No. 18-_____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

PETITION FOR PERMISSION TO APPEAL
PURSUANT TO 28 U.S.C. § 1292(b)

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INTRODUCTION

Pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5, Defendants-Appellants the United States of America, et al. (the government) respectfully petition this Court for permission to appeal two orders of the United States District Court for the District of Oregon denying the government's dispositive motions. Appendix 74-127 (order denying motion to dismiss); Appendix 10-71 (order largely denying motions for judgment on the pleadings and for summary judgment). The district court certified the orders for interlocutory appeal on November 21, 2018. Appendix 1-6.[1]

Plaintiffs claim that "creating, controlling, and perpetuating a national fossil fuel-based energy system" violates their substantive due process and equal protection rights, and that a single district judge is empowered to order virtually the entire Executive Branch to "prepare and implement an enforceable national remedial plan to cease and rectify the constitutional violations by phasing out fossil fuel emissions and drawing down excess atmospheric CO_2." *In re United States*, 9th Cir. No. 18-73014, ECF No. 5, at 2, 3 (Nov. 18, 2018) (Plaintiffs' answer to the government's most recent mandamus petition). In the district court, the government

[1] The cited Appendix, filed concurrently herewith in a separate volume, contains all of the documents required by Federal Rule Appellate Procedure 5(a)(1)(E). Like an Excerpts of Record, it is consecutively paginated beginning with Page 1.

filed dispositive motions arguing that Plaintiffs lacked standing and that this action is not otherwise justiciable under Article III and the equitable authority of the courts; that the action should be dismissed for failure to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq.; and that Plaintiffs have failed to state any claim — under the Due Process Clause or a public trust doctrine or otherwise — upon which relief can be granted.

In denying the government's dispositive motions, the district court's orders undeniably decided "controlling question[s] of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from the order[s] may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Questions about the justiciability of Plaintiffs' claims and the existence of their asserted rights are plainly "controlling" because their resolution in the government's favor would end the case, and the Supreme Court of the United States has already indicated that Plaintiffs' claims present "substantial grounds for difference of opinion." Appendix 8, 73. Moreover, the resolution of these controlling questions by this Court would "materially advance the ultimate termination of the litigation" because, if resolved in the government's favor, they would dispose of the claims or at least narrow the action.

QUESTIONS PRESENTED FOR APPEAL

1. Whether this action is justiciable under Article III and the equitable authority of the courts.

2. Whether Plaintiffs' challenges to agency action must proceed, if at all, under the APA.

3. Whether Plaintiffs have stated any claim — under the Due Process Clause or a public trust doctrine or otherwise — upon which relief can be granted.

STATEMENT OF THE CASE

This action was filed in August 2015 by a group of minor children, a public interest organization, and "future generations" represented by Dr. James Hansen. Plaintiffs brought the action against President Obama (for whom President Trump was later substituted), the Executive Office of the President, three sub-components within that office, eight Cabinet departments and agencies, and various federal officials for allegedly violating their rights under the Constitution and a purported federal public trust that assertedly conferred on them a substantive right to particular climate conditions. *See generally* ECF No. 7 (operative complaint). Plaintiffs asked the district court to order the President and other officials and agencies named as defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." *Id*. at 94.

The government moved to dismiss Plaintiffs' claims on several grounds, including lack of standing and failure to state a cognizable claim. ECF No. 27. In November 2016, the district court denied that motion, Appendix 74-127, and it later declined to certify its order for interlocutory appeal, ECF No. 172 (June 8, 2017). The court ruled that Plaintiffs had established Article III standing by alleging that they had been harmed by the effects of climate change through increased droughts, wildfires, and flooding; and that the government's regulation of (and failure to further regulate) fossil fuels had caused Plaintiffs' injuries. Appendix 91-99. The court determined that it could redress those injuries by ordering

> Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system.

Appendix 101 (quoting complaint); *see generally* Appendix 91-101.

On the merits, the district court held that Plaintiffs had stated a claim under the Fifth Amendment's Due Process Clause. Appendix 101-24. The court found in the Fifth Amendment's protection against the deprivation of "life, liberty, or property, without due process of law," a previously unrecognized fundamental right to a "climate system capable of sustaining human life," and the court determined that Plaintiffs had adequately alleged infringement of that right. Appendix 105. The court concluded that the Plaintiffs had stated a claim that the government's "failure

to adequately regulate CO_2 emissions" supported a "danger-creation due process claim." Appendix 109.

The court also held that Plaintiffs had adequately stated a claim under a federal public trust doctrine, which it held imposes a judicially enforceable prohibition on the government against "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." Appendix 110 (quoting amicus brief in support of Plaintiffs). Plaintiffs' claims under this public trust rationale, the court concluded, are also "properly categorized as substantive due process claims." Appendix 124.

The government petitioned this Court for a writ of mandamus to halt these deeply flawed proceedings. This Court stayed the litigation for seven-and-a-half months but ultimately denied the petition without prejudice. *In re United States*, 884 F.3d 830, 838 (9th Cir. 2018). The Court explained, however, that "[c]laims and remedies often are vastly narrowed as litigation proceeds," and that it had "no reason to assume this case will be any different." *Id*. The Court observed that the government could continue to "raise and litigate any legal objections [it may] have," *id*. at 837, and the Court added that the government remains free to "seek[] mandamus in the future," *id*. at 838.

Consistent with this Court's opinion, the government moved for judgment on the pleadings, arguing that Plaintiffs' claims should be dismissed in their entirety,

ECF No. 195; and for summary judgment, arguing that the district court should enter judgment in favor of the government on all of Plaintiffs' claims, ECF No. 207. The government also moved for a protective order precluding all discovery. ECF No. 196. On June 29, 2018, the district court denied the government's motion for a protective order. ECF No. 300. On July 18, 2018, the district court held argument on the dispositive motions and took them under advisement.

While the two dispositive motions were still pending and after the district court had denied the government's motion for a protective order barring discovery, the government sought relief from both this Court and the Supreme Court. ECF No. 308-1; ECF No. 321-1. Both courts denied the requested relief without prejudice. On July 20, this Court determined that "[a]bsent a specific discovery order, mandamus relief remains premature." *In re United States*, 895 F.3d 1101, 1105 (9th Cir. 2018). On July 30, the Supreme Court denied the government's application "without prejudice" because it was "premature." Appendix 73. The Court also stated that the "breadth of [Plaintiffs'] claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion." *Id*. It instructed the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Id*.

Two months later, on October 15, the district court issued an opinion largely denying the motions. Appendix 10-71. The court granted two narrow aspects of the government's motions. First, the court dismissed the President from the action, but only "without prejudice" and while warning that it "is not possible to know how developments to the record in the course of the litigation may change the analysis," such that the court could "not conclude with certainty that President Trump will never become essential to affording complete relief." Appendix 27-28. Second, the court granted summary judgment to the government on Plaintiffs' "freestanding claim under the Ninth Amendment," which the court held "not viable as a matter of law." Appendix 65.

The district court otherwise denied the government's motions. The court rejected the government's argument that Plaintiffs failed to challenge only discrete, identified agency actions or alleged failures to act, as the Administrative Procedure Act requires, concluding that the "APA does not govern" claims seeking equitable relief for alleged constitutional violations based on "aggregate action by multiple agencies." Appendix 34. The court also rejected the government's argument that Plaintiffs had failed to establish standing at the summary-judgment stage, largely by reiterating its analysis from the motion-to-dismiss stage. Appendix 38-54. The court likewise reiterated its earlier holdings on the government's other central arguments. Appendix 34-36, 54-57, 63-64.

The court then directly addressed Plaintiffs' equal protection claim for the first time. It rejected their argument based on the idea of "posterity" or "minor children" as a suspect class because "[a]pplying strict scrutiny to every governmental decision that treats young people differently from others is unworkable and unsupported by precedent." Appendix 67. Yet the court allowed the equal protection claim to proceed because "strict scrutiny is also triggered by alleged infringement of a fundamental right," and the claim "rests on alleged interference with a climate system capable of sustaining human life — a right the Court has already held to be fundamental." Appendix 67. The court held that application of strict scrutiny to the evaluation of the equal protection and due process claims "would be aided by further development of the factual record." Appendix 68. The district court again declined to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). Appendix 68-70.

With less than two weeks remaining before a scheduled 10-week trial, the government again sought relief from both this Court and the Supreme Court. ECF No. 390; ECF No. 391. The Chief Justice promptly issued an administrative stay of all litigation in the district court while the full Court considered the government's application for a stay. ECF No. 399. On November 2, the Supreme Court again denied the government's stay application "without prejudice," this time on the ground that "adequate relief may be available in the United States Court of Appeals for the Ninth Circuit." Appendix 8. The Supreme Court explained:

> Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice. And the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent. The 50-day trial was scheduled to begin on October 29, 2018, and is being held in abeyance only because of the current administrative stay.

Appendix 9. Once again, the Court invoked the standard of Section 1292(b) — this time expressly citing the provision and describing its earlier order as "noting that the 'striking' breadth of plaintiffs' claims 'presents substantial grounds for difference of opinion.'" Appendix 8.

The government then filed a motion asking the district court to reconsider its denials of the government's requests to certify the court's orders for interlocutory appeal under 28 U.S.C. § 1292(b), and an accompanying request for a stay pending consideration of that motion. ECF Nos. 418-419. In this Court, the government filed a mandamus petition on November 5, asking the Court either to dismiss the action or to direct the district court to certify its decisions for interlocutory appeal under Section 1292(b). *In re United States*, No. 18-73014, ECF No. 1. The petition noted that mandamus would not be necessary if the district court granted certification and stayed proceedings. *Id*. at 1. The government also asked for a stay of litigation in district court, which this Court granted in part on November 8, staying trial pending consideration of the petition. *In re United States*, No. 18-73014, ECF No. 3.

In the stay order, this Court requested that the district court "promptly resolve petitioners' motion to reconsider the denial of the request to certify orders for interlocutory review." *Id.* at 2. The Court also cited the Supreme Court's orders that had used the language of Section 1292(b) in describing the justiciability and merits of Plaintiffs' claims. *Id.*; *see also* Appendix 8, 73.

On November 21, the district court granted the government's motion for reconsideration and certified its orders for interlocutory appeal pursuant to Section 1292(b). Appendix 1-6. While the court noted "its belief that this case would be better served by further factual development at trial," it took "particular note" of the Supreme Court's orders and this Court's November 2 order. Appendix 5. The district court concluded that "each of the factors outlined in § 1292(b) have been met regarding the previously mentioned orders," Appendix 6, which appears to be a reference to ECF "docs. 83, 172, 238, and 369," Appendix 5. Those orders include the district court's opinion denying the government's motion to dismiss, Appendix 74-127, and the opinion and order resolving the government's motion for judgment on the pleadings and for summary judgment, Appendix 10-71.[2]

[2] The district court also listed its opinion denying the government's initial request for certification, ECF No. 172, and its order denying the government's motion for stay pending resolution of discovery objections, ECF No. 238. The government's motion for reconsideration did not ask the district court to certify ECF Nos. 172 and 238 for appeal, and we accordingly are not asking this Court for permission to appeal of those orders, which do not address the questions presented on Page 3 above.

The district court "exercise[d] its discretion and immediately certifie[d] this case for interlocutory appeal" and stayed proceedings pending a decision by this Court. Appendix 6.

REASONS FOR GRANTING PERMISSION TO APPEAL

An interlocutory appeal under 28 U.S.C. § 1292(b) is authorized when a district court "order involves a controlling question of law as to which there is substantial ground for difference of opinion and [when] an immediate appeal from the order may materially advance the ultimate termination of the litigation." If an order presents just one such question, this Court may accept certification and "may address any issue fairly included within the certified order." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (internal quotation marks omitted). The standard is clearly met here with respect to at least *three* questions: whether Plaintiffs' claims are justiciable under Article III and the court's equitable authority, whether Plaintiffs' claims must be brought pursuant to the APA, and whether Plaintiffs' claims have any merit. Particularly in light of the Supreme Court's multiple orders contemplating interlocutory appellate review, this Court should exercise its discretion to review the district court's orders.

I. The district court's orders involve controlling questions of law.

A question of law is "controlling" if "its incorrect disposition would require reversal of a final judgment." 16 Charles Alan Wright et al., *Federal Practice and*

Procedure § 3930 (3d ed. 2005 & Supp. 2018). Here, the two orders at issue address the three controlling questions of law set forth on Page 3 above.

Both orders addressed the governments' controlling justiciability arguments. Specifically, the dismissal order rejected the government's standing arguments. Appendix 91-101. The order denying judgment on the pleadings and summary judgment again rejected the standing arguments, Appendix 38-54, and it rejected the government's broader Article III argument as well, Appendix 35-36, 54-57. These justiciability questions are plainly controlling because, if Plaintiffs lack standing or their suit is not justiciable as a "Case" or "Controversy" under Article III and under the court's equitable authority, then it is beyond the "judicial Power" and must not proceed. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998).

The APA issue is also a controlling question of law. The district court's second order rejected the government's argument that the APA provides the mechanism for challenging the federal administrative actions that underlie Plaintiffs' claims, but that Plaintiffs fail to challenge discrete, identified agency actions or alleged failures to act, as the APA requires. The district court concluded that the "APA does not govern" claims seeking equitable relief for alleged constitutional violations based on "aggregate action by multiple agencies." Appendix 34. But there is no dispute that if the APA governs, then Plaintiffs' claims would have to be dismissed. Therefore, this question is controlling as well.

The merits of Plaintiffs' claims are also controlling questions of law. The government moved to dismiss (and later moved for summary judgment on) based on Plaintiffs' failure to state any claim based on due process, equal protection, a public trust doctrine, or any other ground. The district court's dismissal order held that Plaintiffs had stated a claim based on due process theories: a previously unrecognized fundamental right to a "climate system capable of sustaining human life," Appendix 105; a "danger-creation due process claim," Appendix 109; and claims under a federal public trust doctrine, which the court concluded are also "properly categorized as substantive due process claims," Appendix 124. The court's second order reiterated its earlier holdings, Appendix 57-64, and also recognized an equal protection claim based on an "alleged infringement of a fundamental right" — namely, the same right to "a climate system capable of sustaining human life," Appendix 67. Whether these rulings are correct are controlling questions of law: if due process, equal protection, and a public trust do not provide Plaintiffs with these rights, then the claims fail.[3]

[3] Reversing the district court's orders on the merits would not allow Plaintiffs to continue to pursue claims based on other unenumerated substantive due process rights, such as "their substantive due process rights to life, liberty, and property, including recognized unenumerated rights to personal security and family autonomy." *In re United States*, 9th Cir. No. 18-73014, ECF No. 5, at 2 (Plaintiffs' answer to mandamus petition). The government first moved to dismiss (and later moved for summary judgment on) *all* of Plaintiffs' claims, most of which are derivative of their asserted fundamental "right to a climate system capable of

II. There are substantial grounds for difference of opinion on the controlling questions of law.

The second requirement for certification under 28 U.S.C. § 1292(b) is that the controlling questions of law decided by the district court must present "substantial grounds for difference of opinion" with the district court's rulings. "A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). And "a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Id.*

The previous orders from the Supreme Court and this Court make crystal clear that this requirement is satisfied here. That Court's July 30 Order stated that "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion." Appendix 73. The Court's November 2 Order quoted the standard in Section 1292(b) and then, in the next sentence, further stated that "the 'striking' breadth of plaintiffs' claims 'presents substantial grounds for difference of opinion.'" Appendix 8 (quoting Appendix 73). This Court cited both of those orders

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sustaining human life." Appendix 67; *see also id.* (explaining that Plaintiffs' equal protection claim "rests on" their asserted fundamental right). In response to the government's motions in the district court, Plaintiffs identified no legal support for their claim that the government's policy actions concerning energy and the environment can violate substantive due process rights concerning life, liberty, property, or personal security and family autonomy. No claims or theories lurk unaddressed in the district court.

in its order requiring a response to the government's mandamus petition and in staying trial. *See In re United States*, No. 18-73014, ECF No. 3, at 2. The observations of both courts are well-founded.

First, as to justiciability, reasonable jurists might disagree with the district court's conclusion that Plaintiffs have Article III standing and that a federal court may otherwise entertain this action consistent with the Constitution's limitations on "judicial Power." To the contrary, Plaintiffs lack standing because they assert "generalized grievance[s]," not the invasion of a "legally protected" interest that is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 575 (1992). As the Chief Justice has cogently observed, the "very concept of global warming seems inconsistent with" the "particularization requirement," because "[g]lobal warming is a phenomenon harmful to humanity at large." *Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (internal quotation marks omitted). Plaintiffs also lack standing because they cannot establish that their asserted injuries likely could be redressed by an order of a federal court: they have not even begun to articulate a remedy within a federal court's authority to award that could move the needle on the complex phenomenon of global climate change, much less likely redress their alleged injuries.

Moreover, quite aside from these fatal flaws with respect to standing, this action is not a case or controversy cognizable under Article III. Plaintiffs ask the

district court to review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to climate change and then to undertake to pass upon the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate. No federal court has ever purported to use the "judicial Power" to perform such a sweeping policy review — and for good reason. The Constitution commits not to the courts but rather to Congress the power to enact comprehensive government-wide measures of the sort sought by Plaintiffs. And the Constitution commits not to the courts but rather to the President the power to oversee the Executive Branch in its administration of existing law and to draw on its expertise and formulate policy proposals for changing that law. The Constitution also assigns to the President the principal role in negotiating treaties — including, as he may see fit, treaties to reduce greenhouse gas emissions — and in otherwise conducting the foreign policy of the United States. U.S. Const. art. II, § 2, cl. 2.

Second, reasonable jurists might disagree with the district court's conclusion that Plaintiffs' claims need not proceed under the APA, targeted at specifically identified agency actions or alleged failures to act and based on the administrative record for those actions. 5 U.S.C. §§ 702, 706(1), 706(2)(A)-(B). As this Court has recognized, the APA provides a "comprehensive remedial scheme" for a "person 'adversely affected . . .' by agency action" or alleged failure to act with respect to regulatory requirements and standards, permitting, and other administrative

measures. *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) (citation omitted); *see also, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 551-554 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions").

Those are precisely the sorts of measures Plaintiffs are challenging here, and the district court was wrong to conclude that Plaintiffs need not comply with the APA because the Constitution itself provides a right of action. The Supreme Court recently concluded that the Supremacy Clause does not "confer a right of action," a conclusion that conflicts with the inherent cause of action for constitutional claims envisioned by Plaintiffs. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015). *Armstrong* also emphasized that any equitable authority to consider alleged constitutional claims or otherwise is "subject to express and implied statutory limitations." *Id.*; *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996). Thus, even if the equitable authority of an Article III court could otherwise extend to an action like the one pursued by Plaintiffs, Congress already created in the APA a remedial scheme for unconstitutional agency actions, 5 U.S.C. § 706(2)(b), which the courts may not ignore or supplement.

Third, reasonable jurists might disagree with the district court's conclusion that Plaintiffs' claims have merit, particularly that there is a substantive due process "right to a climate system capable of sustaining human life," Appendix 105, and that

a federal public trust doctrine imposes judicially enforceable obligations on the government, Appendix 110. As the district court itself acknowledged, "recognizing a federal public trust and a fundamental right to climate system capable of sustaining human life would be unprecedented." Appendix 125. As to the novel due process right, the Supreme Court has repeatedly instructed lower courts to "exercise the utmost care whenever . . . asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed" into judicial policy preferences. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation marks and citation omitted). As to the public trust doctrine, the D.C. Circuit correctly observed that the Supreme Court has "categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (per curiam), *cert. denied*, 135 S. Ct. 774 (2014).

Accordingly, there are substantial grounds for difference of opinion on one or more controlling questions of law.

III. Immediate appeal will advance the termination of the litigation.

An "immediate appeal from" the district court's orders would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Reese*, 643 F.3d at 688 (holding that "neither § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the

litigation, only that it 'may materially advance' the litigation"). A successful appeal on either the government's justiciability or APA issues would end the case entirely, clearly exceeding the requirement that an appeal "materially advance the termination of the litigation." If the Court were to conclude that Plaintiffs had no constitutional or public trust rights or claims, moreover, that conclusion would likewise end the case in its entirety.

Interlocutory appeal would also potentially avoid the time and expense of a 10-week merits trial, followed by an additional potential remedy trial, that would be inappropriate even apart from the viability of this action. As elaborated in the government's previous filings, such trials would likely require federal agencies to take official positions on factual assessments and questions of policy concerning the climate through the civil litigation process — and then, if liability is found, to participate in further judicial proceedings to impose on them an "enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." ECF No. 7, at 94. Such participation would impermissibly conflict with the comprehensive procedures for agency decisionmaking prescribed by the APA, *see Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 36 (1950), and deprive other interested parties and the public of the opportunity mandated by Congress or agency procedures to provide input. In a similar fashion, by seeking to leverage the civil litigation process to direct the agencies' decisions outside the congressionally

prescribed statutory framework, Plaintiffs' anticipated trial would pose substantial separation-of-powers concerns.

Despite these concerns, the district court expressed the view that "this case would be better served by further factual development at trial." Appendix 5. Of course, the court recognized on reconsideration that that view did not outweigh the other concerns with proceeding to trial without interlocutory review. Appendix 6. But the court's view was misguided in any event: no further factual development is necessary to consider the controlling questions presented here. As to standing, there are no disputed facts concerning the government's contention that climate change is a global phenomenon that affects everyone in the world. Nor are the facts disputed that climate change stems from a complicated, world-spanning web of actions across every field of human endeavor, including the energy and transportation choices of everyone on the planet. The government's redressability argument is purely legal as well: Plaintiffs' alleged injuries cannot be redressed in the district court because a single district judge may not assume authority over the regulation of the Nation's energy production, energy consumption, and transportation policy (let alone authority over the same spheres of action by all of the major economies of the world) — as the district court would need to do in order to give Plaintiffs their demanded remedy. Likewise, there are no factual issues concerning the lack of "judicial Power" under Article III for a federal court to adjudicate this action.

Finally, no factual development is required to consider the APA question or the underlying merits of Plaintiffs' claims. As to the APA, because Plaintiffs' claims seek review of agency actions and inactions, they must proceed under the APA, not the district court's equitable authority, as explained above, regardless of any possible factual dispute. As to the merits, Plaintiffs contend that the government's actions and inaction violate Plaintiffs' substantive due process and equal protection rights, as well as a public trust doctrine. Because Plaintiffs' claims are completely without support in the law, this Court should assess whether the claims have any legal basis before allowing this action to proceed.

CONCLUSION

For the foregoing reasons, the Court should grant the government's petition for interlocutory appeal under 28 U.S.C. § 1292(b).

Dated: November 30, 2018.

Respectfully submitted,

s/ Eric Grant

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STATEMENT OF RELATED CASES

There are four related cases within the meaning of Circuit Rule 28-2.6, namely, the government's four petitions for writs of mandamus: *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692); *In re United States*, 895 F.3d 1102 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776 (denied as moot Nov. 2, 2018); and *In re United States*, No. 18-73014 (pending).

CERTIFICATE OF COMPLIANCE

I certify that this petition is 4,972 words, excluding the portions exempted by Federal Rules of Appellate Procedure 5(c) and 32(f) and Circuit Rule 5-2(b), which is less than the limit of 5,600 words established by Circuit Rules 5-2(b) and 32-3(2). The petition's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

s/ Eric Grant
Eric Grant

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 30, 2018.

I further certify that on this date, an electronic copy of the foregoing has been provided via e-mail to the following counsel for Plaintiffs, who have consented in writing to such service pursuant to Federal Rule of Appellate Procedure 25(c)(1)(D):

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