Case Nos. 18-80176

IN THE 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 Writ of Mandamus to the United States District Court for the District of Oregon (No. 6:15-cv-01517-AA)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO LIFT STAY IN CASE NO. 18-73014, OR, ALTERNATIVELY, EXPEDITE REVIEW OF PETITIONS FOR WRIT OF MANDAMUS (18-73014) AND PERMISSION FOR INTERLOCUTORY APPEAL (18-80176)

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3(a), I hereby certify that, to avoid irreparable harm to Plaintiffs-Appellees and Real Parties in Interest Kelsey Cascadia Rose Juliana, et al. ("Plaintiffs"), relief is needed in less than 21 days' time.

1. Regarding Circuit Rule 27-3(a)(1), counsel for Plaintiffs notified the Clerk of this Court on December 19, 2018 of their intent to file this emergency motion. Plaintiffs also notified counsel for Petitioners-Defendants ("Defendants") on December 19, 2018.

2. Regarding Circuit Rule 27-3(a)(3)(i), counsel are as follows:

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3. Regarding Circuit Rule 27-3(a)(3)(ii), the facts showing the existence and nature of the claimed emergency are set forth in detail below in Section IV (pp. 9-25). In brief, Plaintiffs respectfully request emergency relief because, with every passing day, through Defendants' ongoing systemic actions in creating, perpetuating, and promoting a national fossil fuel energy system, Defendants continue to destabilize the climate system, profoundly endangering Plaintiffs such that, absent preliminary injunctive relief, any time lost in proceeding to trial and implementing a remedy resulting from a continued stay of proceedings constitutes irreparable harm to Plaintiffs. Because Plaintiffs need either to swiftly proceed to

trial to seek a remedy or move for preliminary injunctive relief, they first seek to lift the stay, which is the most efficient course of action to the relief they urgently need.

4. Regarding Circuit Rule 27-3(a)(3)(iii), Defendants' counsel were notified of this emergency motion via email on December 19, 2018 and oppose the motion.

5. Regarding Circuit Rule 27-3(a)(4), Plaintiffs have sought related relief from the district court by motion filed December 5, 2018. That motion, for which Plaintiffs requested expedited consideration and oral argument, is currently pending. On December 17, Defendants filed their response. ECF 449.

s/ *Julia A. Olson*
Julia A. Olson

Counsel for Plaintiffs-Appellees and Real Parties in Interest

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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I. INTRODUCTION

Safety, security, and America's promise of liberty for our children are slipping away and will soon be out of reach. According to the world's scientific community, we have only 12 years to transform our nation's energy system away from fossil fuels to avoid irreversible catastrophic harm to these youth Plaintiffs and generations who follow.[1] We do not have 12 years, or even another month, to wait to begin this transition. The work needed to accomplish that energy transition must begin in 2019, first by eliminating coal from our energy system and avoiding unnecessarily locking in more reliance on fossil fuels for energy. The overwhelming evidence shows a delay of even one or two years will lock in impending catastrophes and diminish the possibility of remedying the already present dangers. There is no dispute as to these facts. Defendants' own climate assessments,[2] published since this Court's November

[1] *See* IPCC, Global Warming of 1.5ºC: Summary for Policymakers 6–7 (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf

[2] On November 23, 2018, Defendants released the Fourth National Climate Assessment, a comprehensive report on climate change and its impacts in the United States, endorsed by each of the agency Defendants. USGRCP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, U.S. Glob. Change Research Program, available at: https://www.globalchange.gov/nca4 (hereinafter "NCA4"). The same day, Defendants released the Second State of the Carbon Cycle Report, highlighting major elements of the North American and global carbon cycles and key interactions with climate forcing and feedbacks. 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 (hereinafter "SOCCR2"). Plaintiffs request this Court take judicial notice of these publicly available federal reports and the other reports cited herein, which are not

8 Order staying trial, demonstrate that the lives, liberties, and property of American children, including Plaintiffs, are harmed ***now*** by Defendants' systemic conduct in causing climate change, that the harms are growing increasingly irreversible, and that the timing of implementing substantial greenhouse gas ("GHG") emissions reductions is a critical factor in preventing future harm and averting uncontrollable planetary heating.

In light of these assessments and the lack of any cognizable harm to Defendants in proceeding to trial, Plaintiffs plea with *all possible urgency* that this Court lift the stay imposed by its November 8 Order, Ct. App. IV Doc. 3, and allow this case to proceed to trial and a prompt remedy, should Plaintiffs prevail.[3] Plaintiffs also request this Court recommend the district court reconsider its stay of all proceedings imposed by its November 21 Order, ECF 444, because that stay was predicated on this Court's November 8 Order.

With no supporting evidence, Defendants consistently mischaracterize climate change as a slow-moving, long-term, global problem lacking urgency that

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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); ECF 368.

[3] Plaintiffs reference the District Court docket, *Juliana v. United States*, No. 6:15-cv-0157-AA (D. Or.), as "ECF"; the docket for Defendants' Fourth Petition, *In re United States*, No. 18-73014 (9th Cir.), as "Ct. App. IV Doc."; and the docket for Defendants' Fifth Petition, *Juliana v. United States*, 18-80176 (9th Cir.), as "Ct. App. V Doc."

can be addressed, if at all, over time, and that, somehow, it is the fault of these children for waiting so long to sue their government. That narrative runs contrary to the entirety of the record. It is absolutely true that a climate solution will require ongoing efforts through mid-century to transform our energy system, and through the end of the century to continue sequestering excess accumulated carbon. However, that the solution requires sustained effort does not lessen the urgency of the climate emergency *today*, the severe psychological and physical consequences of any further stay of proceedings, or the importance of timely and efficient judicial review.

As the vast majority of trial preparations have been completed, judicial economy is served by lifting the stay, thereby bypassing preliminary injunctive relief, updates to expert reports, and another full round of depositions of experts to reflect new scientific evidence that will indisputably arise during continuation of the stay. Given that Defendants have consistently failed to demonstrate any cognizable harm, and neither the district court, this Court, nor the Supreme Court has found any harm to Defendants in proceeding to trial, the stay should be immediately lifted. If this Court will not lift the stay, Plaintiffs request expedited consideration of Defendants' two currently pending petitions in this Court.

II. STANDARD OF REVIEW

A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotes, citations omitted). When considering whether to stay proceedings, the 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. ConsumerAffairs.com, 2016 WL 7238919 at *2 (D. Or. 2016) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). The burden of showing a stay is warranted "lay[s] heavily" on Defendants. *Landis v. N. Amer. Co.*, 299 U.S. 248, 256 (1936). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Id.* at 255; *Dependable Highway Express, Inc., v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (same). A stay is particularly inappropriate where the party is seeking injunctive relief against ongoing and future harm, as opposed to damages for past harm. *Lockyer v. Mirant Corp*., 398 F.3d 1098, 1112 (9th Cir. 2005) ("[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*."). A stay should not issue where it would

not "promote economy of time and effort for [the court], for counsel, and for litigants." *Landis*, 299 U.S. at 254-55. In staying proceedings, neither this Court in its November 8 Order, nor the district court in its November 21 Order, indicated that it performed the requisite analysis.

"'When circumstances have changed such that the court's reasons for imposing [a] stay no longer exist or are inappropriate, the court may lift the stay.'" *Hawai'i v. Trump*, 233 F.Supp.3d 850, 854 (D. Haw. 2017) (quoting *Crawford v. Japan Airlines*, No. 03-00451 LEKKSC, 2013 WL 2420715, at *6 (D. Haw. May 31, 2013)); accord *CMAX, Inc.*, 300 F.2d at 270. "Logically, the same court that imposes a stay of litigation has the inherent power and discretion to lift the stay." *Canady v. Erbe Elektromedizin GmbH*, 271 F.Supp.2d 64, 74 (D.D.C. 2002).

III. PROCEDURAL HISTORY

The background of this case is comprehensively set forth in Plaintiffs' opposition to Defendants' Fourth and Fifth Petitions pending in this Court. *See* Ct. App. IV Doc. 5 at 1-14; Ct. App. V Doc. 2 at 3-11. To reiterate the continuing injustice and harm to Plaintiffs that will result should the stays remain in place, necessitating a motion for injunctive relief, Plaintiffs highlight Defendants' repeated efforts to delay trial.

Over three years have passed since the Complaint was filed. Plaintiffs initially informed the district court that any delay in getting to trial would necessitate a

motion for preliminary injunction in light of the ongoing, irreparable harms being suffered by Plaintiffs. *See* Declaration of Julia A. Olson in Support of Emergency Motion ("Olson Decl."), ¶ 8. In response, the district court urged Plaintiffs to wait for an early trial. *Id*. Instead of a prompt hearing on appropriate equitable relief, Defendants have continued their ongoing unconstitutional conduct in causing climate change and obstructed the path to justice in this case. *Id.* ¶¶ 16, 17, Exhs. 5, 6. This miscarriage of justice continues despite Plaintiffs prevailing on each of Defendants' motions and petitions for dismissal, judgment, and mandamus at all three levels of the federal judiciary, and in spite of the fact that the parties are ready to commence trial. *Id*. ¶ 9.

On November 5, Defendants filed their fourth Petition in this Court, requesting a stay of proceedings and again claiming non-specific and unsupported separation of powers harms from general participation in litigation. Ct. App. IV Doc. 1-2. On the same day, Defendants moved the district court to reconsider its denials of previous requests to certify prior orders for interlocutory appeal under 28 U.S.C. § 1292(b) and to stay litigation. ECF 418, 419. *In requesting the stays, Defendants put forth no cognizable evidence they will suffer damage in proceeding to trial.*

On November 8, this Court issued a partial temporary stay, preventing the setting of a new trial date. Ct. App. IV Doc. 3. The November 8 Order allowed both discovery and pre-trial matters to proceed "pending this court's consideration of

th[e] petition for writ of mandamus." *Id*. In granting the partial temporary stay, this Court did not perform any analysis as to the harms Defendants would suffer absent a stay and granted the stay before Plaintiffs had an opportunity to oppose the stay.[4]

On November 21, in response to this Court's November 8 Order, the district court *sua sponte* certified four prior orders for interlocutory appeal and stayed the entire case pending a decision by this Court. ECF 444 at 6. In its November 21 Order, the district 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. Neither this Court's nor the district court's stay Order identified *any* harm Defendants would suffer in proceeding to trial, nor did either stay Order 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, Ct. App. IV. Doc. 12, Defendants will suffer no cognizable hardship in finalizing the remaining discovery, which does not require disclosure of any confidential or privileged information nor require Defendants to take any policy positions. Olson Decl., ¶¶ 2-4, 6, Exh. 1. There remain only: (a) depositions of two rebuttal and one

[4] Pursuant to Rule 27(a)(3)(A), Plaintiffs had until November 15 to oppose Defendants' motion for stay filed on November 5, Ct. App. IV Doc. 1-2. This Court ruled on November 8 before Plaintiffs had an opportunity to file their opposition brief.

sur-rebuttal experts and five Plaintiffs; and (b) completion of briefing and hearing on the pending pretrial motions.[5] *Id.*; *see* Ct. App. IV. Doc. 12. No high-level officials of the federal government will be witnesses at trial. Olson Decl. ¶ 4, Exh. 2.

On November 30, Defendants petitioned for permission to appeal pursuant to 28 U.S.C. § 1292(b). Ct. App. V. Doc. 1-1. Plaintiffs filed their opposition on December 10. Ct. App. IV. Doc. 2-1. On December 5, Plaintiffs moved for reconsideration of the district court's November 21 Order, seeking expedited consideration and permission to complete discovery and pretrial proceedings. ECF 446. On December 17, Defendants filed their opposition, arguing the stay "maintains the status quo while the Ninth Circuit considers Defendants' § 1292(b) Petition." ECF 449 at 8. The "status quo" in Defendants' view is "the status of discovery," rather than Plaintiffs' security and the state of the climate system. *Id*. The district court has not ruled on the motion or the request for expedited consideration.

Defendants' Petitions for Writ of Mandamus, Case No. 18-73014, and Permission to Appeal, Case No. 18-80176, are fully briefed and await decision by

[5] Defendants may claim there are seven possible additional depositions, but never propounded any discovery regarding Plaintiffs' fact witnesses (apart from the youth Plaintiffs themselves) and served no deposition notices for those fact witnesses. Olson Decl. ¶ 5.

this Court. While this Court issued its stay in response to the Petition for Writ of Mandamus, both Petitions are implicated in this Motion.

IV. ARGUMENT

A. The Stay Should Be Lifted Because the Factors Required to Issue a Stay Are Not in Defendants' Favor

Given the damage to Plaintiffs resulting from the stay and the absence of any harm to Defendants, the stay should be immediately lifted. Defendants have offered no evidence of cognizable harm justifying a stay, and neither this Court nor the district court made any findings that Defendants stablished *any* of the factors necessary for a stay, including:

> [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.

ConsumerAffairs.com, 2016 WL 7238919 at *4 (citing *CMAX, Inc.*, 300 F.2d at 268);[6] *Landis*, 299 U.S. at 254–55.

[6] As explained in *ConsumerAffairs.com*, the four-part *Nken* test for stays of enforcement of judgments pending appeal does not apply to stays pending an interlocutory appeal lacking the potential to resolve all claims in an action. 2016 WL 7238919 at *4. As Plaintiffs explained, neither the Fourth Petition nor the Fifth Petition could resolve all claims in this case. *See* Ct. App IV Doc. 5 at 24; Ct. App. V Doc. 2-1 at 17, 19. Even if the *Nken* factors did apply, Plaintiffs' filings establish that Defendants are not likely to succeed on the merits of their pending Petitions. Further, the public interest is served by allowing Plaintiffs to vindicate constitutional violations. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)).

1. Plaintiffs Are Irreparably Harmed by the Stays

The overwhelming evidence shows that Plaintiffs are and will continue to suffer substantial harm from *any* further delay in resolving their claims. Dr. Hansen, a renowned former long-time NASA climatologist, opines: "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." ECF 274-1 at 3. Defendants have proffered ***zero evidence*** to contest Plaintiffs' evidence of the damage they are suffering from this delay and the dire urgency of their claims. Atmospheric CO_2 concentrations are already well into the danger zone and Defendants' unlawful conduct enhances that danger every day. *See, e.g.*, ECF 262-1, 274-1, 275-1 (expert declarations of Drs. James Hansen, Harold Wanless, and Eric Rignot). There is no evidence to the contrary in the record. None.

Defendants' NCA4 and SOCCR2, each released fifteen days after this Court's stay, unmistakably affirm that the "substantial damages" Plaintiffs are already suffering will continue to worsen if trial does not commence immediately and a remedy is not implemented promptly, because the magnitude of Plaintiffs' harm is correlated to the amount of GHG emissions released into the atmosphere:

> 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: Overview*, 34 (emphasis added). Other NCA4 findings highlight the harms Plaintiffs are suffering and the urgent need for Defendants to reduce GHG emissions:

- "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 [and] the timing of those reductions*** . . . ." *Id.* at Ch. 29, 1348.
- "Research supports that ***early and substantial mitigation offers a greater chance of avoiding increasingly adverse impacts***." *Id.* (emphases added).
- "[D]elayed and potentially much steeper emissions reductions jeopardize achieving any long-term goal . . . [with] the potential for abrupt consequences." *Id.* at Ch. 29, 1351.
- "Evidence exists that ***early mitigation can reduce climate impacts in the nearer term*** . . . and, in the longer term, ***prevent critical thresholds from being crossed***." *Id.* (emphases added).
- Climatic changes "are affecting the health and well-being of the American people, ***causing injuries, illnesses, and death***." *Id.* at Ch. 14, 541.

In the NCA4, Defendants acknowledge that climate change is already causing the types of injuries that Diné Plaintiff Jaime B. is experiencing on the Navajo Reservation. *Id.* at Ch. 15 (*Tribes and Indigenous Peoples*); ECF 282 (Declaration of Jaime B.).

- "***Observed*** and projected ***changes*** of increased wildfire, diminished snowpack, pervasive drought, flooding, ocean acidification, and sea level rise threaten the viability of Indigenous peoples' traditional subsistence and commercial activities that include agriculture,

> hunting and gathering, fisheries, forestry, energy, recreation, and tourism enterprises." NCA4 at Ch. 15, 574 (emphases added).

Specific to Jaime's personal security and ability to protect her family's culture and autonomy, Defendants admit:

- "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." *Id.* at Ch. 25, 1132.
- "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." *Id.* at Ch. 15, 574.
- "Indigenous agriculture is already being adversely affected by changing patterns of flooding, drought, dust storms, and rising temperatures." *Id.* at Ch. 15, 579.
- 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." *Id.* at Ch. 15, 582.

These impacts are the very impacts that Jaime B. is *already* experiencing. ECF 282 at ¶¶ 4, 12-15 (Jaime B. had to move from her traditional home on the Reservation

because of extended drought, harming her significantly, and her ability to participate in sacred Navajo ceremonies was adversely impacted due to drought and scarcity of once plentiful medicinal plants, causing her to lose her dignity and way of life.).

For Plaintiffs Alex, Isaac, Tia, and Nathan, who have asthma, their physical health and safety are damaged by climate change-induced wildfires and ongoing GHG pollution that affects local air quality.

- "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." NCA4 at Ch. 13, 514.
- "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." *Id.* at Ch. 13, 519.
- "[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." *Id.* at Ch. 13, 514.
- "[C]hildren . . . are especially susceptible to ozone and PM-related effects." *Id.* at Ch. 13, 517.
- "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." *Id.* (emphasis added).

Defendants' NCA4 warns that children and youth, like Plaintiffs, "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. *Id.* at Ch. 24, 1050. "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." *Id.* Plaintiff Aji has been harmed by the mental health effects of climate change and Defendants' conduct in causing it, which have contributed to depression, insomnia, panic, and persistent stress. *See* Declaration of Aji P. in Support of Emergency Motion ("Aji Decl."). The ongoing stays of this case exacerbate the emotional harm Aji experiences which is akin to being in a pressure cooker where every hour of the day matters; his government exacerbates his harm with more promotion of fossil fuels, while his judiciary stays his case without reasoning why the government's harm in proceeding to trial is worse than his own harm, both in not having his case tried and in failing to provide opportunities for early and substantial mitigation of emissions thereby avoiding increasingly adverse impacts. *Id.* ¶¶ 4-13.

Defendants' NCA4 confirms the August 2016 floods that damaged Plaintiff Jayden's health and home were climate-induced, will become more frequent, and will continue to pose imminent threats to her physical and mental health. NCA4 at Ch. 3 (*Water*), Ch. 14 (*Human Health*), Ch. 19 (*Southeast*). Defendants' NCA4 evidences the urgent need for near-term steep emissions reductions to prevent the worsening and locking in of many of Plaintiffs' particularized individual injuries. It makes abundantly clear that ***any delay*** in Defendants reducing emissions makes a

remedy less likely. Defendants have not and cannot dispute this evidence emanating from the agencies themselves.

Defendants' SOCCR2 also demonstrates the emergency facing Plaintiffs, presenting key findings regarding increasingly rapid changes in the carbon cycle, which are converting carbon sinks into carbon sources, further exacerbating the harm:

- "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 . . . which exist throughout the Arctic and store almost twice the amount of carbon currently contained in the atmosphere. Warming temperatures can release this stored carbon into the atmosphere." *Id.* at 2-3.[7]
- "[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." SOCCR2 at 28.
- Ocean acidification is a "major concern" and the amount of CO_2 absorbed by the oceans has been increasing steadily, creating a significant stressor for marine ecosystems. *Id.* at 670–74.

These threats are mounting every day. Plaintiff Aji's emotional pressure cooker is a reflection of the tangible one. Undisputed science shows the damage from emissions

[7] In December, NOAA released the 2018 Arctic Report Card, confirming the urgent threat of harm. NOAA, Arctic Report Card: Update for 2018, https://arctic.noaa.gov/Report-Card/Report-Card-2018/ArtMID/7878/ArticleID/772/Executive-Summary. Judicial notice is requested.

tomorrow, next month, and next year cannot be undone for hundreds of years. As such, the status quo of mounting U.S. GHG emissions is harming Plaintiffs now.

As this Court held, when "the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government," a stay that prevents a meaningful remedy should not issue. *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (denying stay of preliminary injunction where government would suffer financial harm and inconvenience, but plaintiff class would suffer emotional and potentially physical harm, and retroactive relief would not later undo the harm). "Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *Id.; see Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008).

Finally, a November 2018 U.S. Geological Survey ("USGS") report confirms the substantial greenhouse gas emissions associated with the extraction and use of fossil fuels from Federal lands, for which Defendants are responsible.[8] The USGS Report estimates that emissions from fossil fuels produced on Federal lands alone

[8] Merrill, M.D., Sleeter, B.M., Freeman, P.A., Liu, J., Warwick, P.D., and Reed, B.C., 2018, *Federal lands greenhouse gas emissions and sequestration in the United States—Estimates for 2005–14: U.S. Geological Survey Scientific Investigations Report 2018–5131*, 31, https://pubs.er.usgs.gov/publication/sir20185131 ("USGS Report"). Judicial notice is requested.

represent, on average, 23.7% of national emissions for carbon dioxide ("CO_2") over the 10 years studied,[9] and coal extracted from Federal lands accounts for over 40% of coal emissions.[10] Nationwide emissions from fossil fuels produced on Federal lands in 2014 were 1,279.0 million metric tons of carbon dioxide equivalent (MMT CO_2 Eq.) for CO_2.[11] Fossil fuels extraction on Federal lands is only one component of Defendants' unconstitutional fossil fuel energy system, which touches in some consequential way every ton of CO_2 emitted from our Nation's territory. ECF 384 at 24-35 (Pre-Trial Memorandum describing Defendants' control over the fossil fuel energy system).

Notwithstanding Defendants' acknowledgement in these reports of the substantial role and dangers of fossil fuels and the urgent need for GHG emission reductions to avoid locking in irreversible harms, Defendants have doubled-down in their unconstitutional systemic conduct, continuing their exacerbation of the climate crisis and making the "status quo" harmful to Plaintiffs. As Defendants recently stated: "The United States has an abundance of natural resources and is not going to keep them in the ground."[12] Moreover, since November 2016, when Plaintiffs first

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[9] *Id.* at 6.
[10] ECF 98 at ¶ 166 (Defendants' Answer admitting 40% of coal produced in the United States comes from Federal lands).
[11] USGS Report at 6.
[12] Brad Plumer and Lisa Friedman, *Trump Team Pushes Fossil Fuels at Climate Talks. Protests Erupt, but Allies Emerge, Too.* (Dec. 10, 2015), https://www.nytimes.com/2018/12/10/climate/katowice-climate-talks-

informed the district court of the need for preliminary injunctive relief or an immediate trial date, ECF 100, Defendants have:

- Offered 78 million acres offshore Texas, Louisiana, Mississippi, Alabama, and Florida for oil and gas exploration and development (ECF 341-135);
- Offered 2.85 million acres of land for oil and gas lease sale within the National Petroleum Reserve in Alaska;[13]
- Removed National Monument status from federal lands to allow oil and gas extraction (ECF 381-17);
- Leased 56 million tons of coal for extraction from land in Utah (ECF 341-110);
- Issued a Presidential Permit for Keystone XL Pipeline authorizing TransCanada to construct, operate, and maintain pipeline facilities for the importation of crude oil;[14]
- Expedited approval and construction of the Dakota Access Pipeline (ECF 341-116);
- Proposed grid pricing rules that encourage coal-fired electricity generation (ECF 381-361);
- Ended the moratorium on coal leasing on federal land (ECF 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 (ECF 381-315);
- Rolled back emission standards for passenger cars and light trucks, which Defendants admit will increase fossil fuel consumption (ECF 341-390);

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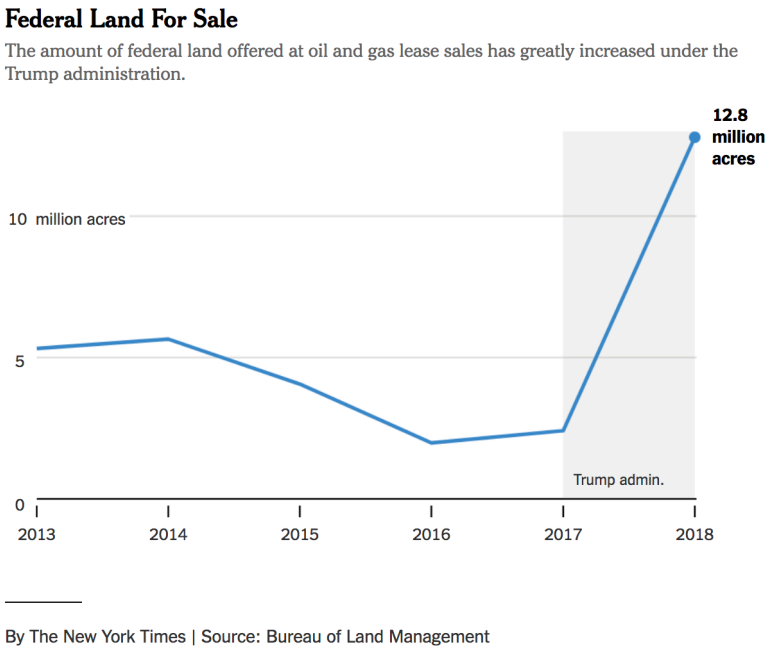
cop24.html?emc=edit_th_181211&nl=todaysheadlines&nlid=567900381211. Judicial notice is requested.

[13] *BLM Offers 2.85 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. Judicial notice is requested.

[14] *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. Judicial notice is requested.

- Rescinded regulations intended to reduce methane leaks from oil and gas operations (ECF 341-95); and
- Systematically expressed support for and promoted the fossil fuel industry (ECF 299-163, 341-6, 341-108).



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These are long-lasting investments by Defendants in fossil fuel-based infrastructure, modes of transit, and energy supply that "lock-in" the use of fossil fuels, making it harder to transition to carbon-free energy sources and thus harder to redress Plaintiffs' injuries.[16] By pursuing high-carbon energy sources through 2020, the cost to reduce CO_2 emissions after 2020 will increase fourfold.[17] A report recently issued

[15] https://www.nytimes.com/2018/10/27/climate/trump-fracking-drilling-oil-gas.html

[16] *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.

[17] *Id.*

by the EPA confirms that unabated GHG emissions will result in profound economic losses to the U.S. economy, costing trillions of dollars.[18]

Defendants claim the stays are necessary to "maintain[] the status quo" of *discovery* in this case, while Defendants proceed to destroy Plaintiffs' lives and liberties with their dangerous energy system, which is further destabilizing the status quo of an *already destabilized climate system*. ECF 449 at 8. Defendants' concerted efforts to double-down on fossil fuel extraction, transportation, and combustion, have increased U.S. CO_2 emissions in 2018. In the decade preceding 2016 (from 2007 to 2016), U.S. energy-related CO_2 emissions were decreasing by about 1.5% annually,[19] but still at dangerous levels and the second highest in the world. In 2017, U.S. energy-related CO_2 emissions declined again.[20] However for 2018, the Energy Information Administration ("EIA") expects U.S. CO_2 emissions will ***increase by 2.5%.***[21]

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[18] EPA. 2017. Multi-Model Framework for Quantitative Sectoral impacts Analysis: A Technical Report for the Fourth National Climate Assessment. U.S. Environmental Protection Agency. EPA 430-R-17-001, https://cfpub.epa.gov/si/si_public_record_Report.cfm?Lab=OAP&dirEntryId=335095. Judicial notice is requested.

[19] EIA, *November 2018, Monthly Energy Review* 201 (Nov. 20, 2018), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf. Judicial notice is requested.

[20] EIA, Short-Term Energy Outlook 2 (Nov. 6, 2018), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf. Judicial notice is requested.

[21] *Id.*

It could not be clearer that absent timely trial on Plaintiffs' claims and implementation of a remedy now – *not after a more than two-year delay for interlocutory appeal* – Defendants will continue to engage in their unconstitutional systemic acts, locking in more accumulated CO_2 and making Plaintiffs' injuries potentially irreversible. *See* Olson Decl. ¶ 18, 19, Exh. 8 (depicting projected timeline to trial and appellate review if the stay is lifted (Path A) and if the stay is not lifted and the case is reviewed on interlocutory appeal (Path B)).

2. Defendants Would Not Be Harmed by Proceeding to Trial

The harm Defendants assert absent a stay—participating in limited pretrial proceedings and trial—does not constitute inequity or undue hardship. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."); *Lockyer*, 398 F.3d at 1112 (defending a suit "does not constitute a 'clear case of hardship or inequity'").[22] As set forth in the parties' Joint Status Conference Statement, there remain only: (a) the depositions of three rebuttal and sur-rebuttal experts (all in California) and five plaintiffs (to be deposed in Eugene, OR); and (b) completion of the briefing on five pending motions. Olson Decl. ¶ 2, Exh. 1 at 3, 6-

[22] *See also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943); *The Appellate Lawyer Representatives' Guide To Practice in the United States Court of Appeals for The Ninth Circuit*, 28 (June 2017 ed.) ("[T]he expense, delay, and annoyance of enduring the litigation through final judgment will not qualify as such a loss. . . .").

8. There is no cognizable harm to Defendants in completing these limited pre-trial proceedings.

To the extent Defendants claim they will suffer some kind of hypothetical erosion of the separation of powers, trial itself will have no such effect. Olson Decl. ¶ 7. No order on liability or remedy has issued. Defendants can "pursue and vindicate [their] interests in the full course of this litigation" and appeal after final judgment. *East Bay Sanctuary Covenant v. Trump*, ___ F.3d ___, 2018 WL 6428204 at *21 (9th Cir. Dec. 7, 2018) (citation and quotations omitted); *Id.* ("[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.") (citation and quotations omitted).[23]

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. ECF 419. This is simply

[23] *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. 3) (arguing 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.").

untrue. As this Court has held, "[t]he government must be concerned not just with the public fisc but also with the public weal. In assessing this broader interest, we are not bound by the government's litigation posture. Rather, we make an independent judgment as to the public interest." *Lopez*, 713 F.2d at 1437. The government's own climate assessments affirm that the public interest is not served by any further delay on efforts to redress the climate emergency. *See Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997) ("public interest would be undermined" were public entity's "unconstitutional actions" allowed to stand); *see Lopez*, 713 F.2d at 1441 (J. Pregerson, concurring).

Defendants have not, and cannot, show that they would be unable to assert all of their arguments in the normal course of appellate review. None of the three levels of our federal judiciary has so found, and this Court has expressly found to the contrary. *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018); *In re United States*, 895 F.3d 1101, 1106 (9th Cir. 2018). Defendants also cannot show that the typical expenses associated with complex civil litigation constitute irreparable harm. This Court 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).

B. The Most Efficient Means to Move Forward is to Proceed to Trial

In light of the numerous stops and starts in this case and the ongoing harm to Plaintiffs, the most efficient way forward is for this Court to issue an order that clears this case for trial. Where urgent and lasting injunctive relief is needed, as it is here, a trial, rather than a preliminary injunction proceeding, is the most efficient course. ECF 100. This is particularly so when the parties are ready for trial and this Court issued its stay on the eve of trial. Olson Decl. ¶¶ 2, 20. If a stay continues pending full interlocutory appeal, it is likely to take at least six to nine months for briefing, oral argument, and a decision by this Court, and a similar amount of time on appeal to the Supreme Court before Plaintiffs could try their case, with parallel appellate proceedings on Plaintiffs' motion for injunctive relief pending appeal. Olson Decl. ¶ 18. At that point, the expert discovery would have to be entirely reconducted because of the scientific evidence on the catastrophic state of climate change in 2020. *Id.* ¶ 15. A stay of trial will compound emotional and physical 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 neither of the pending petitions do Defendants articulate any actual argument (beyond conclusory statements) as to why Plaintiffs' claims of infringement of well-established fundamental rights or of discrimination may not proceed even if this Court accepts interlocutory appeal or issues mandamus on

Plaintiffs' other claims. Consequently, these claims will survive and must be tried even if the other claims are dismissed on early review. This necessitates moving the proceedings forward expeditiously to adjudicate these matters even if the early appellate process remains underway.

V. IN THE ALTERNATIVE, PLAINTIFFS REQUEST THAT THIS COURT GRANT EXPEDITED CONSIDERATION OF DEFENDANTS' TWO PENDING PETITIONS.

Pursuant to Ninth Circuit Rule 27-12, this Court can expedite proceedings "upon a showing of good cause," which includes situations where, "in the absence of expedited treatment, irreparable harm may occur . . . ." 9th Cir. Rule 27-12; *see Alliance for the Wild Rockies v. Salazar*, 2011 WL 3794399 (9th Cir. 2011) (granting motion to expedite); *United States v. Harris*, 846 F.2d 50 (9th Cir. 1988) (same). As explained in Section IV.A.1, the evidence demonstrates that Plaintiffs are, and will continue to be, irreparably harmed by any delay in the ultimate resolution of their case and the implementation of a remedy, should they succeed on the merits after trial. Accordingly, expedited consideration of Defendants' two pending Petitions is warranted to ensure the greatest likelihood of preventing irreparable harm to Plaintiffs.

VI. CONCLUSION

While Plaintiffs' pre-trial proceedings and trial have been stayed, Defendants have not ceased causing and contributing to climate change. The status quo of

discovery is not what needs protecting. These children need this Court's protection. The evidence shows, and Defendants' newest reports confirm, time is of the essence to protect Plaintiffs' constitutional rights from further infringement. Defendants admit "[w]ithout 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 Ch. 1, 51(emphasis added); *Id.* at Ch. 9, 367 ("losses of unique coral reef and sea ice ecosystems, can only be avoided by reducing carbon dioxide emissions"). Harms that "cannot be avoided" justify the lifting of the stay in this case.

This Court has jurisdiction and power to clear this case for trial. Defendants failed to satisfy *any* of the requirements warranting a stay and failed to proffer *any* legitimate harm that would necessitate a stay. This Court did not afford Plaintiffs an opportunity to oppose the stay nor conduct any analysis of the stay factors. Continuation of a stay will result in irrevocable harm to Plaintiffs and increased future litigation burdens, including the necessity of 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 months, if not years, to get to trial while their injuries worsen and the window to redress the injuries closes. In the event this Court declines to clear this case for trial, Plaintiffs' respectfully request that this Court grant expedited review of Defendants'

two currently pending Petitions, giving Plaintiffs the opportunity to return to a course towards trial as quickly as possible. However, if this case is not cleared for trial, Plaintiffs will proceed on the less efficient and burdensome course of protecting their rights, indeed their lives, through an injunctive relief motion.

For the above-stated reasons, Plaintiffs respectfully request the Court to lift the stay in this case.

DATED this 20th day of December, 2018, at Eugene, OR.

Respectfully submitted,

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STATEMENT OF RELATED CASES

These cases were previously before this Court and each is a related case within the meaning of Circuit Rule 28-2.6: Defendants' four prior petitions for writs of Mandamus and a Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b): *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); *In re United States*, No. 18-73014 (9th Cir. Nov. 5, 2018) (pending); and *Juliana v. United States*, No. 18-80176 (9th Cir. Nov. 30, 2018) (pending).

CERTIFICATE OF COMPLIANCE

I certify that this Emergency Motion contains 6,569 words, excluding the portions exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f), which is over the limit of 5,600 words established by Circuit Rules 27-1(1)(d) and 32-3(2). Plaintiffs file a Motion for an Overlength Brief herewith. The Motion's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

s/ Julia A. Olson
Julia A. Olson