No. 18-80176

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

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# MOTION FOR LEAVE TO FILE REPLY AND REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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**MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL**

Defendants-Appellants the United States of America, et al. (the government) respectfully seek permission to file the following reply in support of their pending petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

The district court certified for appeal its order denying the government's motion to dismiss and its order denying the government's motion for judgment on the pleadings and granting in part and denying in part the government's motion for summary judgment. Appendix 1-6 (certification); Appendix 74-127 (order denying motion to dismiss); Appendix 10-71 (order largely denying motions for judgment on the pleadings and for summary judgment).[1] The government showed in its petition that both orders feature controlling questions of law; that there is substantial ground for difference of opinion as to the resolution of each question; and that immediate appeal of either order will materially advance the ultimate disposition of this case.

In their answer, Plaintiffs dispute that the district court properly certified these two orders for interlocutory appeal under Section 1292(b), and they contend that "endorsing Defendants' delay tactics on the eve of trial will contribute to a miscarriage of justice." Answer 1. The government's proposed reply, set out below, responds to Plaintiffs' arguments on each of the three factors under Section 1292(b).

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[1] The cited Appendix was filed concurrently with the petition on November 30, 2018. Like an Excerpts of Record, it is consecutively paginated beginning with Page 1.

Among other things, the reply explains that the government has challenged the merits of all of Plaintiffs' claims, not (as Plaintiffs argue) merely a subset of them. Plaintiffs are wrong that there are disputed issues of fact concerning standing or the merits; the government's arguments are entirely legal. This combined motion and proposed reply complies with the word-limit requirements for a reply (2,800 words).

For these reasons, the government's motion to file the following reply in support of its pending petition for permission to appeal should be granted.

**REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL**

Section 1292(b) authorizes interlocutory appeals where an "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." As explained in the petition and reiterated below, the orders and issues here meet this standard. Indeed, although Plaintiffs barely acknowledge the fact, both the Supreme Court and this Court have strongly indicated that the standard is satisfied here. This Court should accordingly grant the petition. Plaintiffs are wrong on their two central contentions — that the appeal would necessarily be "piecemeal" and that there are factual questions relevant to the government's arguments to be resolved at trial. Those arguments about standing, justiciability, the Administrative Procedure Act (APA), and the merits are purely legal, and the government has challenged the merits of all of Plaintiffs' claims.

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

The government's petition demonstrated that the district court's order denying the motion to dismiss, Appendix 74-127, and the order denying the motions for judgment on the pleadings and summary judgment, Appendix 10-71, involve three controlling questions of law: (1) whether Plaintiffs' claims are justiciable under Article III and the equitable authority of the courts; (2) whether Plaintiffs challenges to agency action must proceed, if at all, under the APA; and (3) whether Plaintiffs have stated any claim — under the Due Process Clause or a public trust doctrine or otherwise — upon which relief can be granted. *See* Petition 3, 11-13.

Plaintiffs argue that standing is not a controlling question because it is a "fact-laden" inquiry, and there are factual disputes that would preclude this Court from resolving the question. Answer 18-19, 21. But as the petition explained (p. 20), the government's standing and justiciability arguments are purely legal: there is no factual dispute that global climate change affects everyone in the world; that it stems from a complex, world-spanning web of actions across all fields of human endeavor; and that a single district judge may not (consistent with Article III and the equitable authority of federal courts) seize control of national energy production, energy consumption, and transportation to actually move the needle on climate change.[2]

[2] Plaintiffs assert that the government conceded injury-in-fact at the summary judgment hearing, Answer 7, 21 n.11, but the government made no such concession.

With respect to redressability in particular, Plaintiffs argue that "Defendants submitted no evidence to support their argument that Plaintiffs' claims cannot be redressed without the district court taking over the energy policy of the Nation. . . . That notion is fundamentally at odds with what Plaintiffs seek, the availability of declaratory relief, and with the evidence to be presented at trial." Answer 21. But less than a month ago, Plaintiffs told this Court that they sought to require the government to "prepare and implement an enforceable national remedial plan to cease and rectify the constitutional violations by phasing out fossil fuel emissions and drawing down excess atmospheric $CO_2$." *In re United States*, No. 18-73014, ECF No. 5, at 3 (Nov. 18, 2018) (Plaintiffs' answer to the government's most recent mandamus petition); *see also* ECF No. 7 at 94 (operative complaint, including the same request). If the district court were to order the government to "phas[e] out fossil fuel emissions," the court would take over the energy policy of the Nation.

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At that hearing, government counsel merely observed that when the district court denied the government's motion to dismiss, it "held that the allegations of certain specific injuries . . . were sufficient to trigger injury in fact under Article III." ECF No. 329, at 25:7-9. Thus, Plaintiffs had made a "prima facie case . . . for those injuries" at the pleading stage. *Id*. at 25:12-13. The government did not concede that the district court's determination was correct or that Plaintiffs have indeed suffered an injury-in-fact. To the contrary, the government has consistently maintained that Plaintiffs have suffered at most generalized grievances. *See, e.g.*, ECF No. 195, at 6; ECF No. 207, at 7-9. In any event, because Article III standing is a jurisdictional requirement, it cannot be conceded. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court.").

As to the merits, Plaintiffs argue that the district court's rulings are not controlling because Plaintiffs possess additional constitutional theories that the government never attacked in its motions, and that the district court therefore never addressed. Answer 6, 12, 18-19.

Plaintiffs are wrong as to the government's motions. The government moved to dismiss and for summary judgment on the merits of *all* of Plaintiffs' claims, including all of their constitutional claims alleging infringement of fundamental rights and discrimination. ECF No. 27, at 1, 19 (moving "for dismissal of the action with prejudice" because "Plaintiffs fail to state a claim under the Constitution"); ECF No. 207, at 1 (moving for summary judgment "on each of the four claims" in the First Amended Complaint). Plaintiffs made their arguments regarding additional due process and equal protection claims at both the motion-to-dismiss and motion-for-summary-judgment stages. *See* ECF No. 41, at 10; ECF No. 255, at 52-53 (arguing, incorrectly, that the government failed to seek summary judgment on three Fifth Amendment claims). The government's reply in support of its motion for summary judgment argued that the motion's "rationales fully justify rejecting *every one of Plaintiffs' constitutional claims*." ECF No. 315, at 39 (emphasis added).

In response to the government's motions, the district court recognized only four claims: a due process claim based on a previously unrecognized fundamental right to a "climate system capable of sustaining human life," Appendix 105; a

"danger-creation due process claim," *id*. at 109; claims under a federal public trust doctrine that are "properly categorized as substantive due process claims," *id*. at 110, 124; and an equal protection claim based on the same fundamental right to "a climate system capable of sustaining human life," *id*. at 67. If this Court grants permission to appeal, Plaintiffs will be free to argue that the district court should have recognized additional due process or equal protection claims. But they are wrong that the merits of those claims would not be before this Court in that appeal. Because the orders certified by the district court resolve the motions seeking the dismissal or judgment on all of Plaintiffs' claims, all of those claims are before this Court. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("[T]he appellate court may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court." (internal citation and quotation marks omitted)).

Plaintiffs' assertion, Answer 19-20, that "expert testimony" and an "empirical analysis" under *Washington v. Glucksberg*, 521 U.S. 702 (1997), are required to resolve their due process and public trust claims is baseless. The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," *id.* at 720 — an inquiry that requires no expert testimony or empirical analysis — but the right to "a climate system capable of sustaining human life" is

not so rooted. The fact that Plaintiffs' theory is novel does not mean that it merits further development. And no expert testimony or empirical analysis is necessary to evaluate Plaintiffs' public trust claim because, as the D.C. Circuit observed, the Supreme Court "categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir.) (per curiam), *cert. denied*, 135 S. Ct. 774 (2014).

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

Plaintiffs (finally) acknowledge the Supreme Court's statement in its July 30 Order that "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion." Answer 20 (quoting Appendix 73). But Plaintiffs still ignore that the Supreme Court's November 2 Order makes the same point with respect to the *merits* of Plaintiffs' claims. That is, the Court stated that "the 'striking' breadth of plaintiffs' claims 'presents substantial grounds for difference of opinion.'" Appendix 8 (quoting Appendix 73). In any event, the Supreme Court's statements make completely clear that the substantial-grounds requirement is satisfied here.

Plaintiffs, however, focus solely on the government's APA argument. As an initial matter, that is not sufficient: if the justiciability and merits questions satisfy Section 1292(b), then this Court may accept certification and "may address any issue fairly included within the certified order." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (internal quotation marks omitted).

In any event, Plaintiffs' response to the APA argument is unavailing. Instead of actually responding to the government's argument that the APA provides the sole mechanism to challenge unconstitutional agency action and inaction, Petition 18 (discussing *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996)), Plaintiffs cite several cases discussing the scope of the APA's waiver of sovereign immunity or the availability of a court's equitable authority when the APA does not apply. Answer 20. But the government is not making a sovereign immunity argument, and this is a suit against federal agencies, where the APA plainly applies.

Plaintiffs cite a footnote in a recent decision of this Court for the proposition that "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.'" Answer 20 (quoting *Regents of University of California v. U.S. Department of Homeland Security*, 908 F.3d 476, 494 n.8 (9th Cir. 2018)). But *Regents* merely restated the well-settled rule that, even in a case where agency action is otherwise "committed to agency discretion by law" within the meaning of 5 U.S.C. § 702(a)(1), "review is still available to determine if the Constitution has been violated." *Id.*; *see also Webster v. Doe*, 486 U.S. 592, 601-06 (1988). That is no surprise: Section 702(a)(1) precludes review only "to the extent" that a decision is committed to agency discretion, but no agency has discretion to violate the

Constitution. Review of such constitutional claims, however, nevertheless must proceed "under the APA." *Webster*, 486 U.S. at 602.

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

With respect to the final Section 1292(b) consideration, Plaintiffs rely heavily on points addressed above. They rely predominately on their assertion that they have additional constitutional claims that are not before this Court in this appeal. *See* Answer 14-18. As explained in Part I above, however, that assertion is wrong. Plaintiffs also claim that there are disputed facts regarding standing and the merits and that the government has not addressed Plaintiffs' expert reports and evidence — all of which prevents this Court from reviewing those issues. *See* Answer 14-15. Again, as explained in Part I, the government arguments are purely legal.

As to Plaintiffs' discussion of potential timelines, they are all premised on the assumption that, at the end of the day, the Supreme Court will hold that Plaintiffs have standing; that this dispute is otherwise justiciable; that they can proceed outside of the APA; and that decades of government action and inaction have violated the Due Process Clause, the Equal Protection Clause, or a public trust doctrine. That outcome is, to say the least, unlikely. An appeal now will likely avoid the separation of powers problems and APA violation, Petition 19-20, that would result from a 10-week liability trial followed by a remedy proceeding of unknown length.

At a minimum, the Court should grant permission to appeal because appeal "may materially advance the litigation" by narrowing the issues for trial. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Standing and justiciability would likely be resolved in whole or in part, as would the government's APA argument. And the potential rulings would clarify the constitutional claims (if any) that should proceed to trial.

Finally, Plaintiffs threaten that, if the Court grants permission to appeal, they will move for an injunction pending appeal. Answer 2; *id.* at 16 (citing Fed. R. App. P. 8(a)(2)). If Plaintiffs were to seek such relief, it would be meritless. For the same reasons that Plaintiffs' claims are not redressable, *see supra* p. 4, neither the district court nor this Court could order the Executive Branch to "stop global climate change" pending an appeal.

One final point. Plaintiffs claim that an interlocutory appeal would be a "miscarriage of justice," Answer 1, that would impugn the "integrity and reputation of the judicial process," *id.* at 3; bring into question the "independence of the three levels of the federal judiciary," *id.* at 1; and lead to the "demise of our constitutional democracy," *id.* at 22. That is far from true: the government merely asks for a straightforward application of Section 1292(b) to the two orders and three issues presented here. If the Court grants permission to appeal, Plaintiffs will have their opportunity to present their theories to this Court, and potentially to the Supreme

Court, albeit earlier in the process than they prefer. The fact that such presentations would occur earlier in the process than Plaintiffs would prefer poses no threat to our constitutional democracy.

## CONCLUSION

For these reasons and the reasons set forth in the petition, the government's petition for interlocutory appeal under 28 U.S.C. § 1292(b) should be granted.

Dated: December 14, 2018.

Respectfully submitted,

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