

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.)

**DECLARATION OF JULIA A. OLSON
IN SUPPORT OF ANSWER OF REAL PARTIES IN INTEREST TO
PETITION FOR A WRIT OF MANDAMUS AND
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY (CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS (OSB No. 041029)
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Attorneys for Real Parties in Interest

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

1. I am an attorney of record in the above-entitled action. I make this Declaration in support of the Answer of Real Parties in Interest to Petition for a Writ of Mandamus and Emergency Motion under Circuit Rule 27-3. I have personal knowledge of the facts stated herein, except as to those stated on information and belief, and if called to testify, I would and could testify competently thereto.
2. On or about October 20, 2018, I conferred with Michael Blumm, law professor at Lewis and Clark School of Law. He surveyed his colleagues at law schools and learned that *Juliana v. United States* is being taught at law schools throughout the Nation, including, but not limited to the following law schools: Yale Law School; University of Michigan Law School; Cornell Law School; Boston College Law School; University of California Hastings School of Law; University of California Berkeley School of Law; University of California Davis School of Law; Temple University Law School; Tulane University School of Law; University of Utah School of Law; Denver University Sturm College of Law; American University Washington College of Law; University of Oregon School of Law; Lewis & Clark Law School; University of San Diego School of Law; Wayne State University Law School; Florida International University College of Law; Albany Law School; West Virginia University College of Law; University of Louisville Brandeis School of Law; University

of Missouri Kansas City School of Law; Elisabeth Haub School of Law at Pace University; University of Wyoming College of Law; Vermont Law School; Widener Law School; Barry University School of Law; Nova Southeastern School of Law; and Delaware Law School.

3. Discovery has been extremely limited in this case. There were depositions of only two federal government employees, in summer 2017: Dr. Michael Kuperburg, biologist for Petitioner Department of Energy and director of the U.S. Global Change Research Program; and Dr. C. Mark Eakin, Oceanographer with the National Oceanic and Atmospheric Administration, a division of Petitioner Department of Commerce. Defendants did not object to either deposition. To date, the parties each have propounded one set of contention interrogatories and both sides have responded to those interrogatories. The parties have taken depositions of each side's experts, with three remaining expert depositions, one of which has been scheduled and the remaining two of which are in process of being scheduled, to be completed on or before December 14, 2018. Defendants have deposed most of the Plaintiffs, and the parties are meeting and conferring as to scheduling prompt depositions of the remaining testifying Plaintiffs.
4. The only current federal government employees who Plaintiffs intend to call as witnesses at trial are those witnesses Defendants have identified as fact

witnesses. *See* D. Ct. Doc. 373 at 5-6 (identifying government fact witnesses for authentication of documents). During a meet and confer with Plaintiffs' counsel on November 8, 2018, counsel for Defendants stated that Defendants will call these witnesses for the sole purpose of authenticating documents. Neither side has identified any high-level officials to testify at trial. Both sides will present expert and fact witnesses at trial, but no high-level officials have been deposed or will be called as witnesses.

5. Plaintiffs do not seek to obtain or release any confidential or privileged communications or documents of Defendants, either through discovery or at trial. To date, the only information that has been designated as confidential and subject to the protective order entered in the case has been personal and health information concerning Plaintiffs.
6. Throughout discovery, Defendants have been unwilling to stipulate to any facts outside of those facts admitted in their Answer, including facts contained in federal government documents, a strategy that necessitates the introduction of a larger number of documents than otherwise would be required.
7. In support of their response to Defendants' Motion for Summary Judgment, Plaintiffs submitted approximately 36,361 pages of evidentiary materials, largely consisting of publicly-available government documents, declarations of each Plaintiff, and expert declarations from Plaintiffs' experts, including 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 former head of NASA's Goddard Institute for Space studies.

D. Ct. Doc. 255, 257, 257-1, 258, 258-1, 259, 259-1, 260, 260-1, 261, 261-1 – 4, 262, 262-1, 263, 263-1, 264, 264-1, 265, 265-1, 266, 266-1, 267, 267-1, 268, 268-1, 269, 269-1, 270, 270-1 – 158, 271, 271-1, 272, 272-1, 273, 274, 274-1 – 25, 275, 275-1 – 4, 276, 277-97, 298, 298-1, 299, 299-1 – 227.

8. As of November 18, 2018, the date of this filing, the parties have completed the following discovery and pre-trial matters in preparation for trial:

- Plaintiffs completed and served expert reports and all of their experts were deposed by Defendants;
- Defendants completed and served rebuttal expert reports and all of their original rebuttal experts were deposed by Plaintiffs;
- Defendants completed their final two rebuttal expert reports after this Court's stay was lifted and depositions of those experts are noticed and in process of scheduling, to be completed on or before December 14, 2018;
- Plaintiffs completed and served rebuttal expert reports and all of their rebuttal experts were deposed by Defendants;

- Defendants completed and served one sur-rebuttal expert report and the deposition of that sur-rebuttal expert is now scheduled to occur November 28, 2018;
- Plaintiffs served one set of interrogatories, to which Defendants responded;
- Defendants served one set of interrogatories, to which Plaintiffs responded; and
- 5 of the 21 Youth Plaintiffs were deposed by Defendants. The parties are meeting and conferring as to scheduling prompt depositions of the remaining testifying Plaintiffs.

In total, the parties have conducted 45 depositions over the course of 35 days since August 1, 2018, and have scheduled or are in process of scheduling all remaining depositions as indicated in the chart below:

2018 DEPOSITION SCHEDULE FOR *JULIANA V. UNITED STATES*

	Date (2018)	Deponent Name
1	Aug. 2	H. Frumkin (Plaintiffs' Expert)
2	Aug. 10	O. Hoegh-Guldberg (Plaintiffs' Expert)
3	Aug. 15	S. Running (Plaintiffs' Expert)
4	Aug. 20	Alex L. (Plaintiff)
5	Aug. 20	Kelsey J. (Plaintiff)
6	Aug. 20	Aji P. (Plaintiff)

	Date (2018)	Deponent Name
7	Aug. 20	Avery M. (Plaintiff)
8	Aug. 21	Jacob L. (Plaintiff)
9	Aug. 21	Zealand B. (Plaintiff)
10	Aug. 21	Hazel V. (Plaintiff)
11	Aug. 22	Tia H. (Plaintiff)
12	Aug. 22	Isaac V. (Plaintiff)
13	Aug. 22	Miko V. (Plaintiff)
14	Aug. 23	H. Herzog (Defendants' Expert)
15	Aug. 24	F. Ackerman (Plaintiffs' Expert)
16	Aug. 28	D. Victor (Defendants' Expert)
17	Aug. 30	A. Partikian (Defendants' Expert)
18	Aug. 31	J. Sugar (Defendants' Expert)
19	Sept. 5	P. Erickson (Plaintiffs' Expert)
20	Sept. 6	D. Sumner (Defendants' Expert)
21	Sept. 10	J. Sweeney (Defendants' Expert)
22	Sept. 12	H. Wanless (Plaintiffs' Expert)
23	Sept. 13	J. Weyant (Defendants' Expert)
24	Sept. 13	Jayden F. (Plaintiff)
25	Sept. 14	S. Pacheco (Plaintiffs' Expert)
26	Sept. 18	K. Trenberth (Plaintiffs' Expert)
27	Sept. 18	Xiuhtezcatl M. (Plaintiff)
28	Sept. 19	C. Smith (Plaintiffs' Expert)
29	Sept. 19	Nick V. (Plaintiff)
30	Sept. 21	G.P. Robertson (Plaintiffs' Expert)

	Date (2018)	Deponent Name
31	Sept. 22	Victoria B. (Plaintiff)
32	Sept. 25	J. Stiglitz (Plaintiffs' Expert)
33	Sept. 27	N. Klein (Defendants' Expert)
34	Sept. 28	E. Rignot (Plaintiffs' Expert)
35	Sept. 29	Sophie K. (Plaintiff)
36	Oct. 1	J. Hansen (Plaintiffs' Expert)
37	Oct. 1	L. Van Susteren (Plaintiffs' Expert)
38	Oct. 2	J. Paulson (Plaintiffs' Expert)
39	Oct. 9	J. Williams (Plaintiffs' Expert)
40	Oct. 11	M. Jacobson (Plaintiffs' Expert)
41	Oct. 12	A. Wulf (Plaintiffs' Expert)
42	Oct. 16-17	G. Speth (Plaintiffs' Expert)
43	Oct. 19	G.P. Robertson (Plaintiffs' Expert)
44	Nov. 15	A. Jefferson (Plaintiffs' Expert)
45	Nov. 16	K. Walters (Plaintiffs' Expert)
46	Nov. 26 Noticed, Scheduling in Process	J. Sweeney (Defendants' Expert)
47	Nov. 27 Noticed, Scheduling in Process	D. Victor (Defendants' Expert)
48	Nov. 26/27 Proposed, Scheduling in Process	Sahara V. (Plaintiff)

	Date (2018)	Deponent Name
49	Nov. 26/27 Proposed, Scheduling in Process	Kiran O. (Plaintiff)
50	Nov. 26/27 Proposed, Scheduling in Process	Journey Z. (Plaintiff)
51	Nov. 26/27 Proposed, Scheduling in Process	Levi D. (Plaintiff)
52	Nov. 26/27 Proposed, Scheduling in Process	Nathan B. (Plaintiff)
53	Nov. 28	J. Sugar (Defendants' Expert)

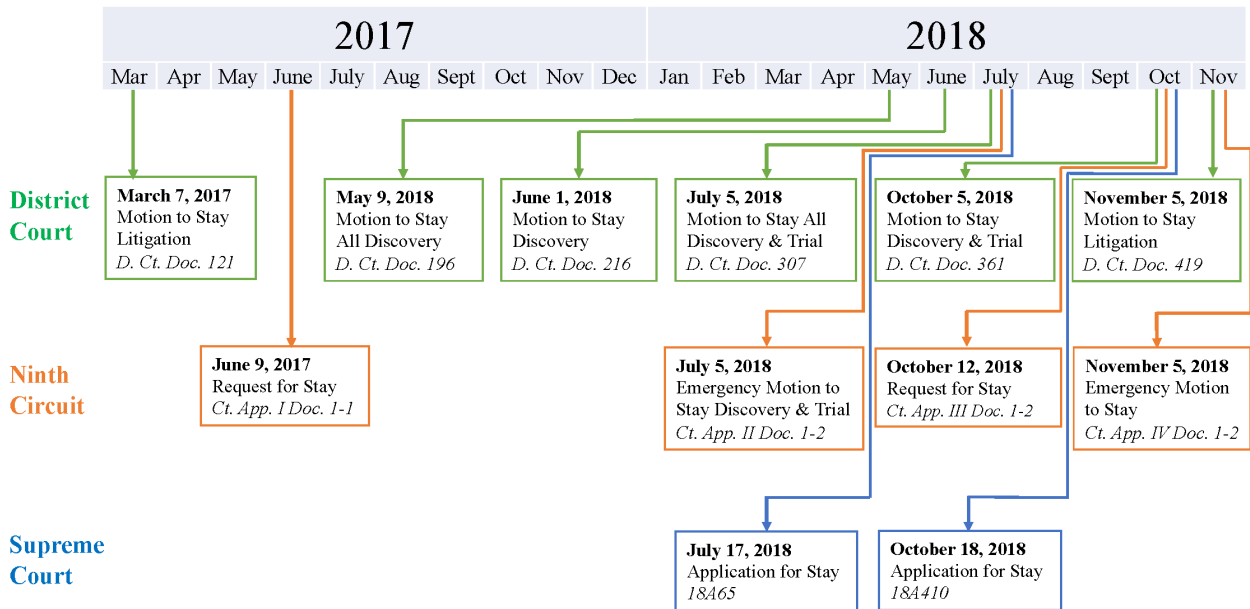
9. Defendants have repeatedly presented materially-identical legal arguments in successive, duplicative motions and petitions for early appeal in contravention of the final judgment rule in all three tiers of the federal judiciary. A chart demonstrating repeated, successive attempts to present the same issues in these filings is included below:

**DEFENDANTS’ ARGUMENTS PRESENTED BY STAGE IN
JULIANA V. UNITED STATES**

	District Court Order Denying Motion to Dismiss November 10, 2016	9th Circuit Order Denying Mandamus March 7, 2018	9th Circuit Order Denying Mandamus July 20, 2018	District Court Order Denying Summary Judgment October 15, 2018
Plaintiffs' Art. III Standing	X	X	X	X
Stable Climate Right	X	X	X	X
Public Trust Doctrine	X	X	X	X
Separation of Powers	X	X	X	X
Failure to Plead Fifth Amendment Claims Under Right of Action, Such as APA	X	X		
APA Provides Sole Right of Action for Plaintiff's Claims			X	X

10. Defendants have moved for a stay in this case a total of twelve times between the district court, the Supreme Court, and this Court, as illustrated below:

**DEFENDANTS’ MOTIONS FOR STAYS IN
JULIANA V. UNITED STATES**



11. The parties currently anticipate a trial lasting 8-10 weeks. In terms of scheduling the length of trial, at a meet and confer session with counsel for Defendants on April 11, 2018, counsel for Plaintiffs initially projected 20 days for their case in chief. Counsel for Defendants responded that 20 days would not be enough for Defendants' case and stated that it would be better for the parties to ask the district court for more time than less for trial. Thus, as a result of that meet and conferral, the parties agreed to jointly request 50 trial days. The next day, at the April 12 Status Conference, counsel for Defendants confirmed the parties' agreement of 5 weeks per side with the Court. *See* Transcript of Proceedings, D. Ct. Doc. 191 at 7:19-8:7. The length of the trial is due to the need for expert testimony on different scientific and historical issues, Plaintiff testimony, and presentation of documentary evidence. Trial length will not change based on the number of legal claims. The same body of evidence will be presented at trial in support of each of Plaintiffs' constitutional claims.
12. The district court denied Defendants' motion to dismiss on November 10, 2016. Since then, by even the most conservative estimates, Plaintiffs and Defendants have spent well in excess of 50 days briefing Defendants' numerous requests for a stay, petitions for early appeal, and dispositive motions before the district

- court, the Supreme Court, and this Court; and preparing for and appearing in oral argument on Defendants' first Petition for Writ of Mandamus to this Court.
13. Since August 1, 2018, Plaintiffs incurred significant litigation costs to be prepared to commence trial as scheduled on October 29, 2018. Plaintiffs continue to incur significant litigation costs in order to be prepared to commence trial as soon as possible.
 14. Plaintiffs also expended a significant amount of time and resources to ensure that the youth Plaintiffs and their experts would be in Eugene, Oregon, and prepared to testify at trial beginning October 29, 2018. Many of the youth Plaintiffs arranged their school schedules so that they could attend trial commencing on October 29, 2018, with some making arrangements to temporarily live in Eugene so that they could attend the entirety of the trial as previously scheduled.
 15. Plaintiffs made and confirmed travel arrangements for the youth Plaintiffs and their experts to come to Eugene and testify consistent with a trial schedule commencing October 29, 2018, with some experts traveling from as far away as London, United Kingdom, Brisbane, Australia, and throughout the United States.
 16. Due to the stay of trial, Plaintiffs' pre-arranged plans to attend trial had to be cancelled and all of the travel and lodging for Plaintiffs' experts had to be

cancelled at great expense and inconvenience. All of Plaintiffs' experts are donating their services *pro bono* and have already invested a significant number of hours in preparing expert reports and sitting for depositions.

17. Plaintiffs are prepared to commence trial as soon as possible, even before depositions of Defendants' experts are complete, and will be harmed significantly if this trial is further delayed. Plaintiffs and their experts are on standby to reschedule their travel arrangements as soon as possible in order to accommodate a trial commencing as soon as possible.
18. The only procedural matters prior to commencing trial are the pre-trial conference and rulings on pending pre-trial motions.
19. Attached as Exhibit 1 is a true and correct copy of the July 20, 2018 letter from the Solicitor General informing the Supreme Court of this Court's denial of the Second Petition.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 18th day of November, 2018, at Eugene, Oregon.

Respectfully submitted,

/s/ Julia A. Olson

Exhibit 1 To Declaration of Julia A. Olson



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

July 20, 2018

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

Re: United States of America, et al. v. United States District Court for the District Court of Oregon, No. 18A65

Dear Mr. Harris:

On July 17, the government filed an application for a stay of discovery and trial in the above-captioned case pending the Ninth Circuit's disposition of a petition for a writ of mandamus to the United States District Court for the District of Oregon and any further proceedings in this Court. In the underlying suit, plaintiffs seek recognition of a new fundamental right to certain climate conditions and an order requiring the Executive Branch to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂," Am. Compl. 94, to be monitored and enforced by the district court. The government's petition for mandamus asked the court of appeals to order the district court to dismiss this suit or, at a minimum, to order the district court to stay all discovery and trial pending resolution of the government's pending motion for a judgment on the pleadings and motion for summary judgment. On July 18, Justice Kennedy requested a response to the government's stay application to be filed by noon on Monday, July 23. The government wishes to inform the Court of a recent development relevant to the government's application.

Earlier today, the Ninth Circuit denied the government's petition for mandamus without prejudice. See *In re United States*, No. 18-71928, slip op (per curiam). A copy of the court of appeals' opinion is enclosed. In its decision, the court again declined to engage with the merits of this suit or the government's arguments for dismissal, insisting that "[t]he merits of th[is] case can be resolved by the district court or in a future appeal." *Id.* at 9-10. The court observed that the government "retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers." *Id.* at 6. The court dismissed the government's concerns about compelling agency officials to articulate official positions through discovery on factual assessments and questions of policy concerning climate change, describing such requests as "routine." *Id.* at 8. It characterized the impending 50-day trial for imposing on the government an "enforceable national remedial plan," Am. Compl. 94, to phase out fossil-fuel emissions and decrease atmosphere carbon dioxide as the "usual legal processes,"

reasoning that it would impose no prejudice on the government that is not correctable on appeal. Slip op. 9. And it distinguished this Court's decision in *In re United States*, 138 S. Ct. 443 (2017) (per curiam), on the ground that the district court there had entered a specific discovery order before resolving the government's justiciability arguments in a motion to dismiss, whereas here the district court rejected the government's objection to any discovery before resolving the government's justiciability arguments in motions for judgment on the pleadings and for summary judgment. Slip op. 6-7.

In its stay application, the government suggested that the Court consider construing the application as a petition for a writ of mandamus to the district court or as a petition for a writ of certiorari to review the Ninth Circuit's decision on the government's prior mandamus petition. Stay Appl. 6. That course of action is now even more warranted in light of the court of appeals' decision, because nothing relevant remains to be done in the lower courts. The Ninth Circuit's denial of mandamus—and its reasoning that the discovery and trial contemplated in this case are simply part of the usual legal processes—make clear that the court of appeals will not prevent this case from moving forward absent direction from this Court. Today's decision, however, does present the Court with an additional way to provide such relief. The Court could now also construe the application as a petition for a writ of certiorari to review the Ninth Circuit's new mandamus decision. Whatever procedural course the Court deems appropriate, the government respectfully submits that it is entitled to relief from the mounting burdens of this litigation for the reasons stated in its stay application.

I would appreciate it if you would circulate this letter and copies of the enclosed opinion to the Members of the Court.

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

18A65

UNITED STATES OF AMERICA, ET AL.
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

PHILIP L. GREGORY (EMAILED)
SENIOR ATTORNEY
GREGORY LAW GROUP
1250 GODETIA DRIVE
REDWOOD CITY, CA 94062
PGREGORY@GREGORYLAWGROUP.COM

JULIA ANN OLSON (EMAILED)
WILD EARTH ADVOCATES
1216 LINCOLN STREET
EUGENE, OR 97401
JULIAAOLSON@GMAIL.COM

ANDREA K. RODGERS (EMAILED)
LAW OFFICES OF ANDREA K. RODGERS
3026 NW ESPLANADE
SEATTLE, WA 98117
206-696-2851
(F) 541-485-2457
ANDREARODGERS42@GMAIL.COM

WAYNE L. MORSE
US COURTHOUSE
405 EAST EIGHT AVENUE
SUITE 2100
EUGENE, OR 97401
541-431-4100