Case No. 18-73014

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *et al*.,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON,
Respondent,
and
KELSEY CASCADIA ROSE JULIANA, *et al*.,
Real Parties in Interest

On Petition For Writ of Mandamus In Case No. 6:15-cv-01517-AA (D. Or.)

ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR A WRIT OF MANDAMUS AND EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Real Parties in Interest 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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INTRODUCTION

Defendants' fourth Petition for Writ of Mandamus to this Court ("Fourth Petition" or "Pet.") again seeks to challenge every aspect of Plaintiffs' case, from justiciability to the merits, and asks for reversal of all orders of the district court which have largely denied motions to dismiss, for summary judgment, and for judgment on the pleadings. Those orders can be reviewed in the ordinary course of appeal after final judgment, as Congress directed, with no irreparable harm to Defendants. Defendants concede they "might be able to raise some of the arguments asserted here" after trial. Pet. at 28. That should be the end of the inquiry. There are no objectionable discovery or injunctive relief orders at issue. As this Court previously denied three prior petitions brought in the identical case by the identical Defendants on identical grounds, *In re United States*, 884 F.3d 830 (9th Cir. 2018), *In re United States*, 895 F.3d 1101 (9th Cir. 2018), *In re United States*, No. 18-72776, Dkt. 5 (9th Cir. November 2, 2018), the issue is whether this Court should grant this Fourth Petition absent any new change in the law, without any evidence of irreparable harm to Defendants, and with Plaintiffs' unrebutted evidence of their substantial injuries caused in large part by these Defendants. It should not.

STATEMENT OF THE CASE

Twenty-one Youth Plaintiffs, a youth organization known as Earth Guardians, and Dr. James Hansen on behalf of future generations filed the First Amended

Complaint ("FAC") on September 10, 2015. D. Ct. Doc. 7.[1] Plaintiffs allege Defendants' systemic, affirmative ongoing conduct, persisting over decades, in creating, controlling, and perpetuating a national fossil fuel-based energy system, despite long-standing knowledge of the resulting destruction to our Nation and profound harm to these young Plaintiffs, violates Plaintiffs' constitutional due process rights. Specifically, Plaintiffs allege Defendants' conduct violates their substantive due process rights to life, liberty, and property, including recognized unenumerated rights to personal security and family autonomy, and has placed Plaintiffs in a position of danger with deliberate indifference to their safety under a state-created danger theory. *Id*. ¶¶ 277-89, 302-06. Further, Plaintiffs allege Defendants' conduct violates their rights as children to equal protection by discriminating against them with respect to their fundamental rights and as members of a quasi-suspect class. *Id*. ¶¶ 290-301. Finally, apart from claims of deprivation of rights already recognized by the Supreme Court, Plaintiffs allege Defendants are

[1] Plaintiffs refer to the District Court docket, *Juliana v. United States*, No. 6:15-cv-0157-AA (D. Or.), as "D. Ct. Doc."; the docket for Defendants' First Petition, *In re United States*, No. 17-71692 (9th Cir.), as "Ct. App. I Doc."; the docket for Defendants' Second Petition, *In re United States*, No. 18-71928 (9th Cir.), as "Ct. App. II Doc."; the docket for Defendants' Third Petition, *In re United States*, No. 18-72776 (9th Cir.), as "Ct. App. III Doc."; the docket for Defendants' First Application to the Supreme Court for stay, *United States v. U.S. Dist. Court for Dist. of Oregon*, No. 18A65, as "S. Ct. I Doc."; the docket for Defendants' Petition for writ of mandamus to the Supreme Court, *In re United States*, No. 18-505, as "S. Ct. II Doc."; the docket for Defendants' Second Application to the Supreme Court for stay, *In re United States*, No. 18A410, as "S. Ct. II App. Doc."

infringing two fundamental rights the Supreme Court has not addressed under *Washington v. Glucksberg*, 521 U.S. 702 (1997): their rights as beneficiaries to public trust resources under federal control and to a climate system capable of sustaining human life. *Id*. ¶¶ 277-89, 302-10. Plaintiffs seek a declaration of their rights and the violation thereof, and an order directing Defendants to cease their violations, prepare an accounting of the Nation's greenhouse gas emissions, and prepare and implement an enforceable national remedial plan to cease and rectify the constitutional violations by phasing out fossil fuel emissions and drawing down excess atmospheric CO_2, as well as such other and further relief as may be just and proper. *Id*. at Prayer for Relief.

On November 17, 2015, Defendants moved to dismiss Plaintiffs' claims, arguing lack of standing, failure to state constitutional claims, and nonexistence of a federal public trust doctrine. D. Ct. Doc. 27-1. On November 10, 2016, Judge Ann Aiken denied Defendants' motion. D Ct. Doc. 83.

On January 13, 2017, Defendants filed their Answer, admitting many of Plaintiffs' scientific and factual allegations, including that:

- "for over fifty years some officials and persons employed by the federal government have been aware of a growing body of scientific research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO_2 could cause measurable long-lasting changes to the global climate, resulting in an array of severe deleterious effects to human beings, which will worsen over time";

- Defendants "permit[], authorize[], and subsidize[] fossil fuel extraction, development, consumption, and exportation";

- "fossil fuel extraction, development, and consumption produce CO_2 emissions and . . . past emissions of CO_2 from such activities have increased the atmospheric concentration of CO_2";

- "the consequences of climate change are already occurring and . . . will become more severe with more fossil fuel emissions";

- "'business as usual' CO_2 emissions will imperil future generations with dangerous and unacceptable economic, social, and environmental risks . . . . [T[he use of fossil fuels is a major source of these emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path";

- United States' emissions comprise "more than 25 percent of cumulative global CO_2 emissions"; and

- "climate change is damaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species . . . . current and projected atmospheric concentrations of GHGs . . . threaten the public health and welfare of current and future generations, and this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change."

D. Ct. Doc. 98 ¶¶ 1, 7, 10, 150, 151, 213; *see also* D. Ct. Doc. 146 at 2-4 (district court setting forth "non-exclusive sampling" of significant admissions in Answer).

On June 9, 2017, Defendants filed their first petition for writ of mandamus with this Court. Ct. App. I Doc. 1 ("First Petition"). As they do here, Defendants claimed separation of powers harms from general participation in discovery and trial and sought dismissal based on standing, the merits of two of Plaintiffs' constitutional

claims, and the failure to identify a cause of action, such as a claim under the Administrative Procedure Act ("APA"). *Id.*

On August 25, 2017, Judges Aiken and Coffin submitted a letter to this Court, explaining:

> [A]ny error that [it] may have committed (or may commit in the future) can be corrected through the normal route of direct appeal following final judgment. Indeed, we believe that permitting this case to proceed to trial will produce better results on appeal by distilling the legal and factual questions that can only emerge from a fully developed record.

Ct. App. I Doc. 12.

On August 28, 2017, Plaintiffs answered the First Petition. Ct. App. I Doc. 14-1. On September 5, 2017, over 90 *amici* filed eight *amicus* briefs in support of Plaintiffs, including over 60 legal scholars and law professors, many of whom are teaching about this case in their classes due to its constitutional import. Ct. App. I Doc. 17, 19-24, 30 (available at 2017 WL 4157181-86, 4157188). Declaration of Julia A. Olson In Support of Answer to Petition for Writ of Mandamus ("Olson Decl.") ¶ 2.

On March 7, this Court denied the First Petition, holding Defendants failed to satisfy *any* of the factors in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977). *In re United States*, 884 F.3d 830. The panel determined: "there is no controlling authority on any of the theories asserted by plaintiffs . . . weigh[ing] strongly against a finding of clear error"; any potential merits errors were correctable through the

ordinary course of litigation; and the denial of the motion to dismiss did not present the possibility that the issues raised would evade appellate review. *Id.* at 836, 837. The panel emphasized that mandamus is not to be "used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Id.* at 834 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). Finally, the panel was "not persuaded" by Defendants' argument, repeated here, that "holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten separation of powers," concluding that "simply allowing the usual legal process to go forward will [not] have that effect in a way that is not correctable on appellate review." *Id*. at 836. The panel noted: "There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of the issues by the trial courts." *Id*. at 837.

On April 12, the district court set this matter for trial to commence October 29, 2018. The parties agreed jointly to request 50 trial days, with the Defendants confirming the parties' agreement of five weeks per side at the April 12 Status Conference. D. Ct. Doc. 191 at 8:3-5 (Apr. 12, 2018 Tr.). Olson Decl. ¶ 11.

Following denial of the First Petition, Defendants filed a series of motions in the district court, each presenting duplicative legal arguments previously rejected by the district court on the motion to dismiss, and considered by this Court in denying

mandamus, with a single exception regarding dismissal of the President. Defendants purported to argue for the first time that the APA presents the exclusive means for bringing constitutional challenges to agency conduct.[2]

First, on May 9, Defendants moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). D. Ct. Doc. 195. Defendants acknowledged that such a motion is governed by the same standard as a Rule 12(b)(6) motion, yet "reassert[ed] their earlier arguments" along with other previously rejected defenses repackaged with slightly different arguments. *Id.* at 1, 6.

Second, also on May 9, Defendants sought a protective order and stay of all discovery pending resolution of their Rule 12(c) motion. D. Ct. Doc. 196.

Third, on May 22, Defendants filed a motion for partial summary judgment, again arguing lack of standing, the two newly recognized fundamental rights fail on the merits, Plaintiffs' claims must be pled under the APA, and separation of powers concerns bar Plaintiffs' claims and requested relief. D. Ct. Doc. 207. Defendants did not move for summary judgment on Plaintiffs' other constitutional claims.

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[2] Defendants made materially identical arguments addressing the APA and Plaintiffs' alleged failure to identify a cause of action in previous motions in the district court and in their First Petition. *See* D. Ct. Doc. 211-1 at ¶ 3 (Defendants' application for extension of time to petition for certiorari of denial of First Petition, conceding "[t]he government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal, contending that the district court's order contravened fundamental limitations on judicial review imposed by . . . the Administrative Procedure Act."); *see also* D. Ct. Doc. 208 at 7-14 (setting forth excerpts from previous briefing).

Importantly, Defendants did not support their motion for partial summary judgment with *any* evidence, contending there were no genuine disputes of material fact despite their denials of material facts in their Answer. *Id.*; *see also* D. Ct. Doc. 98. As to all issues other than standing, S. Ct. II Doc. 1 at 8, Defendants asserted entitlement to judgment purely as a matter of law, rendering their arguments both substantively and procedurally duplicative of those rejected in the motion to dismiss and the First Petition. In response, Plaintiffs submitted over 36,000 pages of evidence supporting standing and their claims, consisting of publicly available government documents; Plaintiff declarations; and expert declarations from Nobel laureate economists and scientists, award-winning historians, a former head of the Council on Environmental Quality, and the top climate scientists in the world, including the former head of NASA's Goddard Institute for Space Studies. D. Ct. Doc. 255; D. Ct. Doc. 369; Olson Decl. at ¶ 7.

On May 24, Defendants applied to the Supreme Court for an extension to file a petition for certiorari review of the denial of their First Petition. D. Ct. Doc. 211-1. The application was first granted on May 29, Ct. App. I Doc. 70, and a further extension granted up to and including August 4, 2018. Ct. App. I Doc. 71.

On June 29, Judge Aiken denied Defendants' motion for protective order and stay of all discovery. D. Ct. Doc. 300. On July 5, Defendants' filed their second petition for writ of mandamus in this Court. Ct. App. II Doc. 1-2 ("Second Petition").

As here, Defendants *again* sought review of the denial of the motion to dismiss, reproducing the same arguments, and *again* claimed unsubstantiated separation of powers harms stemming from general participation in discovery and trial. *Id.* at 20-45. On July 16, this Court denied Defendants' request to stay discovery and trial pending the district court's consideration of the Rule 12(c) and summary judgment motions. Ct. App. II Doc. 9.

On July 17, the Solicitor General filed Defendants' first application with the Supreme Court. S. Ct. I Doc. 1 ("First Application"). Defendants again duplicated their arguments here, requesting the Supreme Court stay proceedings in the district court pending this Court's consideration of the Second Petition and any further proceedings in the Supreme Court. *Id.*

On July 20, this Court denied the Second Petition, concluding Defendants *again* failed to satisfy any of the requirements justifying mandamus. *In re United* States, 895 F.3d 1101. This Court ruled "no new circumstances justify this second petition," and it "remains the case that the issues the government raises . . . are better addressed through the ordinary course of litigation." *Id.* at 1106. Addressing Defendants' contention that "proceeding with discovery and trial will violate the separation of powers," this Court reiterated that "allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." *Id.*

The same day, the Solicitor General informed the Supreme Court by letter of the denial of the Second Petition and reiterated their request that the Supreme Court construe the First Application as a petition for writ of certiorari to review denial of the First Petition or as a petition for writ of mandamus. Olson Decl. at ¶ 19, Exh. 1. The Solicitor General additionally requested that the Supreme Court "now also construe the application as a petition for writ of certiorari to review" this Court's denial of the Second Petition. *Id.*

On July 30, the Supreme Court denied the First Application, concluding Defendants' "request for relief is premature . . . ." *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018). The time has lapsed for Defendants to properly petition the Supreme Court for review of denial of the First Petition. Ct. App. I Doc. 71.

On October 5, Defendants filed their third petition for mandamus with this Court, requesting a stay of proceedings pending consideration of a petition to the Supreme Court, presenting the same arguments raised here and in previous motions and petitions with the district court and this Court. Ct. App. III. Doc. 1-2 ("Third Petition").

On October 15, the district court granted in part the Rule 12(c) and summary judgment motions, thereby narrowing Plaintiffs' case. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 4997032 (D. Or. October 15, 2018). The district court

determined "[d]ue respect for separation of powers . . . requires dismissal of President Trump as a defendant." *Id.* at *9, *11. The district court also granted summary judgment on Plaintiffs' claim under the Ninth Amendment, *id*. at *30-*31, and rejected Plaintiffs' claim that children are a suspect class under the Equal Protection Clause. *Id.* at *31-*32. The district court otherwise denied Defendants' motions. Regarding separation of powers, the district court noted Defendants "offer[ed] no new evidence or controlling authority on this issue . . . [n]or do they offer a rationale as to why the outcome should be different under the summary judgment standard." *Id.* at *25. Nonetheless, ever attentive to this issue, the district court acknowledged:

> the allocation of power among the branches of government is a critical consideration in this case and [the court] reiterate[s] that, [s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The Court recognizes that there are limits to the power of the judicial branch, as demonstrated by the Court's determination that President Trump is not a proper defendant in this case.

Id. at *15. (quotations and citation omitted).

The district court noted it is entirely speculative at this stage, in a bifurcated trial, as to whether any remedy would transgress separation of powers when a full factual record is needed, when no decision has been made on liability, and when the court will take care not to tread on the policy judgments of the other branches. *Id.* at

*24, *26, *26 n. 16, *30.[3] Addressing Plaintiffs' due process claim regarding a previously unrecognized unenumerated liberty interest, the district court found Plaintiffs had submitted significant evidence on the matter and concluded:

> At this stage, [Defendants] have offered no legal or factual rationale significantly different from those offered in their previous motion to dismiss . . . . Moreover, further factual development of the record will help this Court and other reviewing courts better reach a final conclusion as to plaintiffs' claims under this theory.

Id. at *27. With respect to all issues raised at summary judgment, the district court concluded genuine issues of material fact existed as to each and that "[t]o allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to this case, which is certainly a complex case of 'public importance.'" *Id.* at *30 (explaining that this Court and the Supreme Court have reserved summary judgment to obtain a more robust record on particularly difficult and far-reaching issues and collecting cases). The district court declined to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at *32-*33.

On October 18, Defendants filed another Petition with the Supreme Court, repeating identical arguments presented in the district court, in three petitions for mandamus to this Court, and in their First Application to the Supreme Court. S. Ct.

[3] Contrary to Defendants' misrepresentation that neither Plaintiffs nor the district court cited any legal authority by which Defendants could reduce greenhouse gas emissions, the district court noted: "Plaintiffs point to various statutory authorities by which they claim federal defendants could affect the relief they request." *Id.* at *24 (citations omitted).

II. Doc. 1. Defendants also applied to stay district court proceedings pending review of that Petition by the Supreme Court. S. Ct. II. App. Doc. 1 ("Second Application"). On October 19, Chief Justice Roberts ordered a stay of discovery and trial pending Plaintiffs' response to the Second Application. *In re United States*, No. 18A410, 2018 WL 5115388. On October 22, Plaintiffs filed their response, S. Ct. II. App. Doc. 3, and on November 2, the Supreme Court denied the Second Application and lifted the temporary stay. *In re United States*, 18A410, 2018 WL 5778259. The Supreme Court ruled Defendants' Petition "does not have a 'fair prospect' of success because adequate relief may be available" in this Court. *Id.* at *2.

On November 5, Defendants filed the Fourth Petition in this Court, again claiming separation of powers harms from general participation in discovery and trial and seeking dismissal and review of each of the district court's orders on its dispositive motions. Ct. App. IV. Doc. 1. Also on November 5, Defendants moved the district court to reconsider its denials of Defendants' requests to certify for interlocutory appeal under 28 U.S.C. § 1292(b) and stay the litigation. D. Ct. Doc. 418-419.

On November 8, this Court issued a partial stay pending consideration of the Fourth Petition, staying trial but not discovery and other pre-trial proceedings. Ct. App. IV. Doc. 3.

As more fully demonstrated in the parties' Joint Report on the Status of Discovery and Relevant Pretrial Matters, 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. Olson Decl. at ¶ 5. Both sides will present expert and fact witnesses, but no high-level officials have been deposed or will be called as witnesses. *Id.* at ¶ 4. In fact, as evidenced by their witness list, Defendants' fact witnesses will only authenticate documents and offer testimony in relation to those documents. *Id.*; D. Ct. Doc. 373. This case is ready to proceed to trial. Olson Decl. at 17.

ARGUMENT

Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). A party seeking mandamus must establish it has "no other adequate means to attain the relief" sought, "a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-81 (citation omitted). A party also "carries the high burden of establishing that" its "'right to issuance of the writ is clear and indisputable.'" *In re County of Orange*, 784 F.3d 520, 526 (9th Cir. 2015). Even if the party makes those required showings, a reviewing court retains

discretion to deny mandamus if it is not "satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381.

Consistent with *Cheney*, this Court established five factors to determine when mandamus is appropriate in *Bauman v. U.S. Dist. Ct.*:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman*, 557 F.2d at 654–55).[4]

"It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court." *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 35 (1980). This Fourth Petition, like Defendants first three petitions to this Court, seeks to upset the judgment of Congress and the independence of the three levels of the federal judiciary in exercising jurisdiction and rendering decisions in an orderly manner. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (emphasizing "deference that appellate courts owe to the trial judge as the individual

[4] Despite having petitioned this Court for a writ of mandamus three previous times in this case, Defendants do not even mention the *Baumann* factors.

initially called upon to decide the many questions of law and fact that occur in the course of a trial" and that "[p]ermitting piecemeal appeals would undermine the independence of the district judge" and efficient judicial administration).

I. DEFENDANTS WILL NOT BE DAMAGED IN ANY WAY NOT CORRECTABLE ON APPEAL AND HAVE ADEQUATE OTHER MEANS TO OBTAIN RELIEF

Defendants fail to demonstrate they meet either of the first two, closely related *Baumann* factors - whether there are "other means, such as a direct appeal," to obtain relief and whether Defendants will be "damaged or prejudiced in any way not correctable." *Perry*, 591 F.3d at 1156. This Court has twice determined that Defendants' arguments regarding participation in discovery and trial fail to establish irreparable harm not correctable on appeal. *In re United States,* 884 F.3d at 836; *In re United States*, 895 F.3d at 1105-06. Defendants offer no new evidence on these matters and point to nothing specific about discovery or trial that is objectionable. General complaints about time and money spent on discovery and trial have never been sufficient to justify mandamus. *Bankers Life & Cas. Co.*, 346 U.S. at 383; *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943) (the inconvenience of a trial of "several months' duration" that is "correspondingly costly" is not a basis for mandamus); *see Allied Chemical*, 449 U.S. at 34-36 (mandamus denied where trial court granted new trial after finding error in first 4-week trial).

To ensure that mandamus remains an extraordinary remedy, and not a substitute for ordinary appeal, Defendants must show they lack adequate alternative means to obtain relief. *Roche*, 319 U.S. at 31. If a party can seek review of an order on direct appeal after entry of final judgment, "it cannot be said that the litigant 'has no other adequate means to seek the relief he desires.'" *Allied Chemical*, 449 U.S. at 36 (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978)*; see Cheney*, 542 U.S. at 379.[5] Here, *none* of the issues determined in the district court's orders will evade review after final judgment. Defendants concede they "may be able to raise some of the arguments asserted here," failing to identify a single cognizable issue they would be precluded from raising on appeal after final judgment. Pet. 39; *Catlin v. United States*, 324 U.S. 229, 236 (1945) ("denial of a motion to dismiss, even

[5] As the Supreme Court reaffirmed:

> 'From the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.' *McLish v. Roff*, 141 U.S. 661, 665–666 (1891). This final-judgment rule, now codified in [28 U.S.C.] §1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.

Microsoft Corp. v. Baker, 137 S.Ct. 1702, 1712 (2017) (citation omitted). The harassment and delay Defendants continue to wage on Plaintiffs exemplifies the reason for the final-judgment rule. Defendants have repeatedly presented identical legal arguments in successive, duplicative motions and petitions for early appeal in contravention of the final judgment rule in all three tiers of the federal judiciary, and has moved for a stay in this case a total of twelve times between the three tiers of the judiciary. *See* Olson Decl. at ¶¶ 9-10 and accompanying charts.

when the motion is based upon jurisdictional grounds, is not immediately reviewable"); *Johnson v. Jones*, 515 U.S. 304, 315-18 (1995) (denial of summary judgment due to an issue of material fact is ordinarily not a final judgment and not a basis for an interlocutory appeal); *cf. In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 20-21, 25 (1st Cir. 1982) (finding no adequate relief to the irreparable harm of forcing Supreme Court Justices to assume roles of partisan advocates, which undermined their role as judges and the institutional neutrality of the judiciary). As the Supreme Court held in *Roche*, 319 U.S. at 27, "any error which [the district court] may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment and by this Court by writ of certiorari."

Seeking to use the writ process as a substitute for the ordinary appeals process, the Fourth Petition fails on the basis of the first *Cheney* element alone (first and second *Baumann* factors). *Cheney*, 542 U.S. at 380-381 (citing *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). Each issue Defendants raise can be appealed after final judgment and full reversal could be obtained if the district court erred. Defendants do not argue otherwise. As the Supreme Court observed in *Johnson v. Jones*:

> [28 U.S.C. § 1291] recognizes that rules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job-supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence.

515 U.S. at 309 (citations omitted).

Defendants argue, without citing any supporting evidence or applicable authority, that participating in trial will "require agencies to take official positions on factual assessments and questions of policy concerning the climate through the civil litigation process." Pet. 29. Nothing in the record supports this statement. Plaintiffs have not requested Defendants to "take official positions" at trial. Rather, the evidence at trial will be nothing more than Defendants' pre-existing policy positions in numerous publicly available government documents. Olson Decl. ¶ 5. Plaintiffs have not deposed any high-level government officials and will not be calling any federal employees to "take official positions." Defendants will suffer no cognizable harm whatsoever in proceeding to trial.

Nor is there support for Defendants' argument that mere participation in trial could constitute rulemaking under the APA. Defendants misconstrue *Wong Yang Sung v. McGrath*, in which, the Supreme Court held agency adjudications must conform to the APA provisions governing the same. 339 U.S. 33 (1950). The Supreme Court explained the APA was enacted to prevent certain "evils" related to the expansive functions and authority of the growing multitude of federal agencies, including their serious impacts on private rights. 339 U.S. 33, 37-45 (1950). *Wong Yang Sung* makes clear that the APA does not limit constitutional rights or review of constitutional claims; it acts instead as a limit on the historic evils of expansive federal agency authority to act as both legislator and judge. *Id*. at 49-50. Thus, the

very purposes of the APA would be undermined if it were construed to insulate agencies from trial and review of constitutional claims. Indeed "to so construe the . . . Act might . . . bring it into constitutional jeopardy." *Id*. at 50. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1207 (2015), holds only that courts may not impose additional procedural requirements for agency rulemaking, which Plaintiffs do not seek.

Defendants' novel claim that participating in trial, alone, violates separation of powers would upend our system of checks and balances and finds no support in law. *See Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 443, 444 (1930) (acknowledging "claims of constitutional right" are different); *cf. Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) (no constitutional claim) and *United States v. Carlo Bianchi & Co*., 373 U.S. 709, 710 (1963) (no constitutional claim). Further, Defendants offer no evidence to support their assertion that trial will somehow result in the district court "interfering with a coequal branch's ability to discharge its constitutional responsibilities." Pet. at 12 (citing *Cheney*, 542 U.S. at 382). On this factor alone, the Fourth Petition should be denied.

In contrast, Plaintiffs will suffer substantial harm from any further delay in resolving their claims. Defendants admit, among 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.

D. Ct. Doc. 98 at ¶ 213; *see also* Statement of the Case, *supra* (setting forth significant admissions). The best available climate science further illustrates that even a modest delay in resolution of Plaintiffs' claims will substantially worsen Plaintiffs' injuries. Atmospheric CO_2 concentrations are already well above the level necessary to maintain a safe and stable climate system, dangerous consequences of climate change are already occurring, every ton of fossil fuels 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 irreversible climate system tipping points. *See* Decl. of Dr. James E Hansen, D. Ct. Doc. 7-1; Decl. of Dr. Harold Wanless, Ct. App. I Doc. 14-3. Because of Defendants' ongoing conduct, eleven-year-old Plaintiff Levi has been forced from his home in Satellite Beach, FL on several occasions and could lose his home entirely to sea level rise that has already occurred and associated storm surge and flooding. *Id.* at ¶¶ 81, 84; Decl. of Levi D., D. Ct. Doc. 41-7; Decl. of Dr. James E. Hansen, D. Ct. Doc. 7-1 at ¶ 42. In deposition, a government witness admitted that we are "in an emergency situation with respect to protecting our oceans." D. Ct. Doc.394 at ¶ 547. There is no evidence in the record contradicting these irreparable harms.

Furthermore, as will be shown by the evidence, Defendants continue to violate Plaintiffs' rights at an ever-increasing rate. These continuing violations establish irreparable harm per the constitutional nature of Plaintiffs' claims. "An alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Likewise, the irreparable character of environmental injury is well established: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

II. DEFENDANTS' RIGHT TO ISSUANCE TO THE WRIT IS NEITHER CLEAR NOR INDISPUTABLE

A party seeking mandamus "carries the high burden of establishing that" its "'right to issuance of the writ is clear and indisputable.'" *In re County of Orange*, 784 F.3d at 526; *Cheney*, 542 U.S. at 381. "The key factor to be examined" in resolving a petition for a writ of mandamus is whether Defendants have "firmly convinced" this Court that the district court committed clear error as a matter of law. *Christensen v. U.S. Dist. Court*, 844 F.2d 694, 697 (9th Cir. 1988). This requires legal error that is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009); *see also DeGeorge v. U.S. Dist.*

Court, 219 F.3d 930, 936 (9th Cir. 2000); *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016).

Defendants' arguments advanced in this Fourth Petition are duplicative and raised under the same standard as their previous petitions to this Court challenging the denial of their motion to dismiss. Pet. at 1. With respect to all of Defendants' arguments, this Court already determined that "there is no controlling authority on any of the theories asserted by plaintiffs . . . weigh[ing] strongly against a finding of clear error." *In re United States*, 884 F.3d at 837; *In re United States*, 895 F.3d at 1106. The Supreme Court's and this Court's findings should be the end of the inquiry on mandamus. Those determinations are equally applicable to the district court's order on Defendants' motions under Rule 12(c) and for summary judgment, which presented identical arguments to those presented in their First and Second petitions.[6]

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[6] The law of the case doctrine expresses the practice of courts generally, with few exceptions inapplicable here, to refrain "from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). As then-Circuit Judge Neil Gorsuch cautioned:

> Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. . . . Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again.

Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1240–41 (10th Cir. 2016).

A clear and indisputable right to relief before final judgment exists in extremely rare circumstances, and is not available to challenge the general propriety of an entire constitutional case, as Defendants *again* challenge here. *In re United States,* 895 F.3d at 1105. To Plaintiffs' knowledge, neither this Court nor the Supreme Court has ever found a clear and indisputable right to relief prior to final judgment regarding Article III standing, interpretation of the liberty prong of the Due Process Clause, or whether there is an independent right of action under the Fifth Amendment. Defendants cite no cases to the contrary.

The Supreme Court has already resolved this question by finding that both the "striking" breadth of Plaintiffs' claims and their justiciability presents "substantial grounds for difference of opinion." *United States v. U.S. Dist. Court*, 2018 WL 3615551; *In re United States*, 2018 WL 5778259 at *1. That there are "substantial grounds for difference of opinion" on these issues indicates Defendants' right to issuance of the writ is clearly not "indisputable." *United States v. U.S. Dist. Court*, 2018 WL 3615551; *In re United States*, 2018 WL 5778259 at *1. Mere doubt as to the district court's subject matter jurisdiction is not enough to invoke this Court's writ power. *Ex parte Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 275-76 (1921). Regarding Plaintiffs' Fifth Amendment claims, Defendants have not argued that Plaintiffs cannot proceed with their claims of infringement of well-established fundamental rights or of discrimination. Thus, any piecemeal review of the district

court's interlocutory orders regarding newly recognized rights, even if found to be clear and indisputably erroneous, would not result in the dismissal Defendants seek. Nor would piecemeal conclusions on those issues narrow this case further than the district court has already substantially narrowed it by dismissing the President, Plaintiffs' Ninth amendment claim, and Plaintiffs' claim of discrimination as members of a suspect class. Finally, the district court and this Court relied upon clear precedent in holding that Plaintiffs' Fifth Amendment claims need not be brought via the APA. Defendants' APA arguments are the novel ones, lacking supporting precedent, and can be raised in the normal appeal process. *Juliana*, 2018 WL 4997032 at *11-*14.

A. Justiciability

The district court correctly concluded that standing raised a factual inquiry that must be addressed at trial:

> Regarding standing, [Defendants] have offered similar legal arguments to those in their motion to dismiss. Plaintiffs, in contrast, have gone beyond the pleadings to submit sufficient evidence to show genuine issues of material facts on whether they satisfy the standing elements. The Court has considered all of the arguments and voluminous summary judgment record, and the Court finds that plaintiffs show that genuine issues of material fact exist as to each element.

Id. at *25.

Whether there are adequate injuries, causal nexus, and redressability is not a determination this Court can make without reference to the evidence before the

district court, nor one it should make before final judgment. In denying summary judgment, the district court concluded Plaintiffs' declarations, extensive expert declarations, and government documents provided enough evidence of "genuine issues of material fact," precluding summary judgment. *Id.* at *20-*25. Without considering the 36,000 pages of evidence Plaintiffs filed in opposition to summary judgment, this Court cannot reasonably find clear and indisputable error in the conclusion that Plaintiffs established a genuine issue of material fact regarding standing that can only be resolved at trial. *See Massachusetts v. EPA*, 549 U.S. 521-526 (majority), 541-545 (Roberts, C.J., dissenting) (showing as to injuries from climate change, Article III standing is a deeply factual analysis; reviewing scientific evidence now 11 years old). Defendants cite no authority that such an intense factual inquiry would be an appropriate undertaking on mandamus. Indeed, in each of the climate cases Defendants cite for purposes of standing, appellate review occurred *after* a final judgment. *Id.*; *Washington Envtl Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013). This Court previously decided that "appellate review is aided by a developed record and full consideration of issues by the trial courts." *In re United States,* 884 F.3d at 837; *accord Plata v. Schwarzenegger*, 560 F.3d 976, 983 (9th Cir. 2009) (mandamus "would be premature" where this Court was presented "with an insufficient record to determine" the issues).

Notwithstanding Defendants' argument regarding "the courts at Westminster," Pet. at 18, it is a central jurisprudential precept that "the ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015). The canon of our Nation's most celebrated cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (systemic racial injustice in school systems); *Hills v. Gautreaux*, 425 U.S. 284 (1976) (systemically segregated public housing system created by state and federal agencies); *Brown v. Plata*, 563 U.S. 493 (systemic conditions across state prison system).

B. Constitutional Claims

Defendants' arguments challenging Plaintiffs' claims regarding newly recognized liberty interests, without challenging Plaintiffs' claims of infringements of well-established constitutional rights, are identical to those presented in their three previous petitions. This Court has already twice decided the absence of controlling authority on this issue weighs strongly in favor of a finding of no clear error. *In re United States*, 884 F.3d at 837; *In re United States*, 895 F.3d at 1106.

C. The APA Is Not the Sole Means of Review for Constitutional Challenges to Agency Conduct

Defendants' arguments regarding the APA are likewise materially identical to those presented and rejected in their First Petition and *exactly identical* to those presented and rejected in their Second and Third Petitions. Additionally, the district court correctly demonstrated these arguments are directly contrary to settled precedent of this Court[7] and the Supreme Court. *Juliana*, 2018 WL 4997032 at *11-*14

Because Defendants fail to establish that the district court committed "clear error as a matter of law," denial of the Fourth Petition is appropriate without reference to the other *Bauman* factors. *Bundy*, 840 F.3d at 1041 ("Because our conclusion that the district court did not commit 'clear error as a matter of law' precludes issuance of the writ, we address only that *Bauman* factor."). Nonetheless, Defendants fail to satisfy *any* of the requirements for mandamus.

[7] *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 18-15068, 2018 WL 5833232 at *37 n.8 (9th Cir. Nov. 8, 2018) (noting even if judicial review of government actions was foreclosed under the APA that "bar does not affect a plaintiff's ability to bring freestanding constitutional claims") (citations omitted).

III. MANDAMUS IS WHOLLY INAPPROPRIATE IN THESE CIRCUMSTANCES[8]

The totality of the circumstances render mandamus inappropriate. Defendants make no showing that they will suffer any irreparable harm not correctable on appeal. *See* Section I, *supra*. Defendants rely on *Cheney* and four inapposite, out-of-circuit court opinions in support of their argument that mandamus relief is appropriate. Pet. 31-32. Each of these cases demonstrates that mandamus is generally limited to narrow issues, such as discovery orders, and is not applicable to broad challenges to an entire case.

In *Cheney,* the district court compelled production, from the Vice President and other high-level executive officials, of documents subject to executive privilege – the same documents sought as final relief in the case. 542 U.S. at 381, 388. The Supreme Court remanded for further consideration on mandamus because disclosure implicated separation of powers by preventing the executive from maintaining confidential communications. *Id.* at 385, 391. No such confidentiality or order is at issue here.

In re Kellogg Brown & Root, Inc., which overturned a discovery order on mandamus, counsels that mandamus is not "appropriate under the circumstances"

[8] Defendants neither argue nor even reference the fourth and fifth *Bauman* factors. This Court's prior determinations that such factors are not satisfied remain applicable. Plaintiffs' prior briefing to this Court further demonstrates their inapplicability. *See* Ct. App. I Doc. 4 at 12-15.

here, where there has not been a single court order requiring disclosure of confidential communications that could never become "undisclosed" after final judgment. 756 F.3d 754, 760-61 (D.C. Cir. 2014).

Likewise, in *In re Roman Catholic Diocese of Albany, New York, Inc.,* the Second Circuit issued mandamus to prevent harm to employees and victims from "the disclosure of highly sensitive personal information" in documents the district court ordered a defendant (over which it clearly lacked personal jurisdiction) to produce. 745 F.3d 30, 33, 35-36 (2d Cir. 2014).

In *Abelesz v. OTP Bank*, the Seventh Circuit granted mandamus where there was a "complete absence of any arguable basis for exercising general personal jurisdiction" over foreign banks, who faced "intense pressure" to settle when faced with potential liability amounting to $75 billion in protracted litigation over events occurring 65 years prior *on another continent*. 692 F.3d 638, 645, 651-53 (7th Cir. 2012)..

In *In re Justices of Supreme Court of Puerto Rico*, the First Circuit took special care to articulate the specific irreparable harm justifying mandamus. 695 F.2d at 20, 25 (finding relief after final judgment inadequate for Justices forced to "assume the role of advocates or partisans on [the constitutionality of a statute, which] would undermine their role as judges."). The harm to the Court's institutional neutrality, combined with the fact the Justices were nominal unessential parties,

supported mandamus. *Id.* at 17, 20-21, 25. Here, executive branch agencies and officials are commonly and properly defendants in civil suits brought under the Constitution. With the President dismissed, there is now no disagreement among the parties that the remaining defendants are proper defendants in a constitutional case. *See Cheney*, 542 U.S. at 381 ("Were the Vice President not a party in the case [the mandamus argument] . . . might present different considerations.").

Defendants have not made a case for irreparable harm necessitating mandamus that is important and "distinct from the resolution of the merits of this case," *In re Roman Catholic Diocese*, 745 F.3d at 36, such as the improper disclosure of confidential information that cannot be undone, a discovery order's intrusion into executive privileged communications, compromising the nonpartisan nature of the judiciary, or a district court improperly asserting personal jurisdiction over a foreign company and compromising foreign relations. Defendants' three complaints of alleged harm fall flat. *First*, the feared future order on injunctive relief, should Plaintiffs prevail, can be immediately appealed upon final judgment and prior to implementation. *Second*, the expense and time of trial is conclusively not a basis for mandamus. *Third*, the vague notion that Plaintiffs will somehow force Defendants to take new official positions during trial is entirely unsupported by the record, particularly when Plaintiffs do not intend to call any government witnesses to the stand, other than the fact witnesses identified by Defendants themselves, for

purposes of document authentication. Olson Decl. ¶ 4. If Defendants are going to cry wolf *again*, they should at least be required to have a shred of evidence to support their call for such a "drastic and extraordinary remedy" that would derail these young citizens from securing their freedom and safety under the Constitution. Defendants' evasion of the final judgment rule would become limitless and enfeeble judicial administration if it could obtain mandamus on such paltry arguments. *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) ("Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration."); *In re United States*, 830 F.3d at 837 ("If appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed.").

Here, the justiciability of Plaintiffs' claims is at least open to dispute and "differences of opinion" and requires further factual development in the district court. *See In re Kensington Int'l Ltd.,* 353 F.3d 211, 223 (3d Cir. 2003) (remanding where the court was "[r]eluctant to act in a complex situation such as this one, where so many vital interests are at stake, without a developed evidentiary record"). There is no colorable claim of irreparable harm prior to, and ample opportunity for adequate relief after, final judgment as to each of Plaintiffs' claims, some of which are not even included in the Fourth Petition. The district court and this Court have

taken care to consider Defendants' defenses on multiple occasions and have nonetheless allowed the case to proceed to trial. Given all of these considerations, mandamus would be highly inappropriate in this case, which is of immense importance to these children's individual lives and the future of our country.

IV. DEFENDANTS ARE NOT ENTITLED TO MANDAMUS FORCING THE DISTRICT COURT TO CERTIFY ITS ORDERS FOR INTERLOCUTORY APPEAL

The final judgment rule set forth in 28 U.S.C. § 1291 is intended to preserve judicial resources by preventing piecemeal appeals without adequate development of the record. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). As a narrow exception, a district judge, in her discretion, *may* certify an order for interlocutory appeal when the order involves (1) "a controlling question of law" (2) for which "there is substantial ground for difference of opinion"; **and** (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (emphasis added). These requirements are jurisdictional; a court *cannot* certify its decision for interlocutory review unless *all three* of these prerequisites are established. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). "Certification under § 1292(b) requires the *district court* to expressly find in writing that all three § 1292(b) requirements are met." *Id*. (emphasis added). Section 1292(b) is construed narrowly, *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002), and review under Section 1292(b) is exceedingly rare. *Coopers*

& Lybrand, 437 U.S. at 471; *U.S. v. Woodbury*, 263 F.2d 784, 799 n. 11 (9th Cir. 1929); *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (Section 1292(b) "not merely intended to provide review of difficult rulings in hard cases"); *see also Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004).

Yet, even if all three prerequisites are met, "district court judges have unfettered discretion to deny certification." *Mowat Const. Co. v. Dorena Hydro, LLC,* 2015 WL 5665302, at* 5 (D. Or. September 23, 2015) (quotations and citation omitted); *see also Exec. Software N. Am., Inc. v. United States Dist. Ct. for the Cent. Dist. Of Cal.*, 24 F.3d 1545, 1550 (9th Cir. 1994) (district court's certification decision is "unreviewable" on mandamus); *United States v. Riddick*, 669 Fed. Appx. 613, n.2 (3rd Cir. 2016); *Rodriguez v. Banco Cent.*, 790 F.2d 172, n.8 (1st Cir. 1986). "Because the requirements of § 1292(b) are jurisdictional, if this appeal does not present circumstances satisfying the statutory prerequisites for granting certification, this court cannot allow the appeal." *Couch*, 611 F.3d at 633 (quotations omitted).

Here, the district court has not certified its orders for interlocutory appeal because in its unreviewable discretion it has found appellate review will be better served on a full factual record due to the mixed questions of law and fact as to justiciability and the nature of the constitutional claims. *Juliana* , 2018 WL 4997032 *32-33. That decision is unreviewable and entitled to respect. Defendants cite only

one distinguishable case where a circuit court exercised its supervisory mandamus power under the All Writs Act to direct a district court to decide a jurisdictional question and then certify it for interlocutory appeal. *Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir. 1982) ("Under these exceptional circumstances, we find it necessary . . . to supervise the judicial administration of this case and to prevent the defeat of appellate review" (citations omitted)). *Fernandez-Roque* involved 1800 Cuban detainees who were claiming unlawful detention and asylum, where a temporary restraining order was in place preventing their release to Cuba, and where there were significant foreign affairs concerns, jurisdictional questions, and a stalemate between the district court judge and the federal defendants as to a hearing on jurisdiction. *Id.* at 428-432; *see id.* at 432 (J. Joflat, concurring) ("The district court was duty bound from the inception of these consolidated cases to determine without delay whether it had subject matter jurisdiction over the plaintiffs' claims. Instead, the district court deferred this determination; granted the plaintiffs the preliminary injunctive relief they sought, albeit in the form of a temporary restraining order; and ordered the government to submit to sweeping, and in my view absolutely unwarranted, discovery.").

Even if the district court's discretionary decision denying certification were reviewable by this Court on mandamus, Defendants pretend that only one of the three section 1292(b) factors is necessary to reverse the district court's decision. Pet.

33-34. While the Supreme Court has opined that "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion," *United States v. U.S. Dist. Court*, 2018 WL 3615551; *In re U.S.*, 2018 WL 5778259, at *1, this is but one of three requirements for interlocutory review. Just as conspicuous as the Supreme Court's use of the § 1292(b) language regarding differences of opinion is the absence of any comment on the other two factors required for interlocutory review. None of the three courts reviewing this case has found the other two requirements have been met and, thus, interlocutory review is still not appropriate.

A question of law is not controlling if, as here, additional claims would remain with the trial court after appeal, particularly if, as here, those claims involve similar evidence. *See, e.g.*, *U.S. Rubber Co.*, 359 F.2d at 785 (denying certification since question of law was only relevant to one of several causes of action alleged). To state the obvious, a "controlling question of law" is a purely legal consideration, not one that necessitates factual development. *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 WL 952273, at *3 (D. Or. March 10, 2010) (collecting cases). "[A] mixed question of law and fact," by itself, is not appropriate for permissive interlocutory review. *Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993). The question of Plaintiffs' standing and whether they can prevail on the merits are mixed questions of law and fact that are wholly inappropriate for certification and the district court. The court familiar with the record in this case, is

entitled to exercise its discretion and deny certification. It would contravene Congressional intent for an appellate court to preempt a district court's exclusive initial prerogative to decide whether interlocutory appeal is appropriate in cases before it.

CONCLUSION

This Court's March 7 decision concluded:

> We are mindful that some of the plaintiffs' claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress. However, the district court needs to consider those issues further in the first instance. Claims and remedies often are vastly narrowed as litigation proceeds; we have no reason to assume this case will be any different.

In re United States, 884 F.3d at 837-38. That is exactly what has happened in this case. The district court has narrowed Plaintiffs' claims and the parties are fully prepared to go to trial. Denying Plaintiffs the ability to present evidence on their standing and their remaining constitutional claims (the same body of evidence for both), when the district court and this Court have found that a full factual record is necessary for resolution of the claims, would have broad and destabilizing effects on public faith in the judiciary and the responsibility of the district court to first decide cases that come before it. *Juliana*, 2018 WL 4997032 at *30; *In re United States*, 884 F.3d at 837.

As determined in this Court's prior decisions in this case applying the *Bauman* factors, and for the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants' Fourth Petition.

DATED this 18th day of November, 2018, at Redwood City, CA.

Respectfully submitted,

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STATEMENT OF RELATED CASES

This case was previously before this Court and is a related case within the meaning of Circuit Rule 28-2.6: Defendants' prior petitions for writs of mandamus: *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692); *In re United States*, 895 F.3d 1101 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776, Dkt. 5, (9th Cir. 2018) (Order denying petition for writ of mandamus).

Dated: November 18, 2018

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 9,381 words (based on the word processing system used to prepare the brief).

Dated: November 18, 2018

/s/ Julia A. Olson

JULIA A. OLSON

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("s/" plus typed name is acceptable for electronically-filed documents)

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

FEDERAL:

RELEVANT STATUTORY PROVISIONS

FEDERAL:

28 U.S.C. § 1291 – Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Federal Rules of Civil Procedure, Rule 26.1 – Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Circuit Rule 28-2.7 – Addendum to Briefs

Statutory**.** Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review or (2) in an addendum introduced by a table of contents and bound with the brief or separately; in the latter

case, a statement must appear referencing the addendum after the statement of issues. If this material is included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: [e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____.

Orders Challenged in Immigration Cases. All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be bound with the brief but separated from the brief by a distinctively colored page.