appropriate if there is (1) "a 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 conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation, brackets, and internal quotation marks omitted). If the first factor was debatable before, it is clear now. The Court has granted review of the government's petition, which encompasses all of the extra-record discovery. And the Court's stay of Secretary Ross's deposition indicates a fair prospect of reversal on at least a portion of the question presented.

The third factor of irreparable harm also supports a stay. Absent a stay, entry of a final judgment by the district court before this Court has conducted its review could threaten this Court's jurisdiction to decide the question presented. See 18-cv-2921 Doc. 544, at 4 (district court's belief that if trial proceedings continue "the Supreme Court may be able to avoid deciding a thorny legal question altogether"). Ordinarily, when "'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (citation omitted). Issuing a stay here would protect this Court's review of the question presented.

The government recognizes that the Court may well have considered this risk in declining to stay trial proceedings in the November 2 order. See 18A455 Order. And in the government's view, the district court's entry of a final judgment would not moot the case because the Court still could order effective relief, including the exclusion of improperly admitted extra-record evidence and a prohibition on deposing Secretary Ross in any further proceedings. Nevertheless, now that the Court has granted review, a stay of further trial proceedings would protect that review and avoid collateral litigation before this Court over whether that review has been mooted.

Respondents would not suffer irreparable harm if further trial proceedings were stayed. The relief they seek is to exclude the citizenship question from the decennial census questionnaire, which will not be printed until at least next summer. This Court's expedited review of the government's petition ensures a decision in advance of that date, allowing enough time for the district court to issue its final decision thereafter. To be sure, a full round of appellate review of the district court's final decision on the merits might not be possible to complete before next summer—but that would be true even absent a stay. A stay, however, would ensure that the final judgment is actually final, because it would be based only on the evidence this Court rules is properly considered. That judgment might then be affirmed (if correct) or reversed (if not), but at least would not have to be redone.

For these reasons, the government respectfully suggests that the Court may wish to reconsider staying further trial proceedings in light of its grant of the government's petition for a writ of certiorari.

Sincerely,

Noel J. Francisco
Solicitor General

encl.: District court opinion and order denying a stay of trial (Nov. 20, 2018)
Second Circuit order denying a stay of trial (Nov. 21, 2018)

cc: See Attached Service List

18-0557
IN RE UNITED STATES DEPARTMENT OF
COMMERCE, ET AL.
-

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, -v- UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-2921 (JMF) MEMORANDUM OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

These consolidated cases involve a challenge to Secretary of Commerce Wilbur L. Ross, Jr.'s decision to reinstate a question about citizenship status to the 2020 census questionnaire. Defendants, through their attorneys at the Department of Justice, have tried and failed repeatedly to halt the orderly progress of this litigation.[1] Their latest and strangest effort is a motion to stay all further proceedings, including entry of final judgment, pending the Supreme Court's

[1] Indeed, as Plaintiffs note, since the eve of Labor Day Weekend, Defendants have filed in this Court, the Second Circuit, or the Supreme Court "an astonishing *twelve* requests to delay these proceedings" — "an average of a request to delay filed each and every single week from Labor Day to Thanksgiving." (Docket No. 543 ("Pls.' Opp'n"), at 1). With one narrow exception — the stay Defendants obtained from the Supreme Court of this Court's Order authorizing a deposition of Secretary Ross, *see In re Dep't of Commerce*, — S. Ct. —, No. 18A375, 2018 WL 5259090 (U.S. Oct. 22, 2018) — every one of those requests has been rejected. *See New York v. United States Dep't of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4279467 (S.D.N.Y. Sept. 7, 2018) (denying a stay of the deposition of the Acting Assistant Attorney General and all discovery); *In re U.S. Dep't of Commerce*, No. 18-2652, 2018 WL 6006904 (2d Cir. Sept. 25, 2018) (same); *In re Dep't of Commerce*, 2018 WL 5259090 (same); *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 5307097 (S.D.N.Y. Oct. 26, 2018), *as amended*, 2018 WL 5791968 (Nov. 5, 2018) (denying a stay of pretrial proceedings and trial); *In re United States Dep't of Commerce*, Nos. 18-2856 & 2857, 2018 WL 5603576 (2d Cir. Oct. 26, 2018) (same); *In re Dep't of Commerce*, — S. Ct. —, No. 18A455, 2018 WL 5778244 (U.S. Nov. 2, 2018) (same).

resolution of their challenge this Court's discovery-related orders. (Docket No. 540 ("Defs.' Motion")). What makes the motion most puzzling, if not sanctionable, is that they sought *and were denied* virtually the same relief only weeks ago — from this Court, from the Second Circuit, and from the Supreme Court itself. *See In re Dep't of Commerce*, — S. Ct. —, No. 18A455, 2018 WL 5778244 (U.S. Nov. 2, 2018); *In re U.S. Dep't of Commerce*, Nos. 18-2856 & 2857, 2018 WL 5603576 (2d Cir. Oct. 26, 2018); *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 5307097 (S.D.N.Y. Oct. 26, 2018), *as amended*, 2018 WL 5791968 (Nov. 5, 2018). In fact, if anything, their request is significantly weaker this time around, as the trial is complete and the onus is now on the Court to issue a ruling that facilitates timely and definitive higher-court review. Moreover, Defendants themselves now concede, as they must, that a ruling from this Court will not hinder a higher court from granting full relief on appeal. (*See* Defs.' Motion 1). Unless burdening Plaintiffs and the federal courts with make-work is a feature of Defendants' litigation strategy, as opposed to a bug, it is hard to see the point. To borrow from Camus, "[o]ne must imagine Sisyphus happy." ALBERT CAMUS, THE MYTH OF SISYPHUS 123 (Alfred A. Knopf 1991).

Defendants' stated reason for burdening Plaintiffs and the Court with the very application that three levels of federal courts only recently denied is the fact that, on November 16, 2018, the Supreme Court granted their petition for a writ of certiorari and set oral argument for February 19, 2019. (Defs.' Motion 1). But that development is not quite the "significant change in circumstances" that Defendants suggest. (*Id.*). First, as Defendants have previously noted, the Supreme Court's October 22, 2018 stay of this Court's Order authorizing a deposition of Secretary Ross had already signaled that the Supreme Court was likely to grant their petition, (Docket No. 397, at 1), and, notably, that stay did *not* disturb either of the two other discovery

orders challenged in the petition, let alone further proceedings in this Court, *see In re Dep't of Commerce*, — S. Ct. —, No. 18A375, 2018 WL 5259090, at *1 (U.S. Oct. 22, 2018). Second, that "likelihood" was unchanged when the Supreme Court summarily denied Defendants' request for a stay of further proceedings *before* trial. *In re Dep't of Commerce*, 2018 WL 5778244. And finally, when it granted certiorari and set a briefing schedule, the Supreme Court knew that this Court had completed trial, and it presumably expected that the Court would enter final judgment before the date that it set for oral argument. That is, the Supreme Court rejected Defendants' request for immediate relief, in the form of either mandamus or certiorari and reversal without further briefing and oral argument. *See* Pet. for Writ of Mandamus 15, 33, No. 18-557 (U.S. Oct. 29, 2018).

Tellingly, this time, Defendants do not even attempt to argue that they are entitled to the extraordinary relief of a stay of all proceedings under the traditional factors. *See New York*, 2018 WL 4279467, at *1. That is not surprising, as Defendants cannot satisfy any of the four factors, substantially for the reasons set forth in Plaintiffs' opposition to the motion, filed earlier today. (*See* Pls.' Opp'n 1-3). Among other things, as the Court stressed last time, the traditional test requires that Defendants show they would suffer "irreparable harm" absent a stay. *See New York*, 2018 WL 5791968, at *2 (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)). Defendants could not make that showing before trial, *see id.* at *2-3, and they certainly cannot make it now. In fact, the words "harm" and "injury" do not appear anywhere in their motion. That is for good reason, as the notion that they — or anyone else — would suffer "irreparable harm" without a stay is laughable. The only "harm" Defendants suffer from denial of a stay is that they would be required to complete and file their post-trial submissions (which are due tomorrow and, presumably, almost done), and to appear for oral argument on November

27, 2018. As the Court has noted before, however, "'[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *Id.* at *2 (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

Since reliance on the traditional test would obviously be unavailing, Defendants try their hand now with a new line of cases, which stand for the uncontroversial proposition that a district court has discretion to stay civil proceedings where doing so would advance the interests of the parties, the courts, and the public. (Defs.' Motion 2 (citing cases)). But here, for reasons the Court has largely explained before, a stay would undermine, rather than advance, those interests. *See New York*, 2018 WL 5791968, at *6-7. Indeed, by Defendants' own admission, it will take extraordinary efforts *as it is* to ensure "full merits briefing and argument in the Second Circuit, let alone the Supreme Court, . . . before" the census forms need to be printed in June 2019. (Defs.' Motion 2).[2] Such review would become practically impossible if this Court were to await the Supreme Court's decision after oral argument on February 19, 2019, to get briefing from the parties (on what would, at that point, be a stale record), and then to write and issue a final decision. Compounding matters, that harmful delay would come with no corresponding benefit: As Defendants concede, "the Supreme Court will be able to order effective relief notwithstanding this Court's entry of a final decision." (Defs.' Motion 1). Indeed, a ruling from this Court would aid, not hinder, the Supreme Court's task — as the Supreme Court may be able to avoid deciding a thorny legal question altogether (if, for instance, the Court enters judgment in

[2] Notably, Defendants took a different position in seeking to forestall trial. Before the Second Circuit, they argued that delaying trial pending a decision by the Supreme Court on their petition did *not* risk running out the clock, citing the fact that two other courts have scheduled related trials for January 2019. *See* Mot. to Stay Pretrial and Trial Proceedings 1-2, 9, *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Oct. 25, 2018), ECF No. 68.

favor of Defendants or enters judgment in favor of Plaintiffs without relying on evidence outside the administrative record), or would be able to decide that question and the merits together.

Defendants' motion makes so little sense, even on its own terms, that it is hard to understand as anything but an attempt to avoid a timely decision on the merits altogether. That conclusion is reinforced by the fact that Defendants, once again, appealed to the Second Circuit even before this Court had heard from Plaintiffs, let alone issued this ruling on the motion. *See* Mot. to Stay District Court Proceedings, *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Nov. 19, 2018), ECF No. 79.[3] If Defendants' motion in this Court comes close to the sanctionable line, that filing would sure seem to cross it. The Second Circuit has held — in a case that Defendants themselves cite (*see* Defs.' Motion 1) — that the decision to deny a stay is "so firmly within the discretion of the district court" that it "will not be disturbed . . . absent demonstrated prejudice so great that, as a matter of law, it vitiates a defendant's constitutional rights or otherwise gravely and unnecessarily prejudices the defendant's ability to defend his or her rights." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 100 (2d Cir. 2012). "Indeed, so heavy is the defendant's burden in overcoming a district court's decision to refrain from entering a stay" that it is almost impossible to find examples "in which a district court's decision to deny a stay was reversed on appeal." *Id.* (noting that the defendants had "pointed to only one" such case "and that case was decided more than thirty years ago").[4]

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[3] Defendants justified that step by suggesting that this Court had "implicitly den[ied]" their motion. Mot. to Stay District Court Proceedings 1 n.1, *In re U.S. Dep't of Commerce*, No. 18-2856. The Court did no such thing: It merely entered an order giving Plaintiffs one day to respond to Defendants' motion. (Docket No. 541). Unsurprisingly, the Court of Appeals did not countenance Defendants' extraordinary lack of respect for the ordinary incidents of due process and regular procedure. Earlier this afternoon, that Court summarily denied Defendants' motion as "premature." Order, *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Nov. 20, 2018), ECF No. 84.

[4] If past is prologue and Defendants seek a stay from the Supreme Court yet again, their

In the final analysis, Defendants' motion is most galling insofar as it is premised on the suggestion that granting a stay would help conserve judicial resources. (*See* Defs.' Motion 2-3).[5] It is plainly more efficient for this Court to rule expeditiously, while the evidence from trial (the vast majority of which pertains to standing and which Defendants concede may be considered no matter what the Supreme Court decides (Trial Tr. 1421-22)) is fresh. It is also more efficient for this Court to create a comprehensive record that would enable a single round of higher-court review than to tee up a second round of review with almost no time remaining on the clock. And beyond that, if Defendants were truly interested in conserving judicial resources, they could have avoided burdening this Court, the Second Circuit, and the Supreme Court with *twelve* stay applications over the last eleven weeks that, with one narrow exception, have been repeatedly rejected as meritless. *See supra* note 1. Instead, Defendants would have focused their attention on the ultimate issues in this case, where the attention of the parties and the Court now belongs.

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burden will be equally high, if not higher: A request that the Supreme Court "exercise its 'supervisory authority' over" a district court's case management decisions, which is what such an application would be, "implicates a standard even more daunting than that applicable to a stay of a judgment subject to the [Supreme Court's] review." *Gray v. Kelly*, 564 U.S. 1301, 1303 (2011) (Roberts, C.J., in chambers); *see also, e.g.*, *Ehrlichman v. Sirica*, 419 U.S. 1310, 1313 (1974) (Burger, C.J., in chambers) (rejecting a stay application and noting that "[t]he resolution of these issues should they arise after [judgment] must await the normal appellate processes").

[5] A close second is Defendants' suggestion that "a stay would . . . reduc[e] any risk that the Court's consideration of extra-record evidence would affect the analysis of record materials." (Defs.' Motion 2). Putting aside the arguable insult to the Court's intelligence, Defendants themselves do not appear to believe their own suggestion. As they acknowledge, the Court "has already been exposed to the extra-record evidence" during discovery and trial; no Supreme Court decision can undo that. (*Id.*). Moreover, as Defendants also acknowledge (*id.*), "district courts routinely must disregard improper evidence that has been put before them." *See, e.g.*, *Harris v. Rivera*, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.").

Enough is enough. Defendants' latest motion to halt these proceedings is DENIED. Barring a stay from the Second Circuit or the Supreme Court, Defendants shall file their post-trial briefing by the Court-ordered deadline of tomorrow and appear for oral argument as directed on November 27, 2018. The Clerk of Court is directed to terminate Docket No. 540.

SO ORDERED.

Dated: November 20, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

S.D.N.Y.-N.Y.C.
18-cv-2921
18-cv-5025
Furman, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of November, two thousand eighteen.

Present:

John M. Walker, Jr.,
Raymond J. Lohier, Jr.,
Circuit Judges,
William H. Pauley III,*
District Judge.

In Re: United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

18-2856
18-2857

Movants.

The Government moved for a stay of proceedings in two consolidated district court cases pending the Supreme Court's resolution of *In re Department of Commerce*, No. 18-557. We previously denied the motions as premature because the District Court had yet to decide the stay motion pending before it, and we stated that the motion would be automatically reinstated should the District Court deny the motion. *See* No. 18-2856, Dkt. No. 84. The District Court has now denied the Government's motion. Upon due consideration, and substantially for the reasons set forth in the District Court's brief opinion denying the motion before it, it is hereby ORDERED that the motions for a stay before this Court are DENIED. *See New York v. United States Dep't of Commerce*, No. 18-CV-2921 (JMF), Dkt. No. 544 (S.D.N.Y. Nov. 20, 2018); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The Government's motion for an immediate administrative

* Judge William H. Pauley III, of the United States District Court for the Southern District of New York, sitting by designation.

stay pending the resolution of its motion to stay proceedings is DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Exhibit 3

A: PROJECTED TIMELINE IF THE STAY IS LIFTED AND CASE PROCEEDS TO TRIAL

	2018	2019											
	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Complete Discovery													
Trial													
Decision on Liability													
Remedy Phase													
Decision on Remedy													
Appeal to 9th Cir. after Final Judgment													

	2020												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Appeal to 9th Cir. after Final Judgment													
Petition for Writ of Cert. to Supreme Court													

	2021												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Petition for Writ of Cert. and Review by Supreme Court													

District Court

Ninth Circuit

Supreme Court

B: PROJECTED TIMELINE IF INTERLOCUTORY APPEAL IS GRANTED AND TRIAL IS STAYED

	2018	2019											
	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Urgent Injunctive Relief Request to 9th Cir.													
9th Cir. Decision on Injunctive Relief													
Appeal 9th Cir. Injunctive Relief Decision to Supreme Court; Possible Stay Application													
Possible Supreme Court Review of Injunctive Relief Order													
Interlocutory Appeal Briefing in 9th Cir.													
9th Cir. Oral Argument on Interlocutory Appeal													
9th Cir. Decides Interlocutory Appeal													
Petition for Writ of Cert. to Supreme Court													

	2020												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Brief in Opposition to Petition for Writ of Cert. on Interlocutory Appeal													
Supreme Court Review of Cert. Briefing on Interlocutory Appeal													
Briefing in Supreme Court Assuming Cert. is Granted on Interlocutory Appeal Decision													
Oral Argument in Supreme Court on Interlocutory Appeal													
Decision window from Supreme Court													

	2021												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Decision window from Supreme Court													
Remand to District Court for Trial													
New Supplemented Expert Reports													
Expert and Plaintiff Depositions													
New Trial Exhibits, Witness Lists, Pretrial Memos, and Demonstratives													

	2022												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Trial													
Decision on Liability													
Remedy Phase													
Decision on Remedy													
Appeal to 9th Cir. after Final Judgment													

	2023												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Appeal to 9th Cir. after Final Judgment													
Petition for Writ of Cert. to Supreme Court													

	2024												
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Petition for Writ of Cert. and Review by Supreme Court													