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July 24, 2019

Ms. Molly C. Dwyer
Clerk, U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

Re: No. 18-36082, *Juliana v. United States*
Response to Appellees' Rule 28(j) letter of July 10, 2019

Dear Ms. Dwyer:

The motions panel's majority opinion denying a stay in *Sierra Club v. Trump*, No. 19-16102, 2019 WL 2865491 (9th Cir. July 3, 2019), does not compel the Court to reject the government's argument based on the Administrative Procedure Act (APA).

Sierra Club first recognized that the APA provides a cause of action to review whether agency action is constitutional. *Id.* at *19 (citing 5 U.S.C. § 706(2)(B)); accord Op.Br. 32; Oral.Arg. 1:01:16-1:02:04. *Sierra Club* then analyzed the availability of a cause of action under either the APA or courts' equitable authority. The Court ultimately concluded that "at least one cause of action" was available. *Id.* at *20 (capitalization altered). Plaintiffs here have disclaimed APA-based claims, so the "at least one" conclusion does not help them.

In concluding that at least one cause of action was available, the Court stated that an equitable cause of action is available even if the APA provides a cause of action. *Id.* But once the Court found that the statutory APA cause of action was available for the constitutional claim, it did not need to analyze a second potential cause of action. Moreover, the Supreme Court has held that, even where an equitable remedy is available, it is "subject to express and implied statutory limitations," *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015), and the APA provides a statutory cause of action here. See Op.Br. 27-35; Rep.Br. 18-23.

Unlike the *Sierra Club* plaintiffs, who challenged a discrete agency decision, plaintiffs here seek something categorically beyond both the bounds of Article III and the reach of any equitable cause of action. They ask the courts to review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to climate change over decades, and then to pass on the comprehensive aggregate constitutionality of all of those policies, programs, and alleged inaction. No federal court has ever undertaken such an unbounded review.

Finally, the government has also applied to the Supreme Court for a stay pending appeal in *Sierra Club*. See *Trump v. Sierra Club*, S. Ct. No. 19A60.

Sincerely,

s/ Jeffrey Bossert Clark
Jeffrey Bossert Clark

Counsel for Appellants

cc: All counsel via CM/ECF