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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

PLAINTIFFS' MOTION FOR RECONSIDERATION OF NOVEMBER 21, 2018 COURT ORDERED STAY OF PROCEEDINGS

Expedited Consideration Requested

Oral Argument Requested

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TABLE OF AUTHORITIES

CASES

Am. Rivers v. NOAA Fisheries,
No. CV04-00061-RE, 2006 WL 1983178 (D. Or. July 14, 2006) 3

Askins v. U.S. Dep't of Homeland Sec'y,
899 F.3d 1035 (9th Cir. 2018) 3

Ass'n of Irritated Residents v. Fred Schakel Dairy,
634 F.Supp.2d 1081 (E.D. Cal. 2008) 20

Cachil Dehe Band of Wintun Indians of the Colusa Indian Comm'y v. California, 547 F.3d 962
(9th Cir. 2008) 1

City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper,
254 F.3d 882 (9th Cir. 2001) 3, 8

CMAX, Inc. v. Hall,
300 F.2d 265 (9th Cir. 1962) 4, 10

Community Ass'n for Restoration of the Environment, Inc. v. Cow Palace, LLC,
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Consumer Cellular, Inc. v. Consumer Affairs.com,
2016 WL 7238919 (D. Or. 2016) 4, 10

Dependable Highway Exp., Inc. v. Navigators Ins. Co.,
498 F.3d 1059 (9th Cir. 2007) 9

Filtrol Corp. v. Kelleher,
467 F.2d 242 (9th Cir. 1972) 4

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56 (1982) 8

In re United States,
884 F.3d 830 (9th Cir. 2018) 20

In re United States,
895 F.3d 1101 (9th Cir. 2018) 20

In re United States,
No. 17-71692, Dkt. 7 (9th Cir. July 25, 2017) 6

In re United States,
No. 18-73014 (9th Cir. Nov. 8, 2018) 3, 7

Juliana v. United States,
No. 18-80176, Dkt. 1-1 (9th Cir. Nov. 30, 2018) 8

Juliana v. United States,
No. 6:15-CV-01517-AA, 2018 WL 4997032 (D. Or. Oct. 15, 2018) 9, 22

Landis v. N. Am. Co.,
299 U.S. 248 (1936) 4

State of New York, et al., v. United States Department of Commerce, et al.,
No. 18-CV-2921, 2018 WL 6060304 (S.D.N.Y. 2018) 20

Texas v. United States,
787 F.3d 733 (5th Cir. 2015) 19

STATUTES

28 U.S.C. § 1292(b) .... passim

OTHER AUTHORITIES

Alex Guillén, *EPA Chief: Trump Administration May Intervene in Next Climate Study* (Nov. 28, 2018), https://www.politico.com/story/2018/11/28/epa-trump-next-climate-study-992872 18

António Guterres, *Addressing Climate Change, Secretary-General Says World's Fate Is In Our Hands, Requires Rising to the Challenge Before It's Too Late*, United Nations (Sept. 10, 2018), https://www.un.org/press/en/2018/sgsm19205.doc.htm 23

BLM Offers 285 Million Acres for Oil and Gas Lease Sale Within the NPR-A DOI (Nov. 8, 2018) https://www.blm.gov/press-release/blm-offers-285-million-acres-oil-and-gas-lease-sale-within-npr. 16

EIA, *November 2018, Monthly Energy Review* (Nov. 2018), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf 18

EIA, Short-Term Energy Outlook (Nov. 2018), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf 18

Fourth National Climate Assessment, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/ (last visited Dec. 5, 2018) 1

Fourth National Climate Assessment Chapter 1: Overview, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/1/ (last visited Dec. 5, 2018) 11

Fourth National Climate Assessment Chapter 2: Our Changing Climate, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/2/ (last visited Dec. 5, 2018). . 12

Fourth National Climate Assessment Chapter 3: Water, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/3/ (last visited Dec. 5, 2018). 15

Fourth National Climate Assessment Chapter 6: Forests, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/6/ (last visited Dec. 5, 2018) 11

Fourth National Climate Assessment Chapter 13: Air Quality, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/13/ (last visited Dec. 5, 2018). 14

Fourth National Climate Assessment Chapter 14: Human Health, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/14/ (last visited Dec. 5, 2018). 13

Fourth National Climate Assessment Chapter 15: Tribes and Indigenous Peoples, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/15/ (last visited Dec. 5, 2018). 12

Fourth National Climate Assessment Chapter 19: Southeast, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/19/ (last visited Dec. 5, 2018). 15

Fourth National Climate Assessment Chapter 24: Northwest, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/24/ (last visited Dec. 5, 2018). 14

Fourth National Climate Assessment Chapter 25: Southwest, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/25/ (last visited Dec. 5, 2018) 15

Fourth National Climate Assessment Chapter 29: Reducing Risks Through Emissions Mitigation, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/29/ (last visited Dec. 5, 2018). 12

Issuance of Presidential Permit to TransCanada for Keystone XL Pipeline, Dep't of State (March 24, 2017), https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm. 17

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... 19

Stockholm Env't Inst., *Carbon Lock-In from Fossil Fuel Supply Infrastructure* (2015), https://mediamanager.sei.org/documents/Publications/Climate/SEI-DB-2015-Carbon-lock-in-supply-side.pdf 17

Timothy Cama, *Trump on Dire Warnings in Climate Report: 'I Don't Believe It'* (Nov. 11, 2018), https://thehill.com/policy/energy-environment/418289-trump-on-dire-warnings-in-climate-report-i-dont-believe-it 18

Timothy Cama, *Zinke Questions Methodology of Federal Climate Report* (Nov. 27, 2018), https://thehill.com/policy/energy-environment/418450-zinke-questions-methodology-of-federal-climate-report 18

U.S. Glob. Change Research Program, *Second State of the Carbon Cycle Report: A Sustained Assessment Report* (2018), https://carbon2018.globalchange.gov/downloads/SOCCR2_2018_FullReport.pdf....... 1, 15, 16

RULES

Fed. R. App. P. 5(d)(2) 2, 8

Fed. R. App. P. 8 2

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I. INTRODUCTION

Defendants' own recent assessments, published since this Courts' November 21 Order, demonstrate that the harms Plaintiffs already face are growing more irreversible as a result of Defendants' ongoing systemic conduct. In light of these assessments, Plaintiffs respectfully request this Court reconsider and modify, in part, its November 21 Order staying proceedings in the above-captioned case. Doc. 444.[1] Specifically, this Court should modify its November 21 Order by lifting the stay in order to allow discovery and pretrial proceedings to conclude pending a decision by the Ninth Circuit Court of Appeals on Defendants' Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b), and to allow trial to commence forthwith should the Ninth Circuit lift the stay of trial in its November 8 Order. On November 23, 2018, Defendants released the Fourth National Climate Assessment ("NCA4"), a comprehensive report on climate change and its impacts in the United States, which is endorsed by each of the agency Defendants in this case.[2] On the same day, Defendants released the Second State of the Carbon Cycle Report ("SOCCR2"), 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.[3] These assessments make clear that emissions reductions today are imperative both to stopping short-term harms already occurring and to avoid critical thresholds

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[1] 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.

[2] *Fourth National Climate Assessment*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/ (last visited Dec. 5, 2018). The Court can take judicial notice of this publicly available federal report and the other reports cited herein that are not already in the District Court record. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Comm'y v. California*, 547 F.3d 962, 968 n.4 (9th Cir. 2008); Doc. 368.

[3] U.S. Glob. Change Research Program, *Second State of the Carbon Cycle Report: A Sustained Assessment Report* (2018), https://carbon2018.globalchange.gov/downloads/SOCCR2_2018_FullReport.pdf.

that if crossed will result in even more substantial and irreversible harm to human health, well-being, and prosperity in coming decades. The assessments also show that children like Plaintiffs Jaime B. and Jayden F. are being harmed ***right now*** by climate change and Defendants' systemic conduct in causing it.

Given the ongoing and future harms to Plaintiffs' lives, liberties, and property confirmed by Defendants' recent assessments, whether or not the Ninth Circuit grants the interlocutory appeal, a stay of discovery and pretrial proceedings is highly prejudicial to Plaintiffs in the absence of injunctive relief pending appeal under Federal Rule of Appellate Procedure 8. Further, given that the majority of trial preparations have already been completed, judicial economy and efficiency are served by avoiding further stays, which would avoid the need for preliminary injunctive relief in this case and avoid another discovery process to update expert reports with another full round of depositions based on those expert reports to reflect the new scientific evidence that will indisputably arise during the pendency of an appeal.

Plaintiffs request expedited consideration of this motion in light of the urgency of the situation and because this Court is vested with jurisdiction over an interlocutory order until the Circuit Court assumes jurisdiction over the case, were it to grant Defendants' Petition for interlocutory appeal. Fed. R. App. P. 5(d)(2). Plaintiffs respectfully request this Court reconsider and modify its November 21 order *before* the Petition for Permission to Appeal is resolved so that Plaintiffs' ability to be promptly heard on the merits of their case at trial is not jeopardized, thereby minimizing the probability that Plaintiffs will be compelled to seek preliminary injunctive relief before final judgment.

Fundamentally, this Court has the inherent power to reconsider and revise its November 21 Order and should do so given that Defendants have repeatedly failed to demonstrate that a

stay of pretrial proceedings is necessary and neither this Court, nor the Ninth Circuit, nor the Supreme Court, has found any cognizable harm to Defendants in completing pretrial proceedings. In contrast to the irreversible, omnipresent, and escalating harms Plaintiffs are suffering due to Defendants' unconstitutional conduct, Defendants have routinely failed to provide any factual evidence establishing that the public interest lies in staying the proceedings for Defendants' convenience. For these reasons, Plaintiffs urge this Court to modify the November 21 Order so that the parties can complete all discovery and pretrial proceedings while the Ninth Circuit decides the two petitions pending before it, which would be consistent with the Ninth Circuit's November 8 Order staying only trial pending its decision on Defendants' Petition for Writ of Mandamus. *In re United States*, No. 18-73014, Dkt. 3 (9th Cir. Nov. 8, 2018).

II. STANDARD OF REVIEW

Parties may seek reconsideration of interlocutory orders "which adjudicate fewer than all of the claims" under Federal Rule of Civil Procedure 54(b). The Court has the authority to revise such orders "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); *Am. Rivers v. NOAA Fisheries*, No. CV04-00061-RE, 2006 WL 1983178 at *2 (D. Or. July 14, 2006); *see also City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) ("As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.") (quotations and citation omitted); *Askins v. U.S. Dep't of Homeland Sec'y*, 899 F.3d 1035, 1042–43 (9th Cir. 2018). Here, even where this Court has certified orders for interlocutory appeal, this Court retains the right to reconsider, rescind, or modify the stay ordered on November 21 because the Ninth Circuit has not yet accepted appellate jurisdiction over the case. *Santa Monica Baykeeper*,

254 F.3d at 886 (district court retains jurisdiction "until a court of appeals grants a party permission to appeal").

A stay of proceedings is not a mandatory condition for certification of an order for interlocutory appeal, but is discretionary, 28 U.S.C. § 1292(b), in circumstances that "promote economy of time and effort for [the court], for counsel, and for litigants." *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972) (quotations and citations omitted). When considering whether to exercise its discretion to stay proceedings, a district court should consider:

> [T]he possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Consumer Cellular, Inc. v. Consumer Affairs.com, 2016 WL 7238919 at *2 (D. Or. 2016) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)); *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). In its Order of November 21 staying proceedings, this Court did not indicate that it performed this analysis and as such, reconsideration is appropriate.

III. PROCEDURAL HISTORY

This Court is very familiar with the background and procedural history of this case. For purposes of this Motion for Reconsideration, and to reiterate the injustice and harm to the Plaintiffs that would result should the stay remain in place, necessitating a motion for injunctive relief, Plaintiffs highlight Defendants' repeated efforts to delay trial.

On November 28, 2016, less than three weeks after this Court denied Defendants' motions to dismiss, the Court held a status conference to discuss pretrial proceedings. At that status conference, Plaintiffs informed the Court that any delay in getting to trial would necessitate a motion for preliminary injunction in light of the ongoing and irreparable harms being suffered by Plaintiffs. The transcript provides:

MS. OLSON: During our meet and confer, counsel for defendants indicated that they thought it would take five years to complete discovery and to get to trial, and we disagree with that. But there are indications that the defendants are going to attempt to delay our getting to trial in this case. And, again, given the urgency, we attempted to engage in settlement discussions. We are willing to enter into the court's ADR program or have any other settlement negotiations that the defendants would be interested in. They have rejected those requests. They don't believe -- they can speak for themselves, but they have indicated to us they don't believe this case is appropriate for settlement talks. And given, again, the urgency, the plaintiffs have a need to seek preliminary relief in this case, and we would also like the court to set a hearing date for a motion for preliminary relief in early January.

THE COURT: Well, in the first place, you said a lot, and let me try to address it piecemeal, if I can. We are not going to take five years to try this case. That's not going to happen. We are going to set a discovery deadline that's going to be reasonable and not extended far out into the future, and everyone needs to understand that. And hopefully you folks can agree on a discovery schedule, but it sounds like you are pretty far apart and that's not going to happen, in which case, all the parties should submit their proposed schedule to the court, and the court will set a discovery deadline that is within reasonable parameters. The goal would be to set the discovery deadline and the motion practice, dispositive motions, *et cetera*, within a time period where a trial can be held by the middle or toward the fall of next year. With respect to your request to set a hearing for preliminary relief, I will tell you in all candor from where I sit in having dealt with this case, this does not seem to be a case that lends itself to the court fashioning some sort of relief without first having a trial in which all the issues are fleshed out. I mean, I am sitting here looking at Judge Aiken's order in this case, and since, in the absence of consents, she is going to be the one dealing with it, she says quite candidly in her order that, "In any event, speculation about the difficulty of crafting a remedy could not support dismissal at this early stage." And she goes on to quote from the *Baker* case, Supreme Court case, "It is improper now to consider what remedy would be most appropriate if appellants prevail at trial." So given the complexity of this case, it's extremely difficult for me to imagine a prospect for the court to jump ahead in January without the benefit of a trial and craft some sort of preliminary relief and thus put the cart before the horse completely.

MS. OLSON: Thank you, Your Honor. This is Julia Olson again. And if we can get to trial by the middle to late time frame of 2017 that Your Honor suggested, then we could potentially hold off seeking preliminary relief. And just to be clear about the intention, the intention is to ensure that there is not further backsliding in terms of increasing emissions in the United States; that the defendants aren't continuing to promote and develop more fossil fuels and more fossil fuel infrastructure during the [time]frame that it takes to get to trial because of the fact that it locks in additional carbon dioxide and other greenhouse gas pollution that has threatened these plaintiffs. We are attempting to hold as much of the status quo as possible.

THE COURT: All right. I understand the plaintiffs' position.

Doc. 100, at 10:22–13:17. Since this discussion, over two years have passed and Plaintiffs have still been unable to get the merits of their constitutional claims heard, a direct result of the repeated attempts by Defendants to delay trial. This denial of justice has occurred in spite of the fact that Defendants have continued their unconstitutional conduct that threatens Plaintiffs' lives and liberties, in spite of the fact that Plaintiffs have prevailed on every one of Defendants' motions or petitions for dismissal, judgment, mandamus, and permanent stays of litigation for the past 3 years, at all three levels of the federal judiciary, often simultaneously, and in spite of the fact that Plaintiffs are ready to try their case.

On July 25, 2017, the Ninth Circuit issued the first stay in this case that lasted approximately eight months and eliminated the opportunity for the fall 2017 trial date that was discussed during the November 2016 status conference. *In re United States*, No. 17-71692, Dkt. 7 (9th Cir. July 25, 2017). On October 19, 2018, Chief Justice Roberts issued a second administrative stay, ten days before trial was scheduled to begin on October 29, 2018. Doc 399. On November 2, 2018, the Supreme Court denied Defendants' application for stay pending disposition of their Petition for a Writ of Mandamus without prejudice, noting that Defendants had failed to seek appropriate review from the Ninth Circuit. Doc. 416.

On November 5, Defendants filed their fourth Petition for Writ of Mandamus in the Ninth Circuit ("Fourth Petition"), again claiming non-specific separation of powers harms from general participation in discovery and trial and seeking dismissal and review of each of this Court's orders on Defendants' dispositive motions. Doc. 420-1. On the same day, Defendants moved this Court both to reconsider its denials of Defendants' requests to certify for interlocutory appeal under 28 U.S.C. § 1292(b) and to stay the litigation. Docs. 418, 419. On

November 8, the Ninth Circuit issued a partial temporary stay, preventing this Court from promptly setting a new trial date after the Supreme Court lifted its temporary stay. *In re United States*, No. 18-73014, Dkt. 3 (9th Cir. Nov. 8, 2018). The November 8 Order allowed both discovery and pre-trial matters to proceed "pending [the Ninth Circuit's] consideration of th[e] petition for writ of mandamus." *Id*. In requesting the stay with this Court, Defendants put forth no cognizable evidence that they will suffer damage as a result of completing pre-trial proceedings, including scheduled depositions to occur during the month of December 2018.

On November 21, this Court certified this case for interlocutory appeal and stayed the entire case pending a decision by the Ninth Circuit Court of Appeals. Doc. 444 at 6. In its Order, this Court indicated it "stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial." *Id.* at 5. In the Order, the Court did not identify any irreparable harm the Defendants would suffer if discovery and pretrial proceedings are completed, nor did it evaluate the harm Plaintiffs would suffer with further delay, or the inefficiencies such delay would cause.

As more fully set forth in the parties' Joint Report on the Status of Discovery and Relevant Pretrial Matters, filed with the Ninth Circuit on November 23, Defendants will suffer no cognizable burden in finalizing the remaining, extremely limited discovery, which does not require the disclosure of any confidential or privileged information nor require Defendants to take any policy positions. *See* Declaration of Julia A. Olson in Support of Plaintiffs' Motion for Reconsideration ("Olson Decl."), Exh. 1. There remain only (a) the depositions of three rebuttal and sur-rebuttal experts and five Plaintiffs; and (b) completion of the briefing on the pending pretrial motions. *Id.* at 4, 8–9.

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 opposition. Plaintiffs will oppose interlocutory appeal and believe there should not be any further stay of the 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.

IV. ARGUMENT

A. This Court Has The Jurisdiction and Power to Modify Its Stay Order to Allow Pretrial Proceedings and Trial to Continue

This Court should modify its November 21 Order to allow discovery and pretrial proceedings to conclude, which would allow trial to commence promptly should the Ninth Circuit lift the stay of trial in its November 8 Order. A district court retains jurisdiction over an interlocutory order until that jurisdiction is transferred from the district court to a court of appeals upon the filing of a notice of appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). A notice of appeal for an interlocutory order is deemed filed upon the issuance of an order by a court of appeals permitting an appellant to bring an interlocutory appeal. Fed. R. App. P. 5(d)(2); *Santa Monica Baykeeper*, 254 F.3d at 886. No entry of an order permitting interlocutory appeal has issued by the Ninth Circuit and therefore this Court retains jurisdiction.[4]

[4] This includes jurisdiction to withdraw the order certifying this Court's previous orders for interlocutory appeal. *See Santa Monica Baykeeper*, 254 F.3d at 886.

This Court, the Ninth Circuit, and the Supreme Court have repeatedly recognized that district courts have wide discretion to carefully manage and control their own dockets. *See Landis*, 299 U.S. at 254–55; *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) ("[I]t is the prerogative of the district court to manage its workload."); *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 4997032, at *32 (D. Or. Oct. 15, 2018). Pursuant to 28 U.S.C. § 1292, this Court is not bound to order a stay in conjunction with an order certifying interlocutory appeal nor is it automatically divested from managing its own docket upon such a certification. *See, e.g.*, *Community Ass'n for Restoration of the Environment, Inc. v. Cow Palace, LLC*, 2015 WL 403178 at *1 (E.D. Wash. 2015) (court considered whether to stay the case if it granted certification for interlocutory appeal when there was a "quickly-approaching trial date" and stated: "Any delay in these proceedings only increases the already-present risk to the public health. Accordingly, this Court declines to stay these proceedings if it grants certification for interlocutory appeal.")

This Court has repeatedly heard and rejected Defendants' recurring attempts to have the case dismissed and to delay and obfuscate pre-trial and trial preparations since the November 2016 status conference where Defendants took the position it would take five years to get to trial. Docs. 83, 100, 172, 238, 300, 324, 369, 374. This Court has also made clear that it "stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial." Doc. 444 at 5. Accordingly, this Court should exercise its jurisdiction and power to revise its November 21 Order and allow the parties to finalize discovery and pretrial proceedings.

B. The Stay Factors Required Are Not in Defendants' Favor

Defendants failed to establish factors necessary to sustain a stay and this Court made no findings on this point. The Ninth Circuit traditionally considers the factors discussed by the

Landis court, 299 U.S. at 254–55, as applicable generally to motions for stay of proceedings, namely:

> [T]he possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Consumer Affairs.com, 2016 WL 7238919 at *4 (D. Or. 2016) (citing *CMAX*, 300 F.2d at 268).

1. Plaintiffs Are Irreparably Harmed by Entry of the Stay

The overwhelming evidence before this Court shows that Plaintiffs will suffer substantial harm from *any* further delay in resolving their claims. For example, Defendants admit, among many other significant facts:

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

Doc. 98 at ¶ 213. Moreover, the best available climate science illustrates that even a modest delay in resolution of Plaintiffs' claims will substantially worsen Plaintiffs' injuries. *See, e.g.*, Doc. 274-1 at 3 (Expert Report of James Hansen, Ph.D.) ("There is no time left for further delay in taking actions to address the atmospheric burden that endangers our climate system and threatens our children."); *id.* at 48 ("My expert opinion and conclusion is that, at this late stage, further delay in the commencement of rigorous, systemic, comprehensive, and sustained action to phase out CO_2 emissions and draw down atmospheric CO_2 risks imminent catastrophe—a conclusion shared by most climate scientists."); *see also* Docs. 256–69, 271, 272, 274, 275, 298. Not only do Defendants proffer ***zero evidence*** to contest Dr. Hansen, in the NCA4, Defendants agree that the rate of climate warming directly influences the magnitude of the climate change

impacts that are harming the Plaintiffs.[5] Atmospheric CO_2 concentrations are already well above the level necessary to maintain a safe and stable climate system and dangerous consequences of climate change are already occurring. *See, e.g.*, Docs. 262-1, 274-1, 275-1. As such, every ton of fossil fuel emissions the U.S. authorizes to be emitted persists for hundreds of years affecting the climate system for millennia, impacts such as sea level rise register non-linearly and are accelerating, and additional emissions could exceed irretrievable climate system tipping points. *Id.*

In addition to the evidence already before this Court that illustrates how Plaintiffs would be substantially injured by a stay, Defendants' NCA4[6] and SOCCR2, both of which were released on November 23, 2018, two days after this Court issued its stay, unmistakably demonstrate the imminent harm Plaintiffs will suffer if trial does not commence immediately and a remedy is not implemented promptly. According to the NCA4:

> Earth's climate is now changing faster than at any point in the history of modern civilization . . . . Climate-related risks will continue to grow without additional action. ***Decisions made today*** determine risk exposure for current and future generations and will either broaden or limit options to reduce the negative consequences of climate change.

NCA4 Chapter 1[7] (emphasis added). Other findings of the NCA4 highlight the harm Plaintiffs are suffering and the need for urgent action by Defendants to reduce greenhouse gas ("GHG") emissions in the United States:

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[5] *See, e.g.*, *Fourth National Climate Assessment Chapter 6: Forests*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/6/ (last visited Dec. 5, 2018) ("NCA4 Chapter 6").

[6] At the time of filing, the NCA4 was only available online and did not contain page numbers. Accordingly, Plaintiffs provide citations to the relevant online chapter of the NCA4.

[7] *Fourth National Climate Assessment Chapter 1: Overview*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/1/ (last visited Dec. 5, 2018) ("NCA4 Chapter 1").

- "The scale of risks [defined as threats to life, health and safety, the environment, economic well-being, and other things of value] that can be avoided through mitigation actions [defined as reducing GHG emissions and removing them from the atmosphere] is influenced by the magnitude of emissions reductions, the timing of those reductions . . . [and r]esearch supports that ***early and substantial mitigation offers a greater chance of avoiding increasingly adverse impacts***." "[D]elayed and potentially much steeper emissions reductions jeopardize achieving any long-term goal . . . [with] the potential for abrupt consequences." "Evidence exists that ***early mitigation can reduce climate impacts in the nearer term*** . . . and, in the longer term, ***prevent critical thresholds from being crossed***." NCA4 Chapter 29 (emphases added).[8]
- "[W]ithout major reductions in [GHG] emissions, the increase in annual average global temperatures relative to preindustrial times could reach 9°F (5°C) or more by the end of this century. Because of the slow timescale over which the ocean absorbs heat, warming that results from emissions that occur during this century will leave a multi-millennial legacy, with a substantial fraction of the warming persisting for more than 10,000 years." NCA4 Chapter 2.[9]
- "Early greenhouse gas mitigation can reduce climate impacts in the nearer term (such as reducing the loss of arctic sea ice and the effects on species that use it) and in the longer term by avoiding critical thresholds (such as marine ice sheet instability and the resulting consequences for global sea level and coastal development)." NCA4 Chapter 1.
- Prior assumptions about sea level rise projected ranges "do not, however, capture the full range of physically plausible global average sea level rise over the 21st century. Several avenues of research . . . suggest that global average sea level rise exceeding 8 feet (2.5 m) by 2100 is physically plausible . . . ." NCA4 Chapter 2.
- "There is significant potential for humanity's effect on the planet to result in unanticipated surprises and a broad consensus that the farther and faster the Earth system is pushed towards warming, the greater the risk of such surprises." NCA4 Chapter 15.[10]

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[8] *Fourth National Climate Assessment Chapter 29: Reducing Risks Through Emissions Mitigation*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/29/ (last visited Dec. 5, 2018) ("NCA4 Chapter 29").

[9] *Fourth National Climate Assessment Chapter 2: Our Changing Climate*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/2/ (last visited Dec. 5, 2018) ("NCA4 Chapter 2").

[10] *Fourth National Climate Assessment Chapter 15: Tribes and Indigenous Peoples*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/15/ (last visited Dec. 5, 2018) ("NCA4 Chapter 15").

- Climatic changes "are affecting the health and well-being of the American people, causing injuries, illnesses, and death." Chapter 14.[11]
- "Individuals whose households experienced a flood or risk of flood report higher levels of depression and anxiety, and these impacts can persist several years after the event. Disasters present a heavy burden on the mental health of children when there is forced displacement from their home or a loss of family and community stability." NCA4 Chapter 14.
- "***Observed*** and projected ***changes*** of increased wildfire, diminished snowpack, pervasive drought, flooding, ocean acidification, and sea level rise threaten the viability of Indigenous people's traditional subsistence and commercial activities that include agriculture, hunting and gathering, fisheries, forestry, energy, recreation, and tourism enterprises." "Climate impacts to lands, waters, foods, and other plant and animal species threaten cultural heritage sites and practices that sustain intra- and intergenerational relationships built on sharing traditional knowledges, food, and ceremonial or cultural objects. This weakens place-based cultural identities, may worsen historical trauma still experienced by many Indigenous people in the United States, and adversely affects mental health and Indigenous values-based understandings of health." "Indigenous agriculture is already being adversely affected by changing patterns of flooding, drought, dust storms, and rising temperatures." Climate change is altering relationships "central to Indigenous physical, mental, and spiritual health. . . . This alteration in relationships occurs when individuals, families, and communities (within and between generations) are less able or not able to share traditional knowledges about the natural environment [ ], food, and ceremonial or cultural objects, among other things, because the knowledge is no longer accurate or traditional foodstuffs and species are less available due to climate change. For many Indigenous peoples, the act of sharing is fundamental to these intra- and intergenerational relationships, sustains cultural practices and shared identity, and underpins subsistence practices." NCA4 Chapter 15 (emphasis added).
- "Climatic changes, including warmer springs, longer summer dry seasons, and drier soils and vegetation, have already lengthened the wildfire season and increased the frequency of large wildfires. . . . resulting in adverse impacts to human health." "Wildfire smoke can worsen air quality locally, with substantial public health impacts in regions with large populations near heavily forested areas. Exposure to wildfire smoke increases the incidence of respiratory illnesses, including asthma, chronic obstructive pulmonary disease, bronchitis, and pneumonia." "Human-caused climate change is estimated to have doubled

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[11] *Fourth National Climate Assessment Chapter 14: Human Health*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/14/ (last visited Dec. 5, 2018) ("NCA4 Chapter 14").

the area of forest burned in the western United States from 1984 to 2015." NCA4 Chapter 13.[12]

- "Climate change, specifically rising temperatures and increased carbon dioxide (CO_2) concentrations, can influence plant-based allergens, hay fever, and asthma in three ways: by increasing the duration of the pollen season, by increasing the amount of pollen produced by plants, and by altering the degree of allergic reactions to the pollen." NCA4 Chapter 13.
- "[M]itigating GHG emissions can lower emissions of particulate matter (PM), ozone and PM precursors, and other hazardous pollutants, reducing the risks to human health from air pollution." "[C]limate change alone introduces a climate penalty (an increase in air pollution resulting from climate change) for ozone." "[C]hildren . . . are especially susceptible to ozone and PM-related effects." "Short- and long-term exposure to these pollutants results in adverse respiratory and cardiovascular effects, including premature deaths, hospital and emergency room visits, aggravated asthma, and shortness of breath." "Controlling these common [GHG] emission sources would both mitigate climate change and have ***immediate benefits for air quality and human health***." NCA4 Chapter 13 (emphasis added).
- "Without significant reductions in greenhouse gas emissions, extinctions and transformative impacts on some ecosystems ***cannot be avoided***, with varying impacts on the economic, recreational, and subsistence activities they support." NCA4 Chapter 1 (emphasis added).

Further, NCA4 Chapter 24 warns that children and youth "will likely experience cumulative physical and mental health effects of climate change over their lifetimes," and that these climate stressors can have life-long consequences: "Evidence shows that exposure to both pollution and trauma in life is detrimental to near-term health, and an increasing body of evidence suggests that early-childhood health status influences health and socioeconomic status later in life."[13]

In the NCA4, Defendants acknowledge that climate change is already causing the types of injuries that Plaintiff Jaime B. is experiencing as Diné on the Navajo Reservation. Doc. 282;

[12] *Fourth National Climate Assessment Chapter 13: Air Quality*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/13/ (last visited Dec. 5, 2018) ("NCA4 Chapter 13").
[13] *Fourth National Climate Assessment Chapter 24: Northwest*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/24/ (last visited Dec. 5, 2018) ("NCA4 Chapter 24").

Chapter 15. "In the Southwest, the loss of stability and certainty in natural systems may affect physical, mental, and spiritual health of Indigenous peoples with close ties to the land. For example, extended drought raises concerns about maintaining Navajo Nation water-based ceremonies essential for spiritual health, livelihoods, cultural values, and overall well-being." NCA4 Chapter 25[14]; *see also* NCA4 Chapter 15. For Jayden, the NCA4 confirms that the August 2016 floods that damaged her home and her health were climate induced, will become more frequent, and will continue to pose imminent threats to Jayden's physical and mental health. NCA4 Chapter 3[15]; NCA4 Chapter 14; NCA4 Chapter 19.[16] The NCA4 validates many of the particularized individual injuries being experienced by Plaintiffs and is clear evidence of the urgent need for steep emissions reductions to prevent the worsening of Plaintiffs' current injuries and to begin remediating their harm. The NCA4 also makes it abundantly clear that ***any delay*** in Defendants reducing emissions makes a remedy less likely.

In addition to the NCA4, the SOCCR2 also made key findings acknowledging the emergency Plaintiffs are in from the increasing pace of change in the carbon cycle, which could turn carbon sinks into carbon sources, further exacerbating the current dangers.

- "The carbon cycle is changing at a much faster pace than observed at any time in geological history. . . ." SOCCR2 at 27.
- "Arctic surface air temperatures are rising about 2.5 times faster than the global average. This increase can destabilize permafrost soils (i.e., soil that remains permanently frozen at some depth) and surrounding landscapes, which exist throughout the Arctic and store almost twice the amount of

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[14] *Fourth National Climate Assessment Chapter 25: Southwest*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/25/ (last visited Dec. 5, 2018) ("NCA4 Chapter 25").
[15] *Fourth National Climate Assessment Chapter 3: Water*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/3/ (last visited Dec. 5, 2018) ("NCA4 Chapter 3").
[16] *Fourth National Climate Assessment Chapter 19: Southeast*, U.S. Glob. Change Research Program, https://nca2018.globalchange.gov/chapter/19/ (last visited Dec. 5, 2018) ("NCA4 Chapter 19").

carbon currently contained in the atmosphere. Warming temperatures can release this stored carbon into the atmosphere." *Id.* at 2-3.

- "[A] range of research suggests the carbon uptake capacity of [land and ocean ecosystems] may decline in the future, with some reservoirs switching from a net sink to a net source of carbon to the atmosphere." *Id.* at 28.
- "[T]he frequency and intensity of disturbances such as fire, insect and pathogen outbreaks, storms, and heatwaves are expected to increase with higher temperatures and climate variability." *Id.* at 32.
- Ocean acidification is a "major concern" and the amount of CO_2 absorbed by the oceans has been increasing steadily and creating a significant stressor for marine ecosystems. *Id.* at 670–74.

As Defendants' own science shows unequivocally, Plaintiffs are facing ongoing harm and imminent increasing harm if trial does not commence promptly and a remedy is not implemented with all deliberate speed. Notwithstanding Defendants' acknowledgement in these reports of the urgent need for reductions in greenhouse gas emissions to avoid locking in the most significant irreversible harms, since Plaintiffs first raised the prospect of preliminary injunctive relief with this Court in November 2016, Defendants have persisted, in fact doubled-down, in their unconstitutional systemic conduct and have exacerbated the climate crisis and Plaintiffs' constitutional injuries. For example, since November 2016 when Plaintiffs informed this Court they needed injunctive relief or a quick trial date, Defendants have:

- Offered 78 million acres offshore Texas, Louisiana, Mississippi, Alabama, and Florida for oil and gas exploration and development (Doc. 341-135);
- Offered 285 million acres of land for oil and gas lease sale within the National Petroleum Reserve in Alaska[17];
- Removed National Monument status from federal lands to allow for the extraction of oil and gas resources (Doc. 381-17);
- Leased 56 million tons of coal for extraction from land in Utah (Doc. 341-110);

[17] *BLM Offers 285 Million Acres for Oil and Gas Lease Sale Within the NPR-A* DOI (Nov. 8, 2018) https://www.blm.gov/press-release/blm-offers-285-million-acres-oil-and-gas-lease-sale-within-npr.

- Issued a Presidential Permit to TransCanada for Keystone XL Pipeline authorizing TransCanada to construct, operate, and maintain pipeline facilities for the importation of crude oil[18];
- Expedited approval and construction of the Dakota Access Pipeline (341-116);
- Proposed grid pricing rules that would encourage coal-fired electricity generation (Doc. 381-361);
- Ended the moratorium on coal leasing on federal land that was enacted by the Obama administration (Doc. 341-48);
- Withdrawn the Clean Power Plan and replaced it with the Affordable Clean Energy Rule, which Defendants admit will result in higher CO_2 emissions and longer-term reliance on coal when compared to the Clean Power Plan (Doc. 381-315);
- Rolled back emission standards for passenger cars and light trucks, which Defendants admit will increase U.S. fuel consumption (when compared to the standard set by the Obama administration) (Doc. 341-390);
- Rescinded regulations promulgated under the Obama administration that were intended to reduce methane leaks from oil and gas operations (Doc. 341-95); and
- Systematically expressed support for and promoted the fossil fuel industry (Docs. 299-163, 341-6, 341-108).

These actions of Defendants are long-lasting investments in fossil fuel-based infrastructure, modes of transit, and energy supply that "locks-in" the use of fossil fuels, making it harder to transition to carbon-free energy sources and thus harder to redress Plaintiffs' injuries.[19] By pursuing high-carbon energy sources through 2020, the cost to reduce CO_2 emissions after 2020 will increase fourfold.[20]

As can be expected from the Defendants' concerted efforts to double-down on fossil fuel extraction, transportation, and combustion, the result has been an increase in U.S. CO_2 emissions. In the decade preceding 2016 (from 2007 to 2016), energy-related carbon dioxide

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[18] *Issuance of Presidential Permit to TransCanada for Keystone XL Pipeline*, Dep't of State (March 24, 2017), https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm.
[19] *See* Stockholm Env't Inst., *Carbon Lock-In from Fossil Fuel Supply Infrastructure* (2015), https://mediamanager.sei.org/documents/Publications/Climate/SEI-DB-2015-Carbon-lock-in-supply-side.pdf.
[20] *Id.*

emissions in the U.S. had been decreasing by about 1.5% annually,[21] but still at dangerous levels and the second highest in the world. In 2017, U.S. energy-related CO_2 emissions declined again, but the rate of decline was less than previous years.[22] However for 2018, the Energy Information Administration expects that U.S. CO_2 emissions will ***increase by 2.5%.***[23]

Meanwhile, Defendant officials continue to publicly ignore and lie about climate change, all while promoting fossil fuels, at the same time the peer-reviewed and researched climate science coming out of every Defendant Department and Agency is consistent with Plaintiffs' allegations. For example, following the release of the NCA4, both Interior Secretary Ryan Zinke and Acting EPA Administrator Andrew Wheeler criticized and cast doubt on the report of their own agencies[24] while former Defendant President Trump said flat out, "I don't believe it,"[25] without a shred of evidence to the contrary. It could not be clearer that without timely action by the courts ***now***, not over two years from now after interlocutory appeal, Defendants will continue to engage in their unconstitutional systemic acts, locking in more accumulated CO_2, leading the country down a fossil fuel suicide pact, without timely action by the courts. *See* Olson Decl. ¶ 7, Exh. 3 (depicting 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)).

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[21] EIA, *November 2018, Monthly Energy Review* 201 (Nov. 20, 2018), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.
[22] EIA, Short-Term Energy Outlook 2 (Nov. 6, 2018), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.
[23] *Id.*
[24] Timothy Cama, *Zinke Questions Methodology of Federal Climate Report* (Nov. 27, 2018), https://thehill.com/policy/energy-environment/418450-zinke-questions-methodology-of-federal-climate-report; Alex Guillén, *EPA Chief: Trump Administration May Intervene in Next Climate Study* (Nov. 28, 2018), https://www.politico.com/story/2018/11/28/epa-trump-next-climate-study-992872.
[25] Timothy Cama, *Trump on Dire Warnings in Climate Report: 'I Don't Believe It'* (Nov. 11, 2018), https://thehill.com/policy/energy-environment/418289-trump-on-dire-warnings-in-climate-report-i-dont-believe-it.

2. Defendants Would Not Be Harmed by Completing Pretrial Proceedings

The harm Defendants assert that they would suffer if the stay were not granted—namely being required to participate in discovery and litigation—generally does not, under the circumstances, constitute inequity or undue hardship. As set forth in the parties' Joint Status Conference Statement recently submitted to the Ninth Circuit, there remain only: (a) the depositions of three rebuttal and sur-rebuttal experts and five plaintiffs; and (b) completion of the briefing on the pending motions. *See* Olson Decl. Exh. 1 at 1. There would be no cognizable harm to Defendants in completing these limited pretrial proceedings.

To the extent Defendants claim they have suffered some kind of institutional injury by erosion of the separation of powers, that injury is not "irreparable" because Defendants may yet pursue and vindicate their interests in the full course of this litigation. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 767–68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those [separation of powers and federalism] principles."); *see also* 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 (Olson Decl. Exh. 2) (arguing that even after final judgment, "in the government's view . . . 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.").

Without a stay, Defendants argue, the United States and the public interest will be irreparably harmed because trial proceedings will move forward without allowing the opportunity for appellate review of the claims. Doc 419. This is simply untrue. The Court has

"broad discretion to decide whether a stay is appropriate to 'promote economy of time and effort for itself, for counsel, and for litigants.'" *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F.Supp.2d 1081, 1094 (E.D. Cal. 2008). Defendants have not, and cannot, show that they would be unable to assert all of their arguments in the normal course of appellate review and none of the three levels of our federal judiciary has so found. *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018); *see also In re United States*, 895 F.3d 1101, 1106 (9th Cir. 2018) ("The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal."). Defendants also cannot show that the typical expenses associated with complex civil litigation constitute irreparable harm. The Ninth Circuit has previously rejected this argument. *In re United States*, 884 F.3d at 836; *see also State of New York, et al., v. United States Department of Commerce, et al.*, No. 18-CV-2921, 2018 WL 6060304 at *1, 4 (S.D.N.Y. 2018) (litigation expense does not constitute irreparable injury and Department of Justice's repetitive litigation conduct bordered on sanctionable) (citation omitted).

3. The Most Efficient Means to Move Forward is to Complete Discovery and Pretrial Proceedings Notwithstanding Any Potential Interlocutory Appeal

Plaintiffs recognize that, even if this Court modifies its November 21 Order to allow completion of discovery and pretrial proceedings, trial cannot commence unless and until the Ninth Circuit lifts the stay of trial in its November 8 Order. However, in light of the numerous stops and starts in this case and the ongoing harm to Plaintiffs, this Court should issue an order that clears this case for trial should the Ninth Circuit lift its stay, whether or not interlocutory appeal proceeds. Where urgent injunctive relief is needed, as it is here, a trial, rather than a preliminary injunction proceeding, is the most efficient course. *See* Doc. 100. This is particularly so when the parties have already prepared for and are nearly ready for trial. Olson Decl. Exh. 1. Moreover, 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. Olson Decl. ¶ 4. That in turn could lead to Defendants seeking to re-depose Plaintiffs' experts, which they have indicated they would seek to do in the case of supplemental reports. Olson Decl. ¶ 4. 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. Olson Decl. ¶ 4. In essence, if this case is stayed pending full interlocutory appeal, it is likely to take at least six to nine months for briefing, oral argument, and a decision by the Ninth Circuit, and at least a similar amount of time on appeal to the Supreme Court before Plaintiffs would be able to try their case, with parallel appellate proceedings on Plaintiffs' motion for injunctive relief pending appeal. *See* Olson Decl. ¶ 7. At that point, the expert discovery would likely have to be entirely reconducted because of the scientific evidence on the catastrophic state of climate change in 2020. A stay of trial will compound harms suffered by Plaintiffs and ultimately increase the litigation burden on all parties with inefficient and duplicative review on appeal by the higher courts.

Moreover, in their Petition for Permission to Seek Interlocutory Appeal, Defendants do not argue that Plaintiffs' claims of infringement of well-established fundamental rights or of discrimination may not proceed, even if the Ninth Circuit accepts interlocutory appeal. Consequently, these claims will survive and must be tried even if the other claims subject to

interlocutory appeal are reviewed or ultimately dismissed.[26] This necessitates moving the pretrial proceedings forward expeditiously to adjudicate these matters even if the appellate process remains underway.

Plaintiffs' claims present serious factual allegations and raise significant constitutional questions which must be addressed through the ordinary course of trial. In light of the ongoing injuries and increasingly urgent threats affecting Plaintiffs—and that Defendants continuously fail to substantiate their burden to show the necessity of a stay—Plaintiffs urge this Court to reconsider and modify its Order to allow discovery and pretrial proceedings to continue pending interlocutory appeal.

V. CONCLUSION

While Plaintiffs' pretrial proceedings and trial have been stayed, the Defendants' conduct that causes and contributes to climate change has not been "stayed" and gets worse with each passing day. As the evidence before this Court shows, and Defendants' newest climate change reports confirm, time is of the essence to protect Plaintiffs' constitutional rights from further infringement that Defendants admit soon "cannot be avoided." NCA4 Chapter 1 ("[M]any impacts, including losses of unique coral reef and sea ice ecosystems, can only be avoided by significantly reducing global greenhouse gas emissions."). As the UN Secretary-General António Guterres said recently:

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[26] Only a final determination that Plaintiffs do not have standing would prevent Plaintiffs' case from going to trial based on the current request for interlocutory appeal. However, this Court correctly concluded that standing raises a factual inquiry that must be addressed at trial. *Juliana*, 2018 WL 4997032 at *25. Whether there are adequate injuries, causal nexus, and redressability is not a determination that can be made without reference to the evidence before this Court and requires a full record and a trial to decide these urgent matters. This Court and the Ninth Circuit have relied upon clear precedent in holding that Plaintiffs' Fifth Amendment claims need not be brought via the Administrative Procedure Act ("APA"). Defendants' APA arguments are the extraordinary ones, lacking supporting precedent, and can be raised in the normal appeal process. *Juliana*, 2018 WL 4997032 at *11–*14.

> Climate change is the defining issue of our time—and we are at a defining moment. We face a direct existential threat. Climate change is moving faster than we are—and its speed has provoked a sonic boom "SOS" across our world. ***If we do not change course by 2020, we risk missing the point where we can avoid runaway climate change***, with disastrous consequences for people and all the natural systems that sustain us . . . .
>
> There is no more time to waste. As the ferocity of this summer's wildfires and heatwaves shows, the world is changing before our eyes. We are careening towards the edge of the abyss. It is not too late to shift course, but every day that passes means the world heats up a little more and the cost of our inaction mounts. Every day we fail to act is a day that we step a little closer towards a fate that none of us wants—a fate that will resonate through generations in the damage done to humankind and life on Earth.
>
> Our fate is in our hands. The world is counting on all of us to rise to the challenge before it's too late. I count on you all.

António Guterres, *Addressing Climate Change, Secretary-General Says World's Fate Is In Our Hands, Requires Rising to the Challenge Before It's Too Late*, United Nations (Sept. 10, 2018), https://www.un.org/press/en/2018/sgsm19205.doc.htm (emphasis added).

This Court has the jurisdiction and power to reconsider and modify its decision to stay all proceedings in this case. Defendants failed to satisfy any of the requirements warranting a stay and failed to proffer any legitimate harm that would necessitate a stay, particularly as to completion of discovery and pretrial proceedings. This Court must lift the stay if it finds Defendants have failed to show a shred of evidence of cognizable harm where a stay will result in irrevocable harm to Plaintiffs and increased future litigation burdens, including Plaintiffs need to seek preliminary injunctive relief, creating multiple layers of appellate review and determinations of key factual issues without the benefit of live expert testimony at trial. Plaintiffs cannot continue to wait to get to trial, while their injuries worsen and the window of opportunity to redress the injuries closes. They are in dire need of relief. The most appropriate and efficient resolution would be to allow the parties to continue trial preparations pending the appellate

process, in an effort to maximize the benefit of the work already done and increase the chance that the case can be decided on a full record at trial rather than on piecemeal appeals and a motion for preliminary injunctive relief pending appeal. However, if the stay is not lifted, Plaintiffs will proceed on the less efficient course of protecting their rights, indeed their lives, through an injunctive relief motion.

For the reasons stated above, Plaintiffs respectfully request the Court to reconsider and modify its November 21 Order and lift the stay in the case.

DATED this 5th day of December, 2018.

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