Case No. 18-71928

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-TC-AA (D. Or.)

RESPONSE BRIEF OF REAL PARTIES IN INTEREST TO EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL 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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In accord with Ninth Circuit Rule 28-2.7, pertinent statutes, regulations, and local rules are included in the Addendum to this Brief beginning on Page A-1.

STATEMENT OF THE ISSUES

Whether this Court should stay proceedings in the district court when this Court previously denied a mandamus petition brought in the identical case by the identical Defendants on identical grounds, No. 17-71692 (Mar. 7, 2018) (*In re United States*, 884 F.3d 830 (9th Cir. 2018)), especially when there is no discovery to which Defendants must respond and no evidence of irreparable harm to Defendants.

STATEMENT OF THE RELEVANT FACTS

Defendants' Emergency Motion for a Stay of Discovery and Trial ("Motion for Stay") relates to a previously resolved petition for a writ of mandamus, which was heard and decided by Chief Judge Sidney Thomas and Judges Marsha Berzon and Michelle Friedland on March 7, 2018. *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692) ("First Petition").

On August 12, 2015, Real Parties in Interest ("Plaintiffs") filed this fifth amendment constitutional case. Dkt. 1.[1] Defendants' motion to dismiss was denied by District Judge Ann Aiken on November 10, 2016. Dkt. 83. Defendants

[1] Herein, "Dkt" refers to the district court docket and "Doc" refers to the Ninth Circuit docket.

answered Plaintiffs' First Amended Complaint (Dkt. 7, "FAC") on January 13, 2017. Dkt. 98. Thereafter, Plaintiffs began preparing their case for trial. On June 9, 2017, Defendants filed the First Petition seeking dismissal of the case.[2] Plaintiffs opposed the First Petition on August 28, 2017.[3]

On March 7, 2018, after briefing and oral argument, this Court denied the First Petition (the "March 7 Denial"). *In re United States*, Dkt. 68, No. 17-71692, 884 F.3d 830 (9th Cir. 2018). Like here, Defendants argued that allowing this case to proceed would result in burdensome discovery obligations on Defendants that would threaten the separation of powers. *Id.* at 833. The prior panel held that Defendants did not satisfy *any* of the five factors in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977), that there is no controlling Ninth Circuit authority on any theories asserted by Plaintiffs (weighing strongly against a finding of clear error), and that any potential merits errors were correctable through the ordinary appellate process. *Id.* at 836-38. The panel determined mandamus relief was inappropriate where the district court had not issued a single discovery order, nor had Plaintiffs filed a single motion seeking to compel discovery. *Id.* at 834. The panel concluded the issues raised by Defendants were better addressed through the ordinary course of litigation. *Id.* Notably, the panel held appellate review of Plaintiffs' claims

[2] Defendants' First Petition is attached hereto as **Exhibit A**.
[3] Plaintiffs' Answer to the First Petition is attached hereto as **Exhibit B**.

should take place after a full factual record was developed in the district court, deciding Defendants were required to participate in discovery. *Id.* at 838.

After denial of the First Petition, Plaintiffs completed and served expert reports; made themselves and their experts available for deposition per Defendants' requests; propounded requests for admissions based on government documents; and noticed Rule 30(b)(6) depositions. Decl. of Julia A. Olson ISO Opp. to Emergency Mot. for Stay ("Olson Decl.") ¶ 3. While requests for production of documents were at issue in the First Petition, there have been no outstanding requests for production of documents since the March 7 Denial. *Id.* ¶ 4. Through the ordinary meet and confer process, and upon the recommendations of both Magistrate Judge Coffin and Defendants to streamline discovery, Plaintiffs agreed to hold in abeyance all pending discovery (the propounded requests for admissions and deposition notices) and, in lieu thereof, to proceed with motions *in limine* seeking judicial notice of publicly available government documents and to propound limited interrogatories to discover the bases for Defendants' positions on certain disputed material facts. *Id.* ¶ 7. Plaintiffs have also consistently maintained that they will not propound discovery to the President or the Executive Office of the President. *Id.* ¶ 6.

Thus, there is *no pending discovery* to which Defendants are required to respond. Presently, Defendants' sole discovery obligation is to identify their expert

witnesses on July 12 and produce expert reports on August 13, per a schedule Defendants agreed to. *Id.* ¶ 12. Defendants have indicated these expert witnesses have already been retained and Defendants are prepared to disclose them. *Id.* ¶ 14. Defendants have also indicated that they may not rebut all of Plaintiffs' experts and that they may seek to limit the testimony of Plaintiffs' experts through motions *in limine* prior to trial. *Id.* ¶ 15. Defendants have not objected to expert discovery. *Id.* ¶¶ 13, 16. There is no evidence of a discovery burden requiring a stay.

Also since the First Petition was denied, Defendants moved for judgment on the pleadings under Rule 12(c) and for summary judgment. The former motion will be argued on July 18 and the latter will be fully briefed on July 12. *Id.* ¶ 19. On July 3, Defendants filed a motion in the district court for oral argument to be held on the motion for summary judgment on July 18, which Plaintiffs oppose. *See id.* ¶ 19; Dkt. 305.

The district court has set trial for October 29, 2018. Based on a joint recommendation by Defendants and Plaintiffs, the district court set aside 8-10 weeks for trial, with the understanding that less time may be adequate. Olson Decl. ¶ 18.

Since the March 7 Denial and after thorough and reasoned review and analyses, two senior judges rejected Defendants' motion for protective order to stop all discovery. *See* Dkts. 212, 300. The district court denied Defendants'

accompanying request to stay proceedings pending interlocutory review. *Id.* Like their First Petition, Defendants' Motion for Stay merely restates, in unsubstantiated and conclusory terms, Defendants' deficient arguments that were rejected first by the district court and then by this Court in its March 7 Denial.

SUMMARY OF ARGUMENT

Plaintiffs respectfully request this Court deny Defendants' Motion for Stay due to the extreme prejudice to Plaintiffs' fundamental liberty rights that would result. Defendants seek a second chance to make a previously rejected plea, without submitting *any* evidence of harm that would justify an emergency stay, much less mandamus. Denying the district court its authority to decide important constitutional questions upon a fully developed factual record would intrude on the separation of powers underlying the judiciary's obligation to protect individual liberties, including those of these young Plaintiffs. As this Court stated in its March 7 Denial:

> Distilled to its essence, the defendants' argument is that it is a burden to defend against the plaintiffs' claims, which they contend are too broad to be legally sustainable. That well may be. But, as noted, litigation burdens are part of our legal system, and the defendants still have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims. And if relief is not forthcoming, any legal error can be remedied on appeal. The first two criteria articulated in *Bauman* are designed to insure that mandamus, rather than some other form of relief, is the appropriate remedy. . . . Because the merits errors now asserted are correctable through the ordinary course of litigation, the defendants have not satisfied the second *Bauman* factor.

In re United States, 884 F.3d at 836 (quotes, citations omitted).

In its order denying Defendants' motion to dismiss, the district court stated: "At its heart, this lawsuit asks the court to determine whether defendants have violated plaintiffs' constitutional rights." Dkt. 83 at 16 ("November 10 Order"). Specifically, this case concerns whether fundamental constitutional rights protect Plaintiffs from Defendants' knowing historic and ongoing destabilization of our nation's climate system, and the resulting catastrophes and dangers threatening Plaintiffs. The district court properly acknowledged that to confront these constitutional questions is a core duty of the judiciary, and that considered appellate review thereof rests upon sound findings of fact from a fully developed record.

To stay proceedings in this important case would deprive this Court of the record necessary for appellate review of Plaintiffs' claims, the application of the constitutional principles upon which they rest, the climate science upon which they are founded, and the historic and ongoing actions of Defendants which are harming Plaintiffs' fundamental rights. Such a record will demonstrate the profound urgency and factual bases for the constitutional infringements at issue. To present a single illustrative example, eleven-year-old Plaintiff Levi will certainly be displaced from and ultimately lose his childhood home in Satellite Beach, Florida and his family's property in nearby Indialantic to sea level rise and storm surges.

Decl. of Dr. Harold Wanless ("Wanless Decl."), ¶¶ 2, 15, 21, 22. Defendants' Answer admits the seas are rising and will lead to increases in flooding and other damages in coastal communities, like Levi's. Dkt. 98, ¶¶ 214, 218, 219.

In contrast to the irreversible catastrophic harms to Plaintiffs, Defendants provide *no evidence* to justify a stay of proceedings, as is their burden. There is no pending discovery to which Defendants must respond except for expert disclosures and reports, which Defendants have consented to. Olson Decl. ¶¶ 12-14. The district court has before it two of Defendants' motions, which may narrow this matter and are almost fully briefed and ready for oral argument. *Id.* ¶ 19. This constitutional case should proceed in the manner the district court determines is most efficient for review and resolution of factual and legal questions raised in the record before it.

Further, Defendants can seek their desired relief by other means, if justified, and will not be prejudiced in a way not correctable on appeal. The proper method for a mandamus challenge premised on discovery obligations is a petition for a writ directed at an improper discovery order. To base this Petition for a Writ of Mandamus ("Second Petition") solely on an order denying a protective order to stay *all discovery* is not proper when this Court has already held that there was no clear error in moving this case forward to discovery and the merits. While this case may implicate unprecedented and alarming *factual* circumstances on climate

destabilization, the district court's moving this case to trial based on application of foundational constitutional legal principles to the facts alleged does not warrant the issuance of a stay.

Finally, Defendants' hollow and inflammatory accusation that the district court intends to usurp congressional and executive authority misconstrues the relief Plaintiffs request and disregards this case's procedural posture: no determinations of liability have been made nor remedies determined. For all of these reasons, Defendants are not likely to succeed on the merits of their Second Petition.

Defendants' Motion for Stay fails to demonstrate irreparable injury. At most, they allege supposed "irreparable" harms premised entirely on potentially responding to non-existent discovery. Defendants fail to provide *any* affidavits to support the "injuries" claimed, as required under Federal Rule of Appellate Procedure 8(a)(2)(B)(ii). Further, given Defendants' ongoing actions to expand fossil fuel pollution[4] amidst the urgency of the climate crisis, a stay is likely to result in substantial injury to Plaintiffs. *See* Wanless Decl. ¶¶ 16, 20-22; Declaration of Dr. Steven W. Running ("Running Decl.") ¶¶ 11-13.

[4] *See* Dkt. 208, at 15-16, n.3 for a non-exclusive list of Defendants' actions in causing and contributing to the climate crisis.

Given the lack of any evidentiary support of harm to Defendants, this Court should not stay proceedings pending review of this Second Petition, which presents identical issues to Defendants' First Petition.

ARGUMENT

A stay is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotes, citations omitted). A stay, particularly at this phase in the litigation, is "an intrusion into the ordinary processes of administration and judicial review." *Id.* at 427 (quotes, citations omitted). The burden of showing a stay is warranted "lay[s] heavily" on Defendants. *Landis v. N. Amer. Co.*, 299 U.S. 248, 256 (1936), who must satisfy a four-part test:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434. "[I]f there is even a fair possibility that the stay . . . will work damage to someone else, the stay may be inappropriate absent a showing by the moving party of hardship or inequity." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quotes and citation omitted).

I. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THE PETITION

Defendants' First Petition on virtually identical issues was denied on March 7, 2018. Defendants even admit the arguments advanced in this Second Petition are duplicative and raised under the same standard applicable to the First Petition, for which this Court found no clear error. Pet. at 10. Because Defendants lost in the district court, lost a nearly identical petition before this Court, and offer nothing new of substance here, they have failed to make the requisite "*strong* showing" of a likelihood of success on the merits and a "substantial case for relief." *Nken*, 556 U.S. at 426 (emphasis added); *Leiva-Perez v. Holder*, 640 F.3d 967, 968 (9th Cir. 2011) (per curiam) (emphasis added) (finding a "*mere possibility*" that relief will be granted inadequate).

"Mandamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Ct. for Dist. Of Columbia*, 542 U.S. 367, 369 (2004) (citation omitted). The petitioner bears the burden of showing its "right to issuance of the writ is clear and indisputable." *Id.* at 381 (quotes, citations omitted).

The "five guidelines" employed by this Court to determine "whether mandamus is appropriate in a given case" are:

> (1) [W]hether 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 a 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;[5] 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. 2009) (citation omitted).

Here, as this Court previously found with respect to Defendants' First Petition, Defendants satisfy none of these factors.

A. The District Court Committed No Clear Error Rejecting Defendants' Motion to Dismiss and Has Not Committed Oft Repeated Error or Disregarded Federal Rules

As to clear error in declining to dismiss the case, this Court already found the third factor of mandamus inapplicable:

> [T]he absence of controlling precedent in this case weighs strongly against a finding of clear error.
>
> [A]bsent controlling precedent, we decline to exercise our discretion to intervene at this stage of the litigation to review preliminary legal decisions made by the district court or otherwise opine on the merits.

In re United States, 884 F.3d at 837. This Court similarly rejected the fourth mandamus factor:

> Absent controlling authority, there is no "oft-repeated error" in this case and the defendants do not contend that the district court violated any federal rule. The defendants do not satisfy the fourth factor.

[5] Defendants do not argue the fourth guideline applies.

Id. at 837. The Second Petition offers nothing new that would meet Defendants' burden to "firmly convince[]" 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).[6]

B. Defendants Have Other Means to Obtain Relief from Discovery and Will Not Be Damaged in Any Way Not Correctable on Appeal

Defendants assert prejudice based on unsubstantiated claims as to the speculative burdens of responding to non-existent discovery, but there is no more actual burden today than when this Court found that neither of the first two *Bauman* factors are present in this case.

> The *defendants' argument fails* because the district court has not issued a single discovery order, nor have the plaintiffs filed a single motion seeking to compel discovery. Rather, *the parties have employed the usual meet-and-confer process of resolving discovery disputes*.

In re United States, 884 F.3d at 834 (emphasis added). As evidenced by Plaintiffs' unopposed motion and the district court's corresponding order holding discovery requests in abeyance while alternative evidentiary pathways are pursued, the same

[6] Defendants' APA arguments have already been rejected by this Court in the First Petition. Dkt. 211-1 at ¶ 3 (Defendants conceding "The 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.").

process has been successful since this Court's March 7 Denial. Dkts. 247, 249; Olson Decl. ¶¶ 7-8.

In rejecting Defendants' assertion of separation of powers harms that would not be correctable on appeal, this Court held:

> The defendants argue that holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten the separation of powers. We are not persuaded that simply allowing the usual legal processes to go forward will have that effect in a way not correctable on appellate review.

In re United States, 884 F.3d at 836. Significantly, this Court noted, in rejecting the presence of the second *Bauman* factor, that no formal discovery had been sought against the President, and Plaintiffs have agreed not to engage in such discovery going forward. *Id.*; Olson Decl. ¶ 6. This Court flatly rejected that the government is somehow exempt from normal litigation practice or appellate procedure:

> To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them. The United States is a defendant in close to one-fifth of the civil cases filed in federal court. The government cannot satisfy the burden requirement for mandamus simply because it, or its officials or agencies, is a defendant.

In re United States, 884 F.3d at 836; *see Perry*, 591 F.3d at 1156.

In their Second Petition, Defendants mischaracterize Plaintiffs' discovery requests and ignore Plaintiffs' clear efforts to narrow discovery, accommodate Defendants' concerns, and move this litigation to a prompt resolution. Pet. at 5-16. *See, e.g.*, Olson Decl. ¶¶ 2-9; Plaintiffs' Motion *in Limine* Seeking Judicial Notice of Federal Government Documents, Dkt. 254; Plaintiffs' Unopposed Motion to Hold Defendants' Motion for Protective Order in Abeyance and to Suspend Briefing Schedule, Dkt. 247.

1. The Status of Discovery: The Parties Have Continued to Narrow Discovery Through Meet and Confers

Exhibit 1 to the Olson Declaration is a table, which the parties regularly update and submit to the district court in their monthly Joint Status Reports, illustrating the status of discovery and the lengths to which Plaintiffs have gone to narrow discovery.

Plaintiffs' remaining discovery is only to depose Defendants' trial witnesses and propound contention interrogatories, in order to determine the identity of fact witnesses, the evidence supporting denials in Defendants' Answer, and the scope of Defendants' efforts in setting climate change targets. Defendants themselves suggested contention interrogatories in lieu of certain subject areas of the Rule 30(b)(6) deposition notices. Olson Decl. ¶ 17.

Plaintiffs have worked with Defendants to conduct discovery with the least burdensome requests and avoided litigating issues such as executive privilege. *See,*

e.g., Olson Decl. ¶ 5; Dkt. 254 (substituting requests for admissions); Dkt. 159-3 – 159-6; Dkt. 179 at 12:23-25, 13:1-6, 36:4-13.

Finally, Defendants' characterization of their discovery burdens has no basis in fact or evidentiary support. Olson Decl. ¶ 10; Dkt. 179 at 4:23-25. There are *no pending discovery requests* to which Defendants are required to respond. Defendants falsely state "the government is subjected to wide-ranging and impermissible discovery." Pet. at 19. Defendants do not here challenge any *particular* discovery requests or orders; instead, they again challenge the district court's denial of their motion to dismiss and the legal conclusions upon which it is founded. Defendants fail to articulate any manner in which that denial or those conclusions will damage or prejudice them "in a way not correctable upon appeal." *Perry*, 591 F.3d at 1156.

2. Admission of Documents through Motion *in Limine* and Judicial Notice in Lieu of Discovery

Most of Plaintiffs' exhibits at trial will be government documents. As a result, Plaintiffs are pursuing authentication of documents through a judicial notice process, as suggested by Defendants and Magistrate Judge Coffin. Olson Decl. ¶¶ 7-8.

On June 22, the parties met and conferred, and Defendants proposed holding their second motion for protective order in abeyance: (a) until the district court decides Plaintiffs' motions to seek judicial notice of certain government

documents; and (b) until the parties have further opportunity to reach agreement on substituting contention interrogatories for depositions under Rule 30(b)(6). Plaintiffs agreed to this process and that all pending responses of Defendants to outstanding discovery requests would be held in abeyance during the same time period. Olson Decl. ¶ 8.

3. The Length of Trial Was Requested by Defendants.

Plaintiffs initially projected 20 days for their case in chief. Olson Decl. ¶ 18. Defendants responded that 20 days was insufficient for Defendants' case and that it would be better to ask for more time. *Id*. Thus, as a result of meeting and conferring, the parties agreed to request 50 trial days, 4 days a week, 6 hour days. *Id*. The next day, at the April 12 Status Conference, Defendants confirmed the parties' agreement of 5 weeks per side with the Court. Dkt. 191, at 7:19-8:7.

C. That This Case Involves the Application of Established Principles of Law to Novel Facts Does Not Warrant Mandamus

As this Court's March 7 Denial pointed out: "the absence of controlling precedent in this case weighs strongly against a finding of clear error." *In re United States*, 884 F.3d at 837.

As the district court noted, "[t]he facts in this case, though novel, are amenable to those well-established [constitutional] standards." Dkt. 83. Further, even were this Court to "assume that the [November 10 Order] raise[s] 'new and important problems and issues of first impression,' review of those issues now

would be unwise and premature." *Bauman*, 557 F.2d at 661-62. In the First Petition, this Court determined it does not yet have the necessary factual record to undertake a considered appellate review of the November 10 Order's conclusions. *See, e.g.*, *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). A stay of the proceedings in the midst of factual record development is not appropriate here. To quote from the March 7 Denial:

> 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 issues by the trial courts. 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.

In re United States, 884 F.3d at 837.

D. Defendants' Allegations of Intent to Usurp Congressional and Executive Power Do Not Warrant Mandamus

Defendants' inflammatory accusation that the district court is engaged in "usurpation of legislative and executive authority" shows a profound disrespect for the judiciary consistent with Defendants' previous filings and practice during this case. Pet. at 25; *see also* Dkt. 172 at 3; Dkt. 171. The district court has properly recognized that this case, "at its heart," intimately implicates the courts' role as the final arbiter and ultimate guardian of constitutional rights and is therefore "squarely within the purview of the judiciary." Dkt. 83 at 16.

Moreover, the accusation rests upon a deep misunderstanding of the relief Plaintiffs request. Plaintiffs ask not for the district court to "to wrest fundamental policy issues of energy development and environmental regulation," Pet. at 35, but only an order directing Defendants to desist from and remedy the violations of their rights under the Constitution and Public Trust Doctrine. The contents and contours of that remedy, and the policies by which to effectuate it, would be left to Defendants, as in *Brown v. Plata*, 563 U.S. 493 (2011); Dkt. 7 at 94–95 ¶¶ 1–9; Dkt. 83 at 12.

Finally, Defendants provide no support for the supposition that any remedy ordered by the district court would not be correctable upon appeal. Defendants have failed to meet their burden of showing a likelihood of success on the merits.

II. DEFENDANTS HAVE NOT SHOWN IRREPARABLE INJURY

An applicant for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255; *Leiva-Perez*, 640 F.3d at 968 (applicant must "show that an irreparable injury is the more probable or likely outcome.").

Defendants fail to submit *any* factual support for their asserted injuries. Despite the requirement that a motion for stay include "affidavits or other sworn statements supporting facts," Defendants present *no* affirmative evidence of how

they would be harmed by responding to discovery. Pet. at 38; Fed. R. App. P. 8(a)(2)(B)(ii). Their unsupported claim of harm is insufficient to establish irreparable injury. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."); *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 758 (9th Cir. 1991) (defendant not irreparably harmed by participating in discovery pending appeal). Contrary to Defendants' unsupported characterizations, discovery will not be unduly burdensome.

III. PLAINTIFFS WILL SUFFER SUBSTANTIAL INJURY BY A STAY

Even if this Court finds Defendants have shown irreparable injury absent a stay, it must "balance the interests of all parties and weigh the damage to each." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). For this factor, this Court considers whether "issuance of the stay will substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 434.

Defendants cite no evidentiary support or legal authority to substantiate their claim that emissions attributable to Defendants during resolution of the Second Petition "are plainly *de minimis* and not a source of irreparable harm." Pet. at 51; Fed. R. App. P. 8(a)(2)(B)(ii).

Notably, Defendants' admissions in their Answer to the FAC directly contradict the claim that Plaintiffs will suffer no substantial harm. *See* Dkt. 98 at ¶¶ 7, 150–51, 213; *see also* Dkt. 146, at 2–4 (District Court setting forth "non-exclusive sampling" of significant admissions in Defendants' Answer).[7]

Furthermore, Defendants continue to violate Plaintiffs' rights. The continuing violations which would result from a stay establish irreparable injury 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). "[T]he balance of the equities favor[s] preventing the violation of a party's constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quotes and citation omitted). 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,

[7] The best available climate science illustrates that even a modest delay in resolution of Plaintiffs' claims could substantially injure Plaintiffs. Atmospheric CO_2 concentrations are well above the level necessary to maintain a safe and stable climate system, dangerous consequences of climate change are occurring, CO_2 emissions persist for hundreds of years affecting the climate system for millennia, impacts such as sea level rise register non-linearly, and additional emissions could exceed irretrievable climate system tipping points. *See* Decl. of Dr. James E Hansen, Dkt. 7-1. Absent rapid emissions abatement, sea levels could rise by as much as fifteen meters, with dire consequences to Plaintiffs such as Levi. Wanless Decl. ¶¶ 14-15.

i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also* Running Decl. ¶¶ 12-14 ; Wanless Decl. ¶¶ 16-22.

IV. THE PUBLIC INTEREST COUNSELS DENYING THE STAY

Defendants have failed to establish that "the public interest does not weigh heavily against a stay." *Leiva-Perez*, 640 F.3d at 967.[8] The public interest is served by allowing Plaintiffs to vindicate constitutional violations. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

The separation of powers principles argued by Defendants counsel this Court to deny the Second Petition. When the political branches actively infringe the constitutional rights of citizens, particularly those too young to vote, the separation of powers doctrine directs the judiciary to fulfill its duty to serve as a check and balance on the other branches of government to safeguard constitutional liberty. *Marbury v. Madison*, 5 (U.S. 1 Cranch) 137, 163 (1803). The public interest clearly lies in allowing this case to proceed. Defendants fail to establish any of the criteria justifying a stay of proceedings.

[8] Here again disregarding the requirements of Fed. R. App. P. 8, Defendants offer no evidentiary support for their claim that discovery would "divert substantial resources" from their "essential function[s]." Pet. at 53.

CONCLUSION

The March 7 Denial concluded that "the district court needs to consider [ ] 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. The parties are working towards that end and should be permitted to continue to do so as they narrow discovery and issues for trial. There is presently no pending discovery to which Defendants must respond. There will be no discovery propounded to the President and no discovery that crosses into executive privilege. Defendants have agreed to participate in expert discovery. The district court has before it two dispositive motions which may or may not narrow this matter due to the significant factual questions at issue in the case. This litigation should be allowed to proceed in the district court in the ordinary manner without further delay.

As determined in the March 7 Denial, and for the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants' Motion for Stay.

DATED this 10th day of July, 2018, at Eugene, Oregon.

Respectfully submitted,

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Attorneys for Real Parties In Interest

STATEMENT OF RELATED CASES

Defendants' motion for a stay relates to a previously resolved and no longer pending petition for a writ of mandamus, which was heard and decided by Chief Judge Sidney R. Thomas and Judges Marsha S. Berzon and Michelle T. Friedland on March 7, 2018. *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692). Thus, this case was previously before this Court and is a related case within the meaning of Circuit Rule 28-2.6.

Dated: July 10th, 2018

Respectfully submitted,

/s/ Julia A. Olson

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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 5,185 words (based on the word processing system used to prepare the brief).

Dated: July 10th, 2018

/s/ Julia A. Olson

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ADDENDUM

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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 Appellate Procedure, Rule 8 – Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) Initial Motion in the District Court. A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in the Court of Appeals; Conditions on Relief. A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) Proceeding Against a Surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) Stay in a Criminal Case. Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

Federal Rules of Civil Procedure, Rule 26 – Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f)conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f)conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely

benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5)applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B)protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) Sequence. Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.
(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

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.

9th Circuit Case Number(s) 18-71928

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) July 10, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Julia A. Olson

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

Case No. 18-71928

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-TC-AA (D. Or.)

EXHIBITS IN SUPPORT OF OPPOSITION OF REAL PARTIES IN INTEREST TO PETITIONERS' EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL

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Exhibit A

Defendants' First Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, Case No. 17-71692, Doc. 1 (June 9, 2017).

Case No. 17-_____

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 A Writ Of Mandamus In
Case No. 6:15-cv-01517-TC-AA (D. Or.)

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON AND REQUEST FOR STAY OF PROCEEDINGS IN DISTRICT COURT

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INTRODUCTION AND RELIEF SOUGHT

In this case, the United States District Court for the District of Oregon has declared that the Due Process Clause guarantees American citizens an "unenumerated fundamental right" to "a climate system capable of sustaining human life." Dkt. 83 in No. 6:15-cv-01517 (D. Or.) at 31-32 (Attach. 1). The court has determined that this amorphous and sweeping right is judicially enforceable, permitting the court to dictate and manage—indefinitely—all federal policy decisions related to fossil fuels, energy production, alternative energy sources, public lands, and air quality standards. To say the least, and by the district court's own admission, this ruling is "unprecedented." *Id.* at 52.

The defendants—the United States, the President, and twenty other Executive Branch Departments, agencies, offices, Cabinet Secretaries, Directors and Officers—have in both the prior and the current Administrations endeavored to bring to an end this improper case. Defendants moved on November 11, 2015, for the court to dismiss the case (Dkt. 17), and on March 7, 2017, to certify an interlocutory appeal pursuant to 28 U.S.C. §1292(b) from the district court's order denying the motion to dismiss (Dkt. 120). Defendants also moved for a stay of proceedings. Dkt. 121. Despite requests for expedition, the district court did not finally rule on the motion to certify an appeal until June 8, 2017, when it adopted the magistrate judge's recommendation to deny certification, and denied the requested stay. Dkt. 172

(Attach. 2). In the meantime, it has permitted the start of an unbounded discovery process, including requests relating to sensitive internal workings of the Office of the President reaching as far back as the Administration of President Lyndon Johnson. *See infra* at 6-7, 32-37.

The governing criteria for mandamus relief articulated in *Bauman v. U.S. District Court,* 557 F.2d 650 (9th Cir. 1977), are easily satisfied here. The district court has committed multiple and clear errors of law in refusing to dismiss an action that seeks wholesale changes in federal government policy based on utterly unprecedented legal theories. Immediate review is needed to prevent the district court from the unlawful exercise of its jurisdiction and to avoid the staggering burden imposed on the federal government by the ongoing discovery directed at the entire course of federal decision-making relating to the broad issues raised by these unprecedented claims. No other means are available to obtain the relief the government seeks since the district court refused to certify for interlocutory appeal its order denying the motions to dismiss. Defendants respectfully request this Court to issue the writ and direct the district court to dismiss the case. They also request that the Court exercise its authority under the All Writs Act to stay proceedings in the district court until the merits of this petition for mandamus are resolved.

STATEMENT OF JURISDICTION

This Court has authority to issue a writ of mandamus pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

Whether the district court committed clear legal error and exceeded its judicial authority by refusing to dismiss this action against the President and multiple federal agencies that seeks to fundamentally redirect federal policy regarding energy development, transportation and consumption in order to bring about dramatic reductions in global concentrations of carbon dioxide (CO2).

STATEMENT OF RELEVANT FACTS

Twenty-one minors and an organization called Earth Guardians filed this action on August 12, 2015, naming the President, the Executive Office of the President, and numerous cabinet-level Executive agencies. An Amended Complaint was filed on September 10, 2015. Dkt. 7 (Attach. 3). The Amended Complaint alleges that the defendants have allowed cumulative CO2 emissions to increase, ¶151, by enabling and permitting fossil fuel production and combustion, ¶¶164-70, 185-91, by subsidizing the fossil fuel industry, ¶¶171-78, and by allowing interstate and international transport of fossil fuels, ¶¶179-84. With one exception, plaintiffs do not identify or challenge specific agency actions, such as agency orders, permits, or

rulemakings, or the failure to undertake any specific required actions.[1] Instead, they challenge what they term the federal government's "aggregate actions," ¶129, which they assert have caused "climate instability" that injures their prospects for long and healthy lives. ¶288. Plaintiffs allege that the aggregate actions by the defendants violate their rights under the Due Process Clause and the equal protection component of the Fifth Amendment, their rights reserved by the Ninth Amendment, and the public trust doctrine. ¶¶277-310.

For relief, plaintiffs ask the court to declare their rights under the Constitution to a certain kind or quality of "climate system" and to enjoin the Executive Branch to "prepare a consumption-based inventory of U.S. CO2 emissions" and to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2." Dkt. 7 at 94. They ask the court to retain jurisdiction for an indefinite period of time to monitor the government's compliance with this "national remedial plan." *Id.*

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[1] The exception is a challenge to the Department of Energy's (DOE) 2011 authorization, pursuant to Section 201 of the Energy Policy Act, of the export of liquefied natural gas (LNG) from the Jordan Cove, Oregon, LNG Terminal. Dkt. 7 at ¶193. Plaintiffs ask that Section 201 be declared unconstitutional as a violation of plaintiffs' "fundamental rights to life, liberty, and property," and that the DOE Order be set aside. *Id.* at ¶288 and p. 94. This claim is indisputably beyond the district court's jurisdiction because exclusive jurisdiction to review export authorizations like this one is vested in the courts of appeals. 15 U.S.C. § 717r(b); *Consol. Gas Supply Corp. v. FERC,* 611 F.2d 951, 957 (4th Cir. 1979).

On November 17, 2015, defendants moved to dismiss the complaint for lack of jurisdiction due to a failure to establish Article III standing and for failure to state a claim under the Fifth Amendment, the Ninth Amendment, and the public trust doctrine. Dkt. 27. On April 8, 2016, the magistrate judge assigned to the case issued findings and a recommendation that the court deny defendants' motion to dismiss, as well as a motion to dismiss on political question grounds filed by intervenor-defendants. Dkt. 68 (Attach. 4).[2] Defendants and intervenors filed objections to the magistrate's findings and recommendation. Dkt. 73, 74. On November 10, 2016, the district court issued an opinion and order adopting the magistrate's findings and recommendations and denying the motions to dismiss. Dkt. 83 (Attach. 1). The district court found that plaintiffs had adequately alleged the injury-in-fact, causation, and redressability elements of standing, *id.* at 18-28; had not raised non-justiciable political questions, *id.* at 6-17; and had asserted cognizable claims under the Due Process Clause and the public trust doctrine, *id.* at 28-51. With respect to plaintiffs' due process claims, the district court held that the Federal Government's aggregate actions on climate change are subject to "strict scrutiny," *id.* at 29, because plaintiffs have adequately alleged the violation of "an unenumerated fundamental right" to "a climate system capable of sustaining human life," *id.* at 31-32. With respect to

[2] The intervenors have subsequently moved to withdraw from the case. Dkt. 163, 166, 167.

plaintiffs' "public trust" claim, the district court held that, as a matter of "substantive due process," *id.* at 51, plaintiffs have a cause of action under the Constitution to assert claims that the Federal Government has violated "duties as trustee[] by failing to protect the atmosphere, water, seas, seashores, and wildlife," *id.* at 40.

Defendants filed an Answer on January 13, 2017. Dkt. 98. On January 24, 2017, plaintiffs sent a Notice of Litigation Hold and Request for Preservation demanding that defendants preserve, among other things:

> All Documents related to climate change since the Federal Defendants * * * became aware of the possible existence of climate change;
>
> All Documents related to national energy policies or systems, including fossil fuels and alternative energy sources and transportation;
>
> All Documents related to federal public lands, navigable waters, territorial waters, navigable air space or atmosphere; [and]
>
> All Documents related to greenhouse gas emissions or carbon sequestration as those terms apply to agriculture, forestry, or oceans.

Dkt. 121-1 at 5-7.

Consistent with their extraordinarily broad conception of the scope of this case, plaintiffs served Requests for Admissions on the Executive Office of the President and on EPA on January 20, 2017, Dkt. 151-1; filed broad Requests for Production of Documents on all defendants in February and March 2017, Dkt. 151-2, 151-3, 151-4, 151-5, 151-6, 151-7, 151-8; and have announced their intention to depose, *inter alios*:

Rex Tillerson, Secretary of State

Scott Pruitt, Administrator, EPA

Rick Perry, Secretary of Energy

Ryan Zinke, Secretary of Interior

Rule 30(b)(6) witness for Executive Office of the President

Dkt. 151-9.

On March 7, 2017, defendants moved the district court to certify its Opinion and Order of November 10, 2016, for interlocutory appeal pursuant to 28 U.S.C. §1292(b). Dkt. 120. The motion identified controlling questions of law pertaining to plaintiffs' lack of standing and to their failure to state cognizable claims under the Constitution or the public trust doctrine. Defendants also moved to stay the litigation pending consideration of the issues raised by the request under 28 U.S.C. §1292(b). Dkt. 121.

As time passed and discovery deadlines approached, defendants sought expedited rulings on these motions. Dkt. 120 at 2. The district court, however, referred the stay motion to the magistrate judge. The magistrate judge then granted (over defendants' objections) plaintiffs' requests for additional time to respond to the motions. Dkt. 127. The magistrate judge denied the stay motion and recommended denying the §1292(b) motion on May 1, 2017. Dkt. 146 (Attach. 5). Defendants filed objections with the district court on May 5, 2017 and on May 9, 2017, respectively,

again requesting expedited rulings since the court had refused to extend pending discovery deadlines while the motions were being considered. Dkt. 149, 151. On May 31, 2017, the Executive Office of the President was forced to respond to the above-discussed Requests for Admissions. All defendants will be forced to respond in the coming weeks to document requests that seek material dating back over at least five decades.

On June 6, 2017, defendants filed a Notice Regarding Pending Motions reminding the district court of the urgent need for resolution of the defendants' requests for interlocutory appeal and for a stay. Dkt. 171. On June 8, 2017, the district court issued an order adopting the magistrate judge's findings and recommendations, denying the motions to certify for interlocutory appeal, and denying the requested stay. Dkt. 172.[3]

STANDARD OF REVIEW

The Court considers a petition for a writ of mandamus by applying the five factors identified in *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977):

> (1) whether the petitioner has no other means, such as direct appeal, to obtain the desired relief;

[3] The district court declined to dismiss defendants' motion to certify as untimely. Dkt. 172 at 3, n.2. The November 9, 2017, decision denying the motions to dismiss was issued immediately following the election resulting in a new Administration. That, along with the necessarily complex process for approving an appeal by the government, explains why the motion to certify was not filed until March 7, 2017.

(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. 2009) (citing *Bauman*, 557 F.2d at 654-55).[4] Not every factor is relevant in every case, and the writ may issue even if some of the factors point in different directions. *Christensen v. U.S. District Court*, 844 F.2d 694, 697 (9th Cir. 1988). This Court has identified the key factor as whether it is "firmly convinced that [the] district court erred" in issuing the challenged order. *Id.* (quotes, citation omitted).

This Court may also grant mandamus as an exercise its supervisory authority over a district court, to ensure that the judicial system operates in an orderly, efficient manner. *See In re Cement Antitrust Litig.,* 688 F.2d 1297, 1307 (9th Cir. 1982); *see also LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). Mandamus may also be appropriate

[4] The three factors the Supreme Court has established for mandamus relief — (1) the party seeking relief has no other adequate means of relief; (2) the right to relief is clear and undisputable; and (3) issuing the writ is appropriate in the circumstances — overlap substantially with the *Bauman* factors and are also satisfied for the reasons discussed. *See Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004) (*Cheney*).

"to restrain a lower court when its actions would threaten the separation of powers by 'embarrass[ing] the executive arm of the Government * * *.'" *Cheney,* 542 U.S. at 381, quoting *Ex parte Peru*, 318 U.S. 578, 588 (1943).

REASONS FOR GRANTING THE WRIT

I. The district court's order is based on clear error.

In its order denying the motions to dismiss, the district court rendered unprecedented and clearly erroneous rulings. It found that plaintiffs had adequately alleged standing based on alleged injuries that are widely shared by every member of society, cannot plausibly be traced to particular actions of the federal government, and cannot be redressed by an order within the authority of a federal court. It accepted plaintiffs' novel and unprecedented interpretation of the scope of the Due Process Clause as providing an "unenumerated fundamental right" to a global atmosphere capable of sustaining human life with CO2 concentrations that the district court determines are necessary to protect plaintiffs from asserted injury. It improperly found that plaintiffs could proceed on a theory that the President and federal agencies had violated the "public trust" doctrine, even though the Supreme Court has found that such doctrine is purely a creature of state law and even though the Court of Appeals for the District of Columbia Circuit has affirmed the dismissal of nearly-identical claims by some of these same plaintiffs.

These rulings constitute clear and profound error warranting a writ of mandamus directing that the case be dismissed. They also demonstrate a remarkable disregard for essential separation-of-powers limitations on the role of federal courts and call for this Court to exercise its supervisory mandamus powers to end this clearly improper attempt to have the judiciary decide important questions of energy and environmental policy to the exclusion of the elected branches of government.

A. The district court clearly erred by finding that plaintiffs adequately alleged standing based on vague and attenuated allegations of injury, causation and redressability.

The Supreme Court has consistently stressed that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated in non-relevant part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Accordingly, in response to a motion to dismiss, a district court must determine:

> Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Id. at 752. These questions go to the heart of whether an adjudication is proper, and they "must be answered by reference to the Art. III notion that federal courts may exercise power only in the last resort, and as a necessity, * * * and only when

adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Id.* at 738 (inner citations and quote marks omitted); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (standing requirement preserves the separation of powers by "prevent[ing] the judicial process from being used to usurp the powers of the political branches.")

This suit is plainly not "consistent with a system of separated powers" *Allen,* 468 at 752, as it seeks to have a federal court decide broad matters of national energy and environmental policy that are reserved to the elected branches of government, at the behest of plaintiffs who assert highly generalized injuries purportedly resulting from a decades-long failure of Congress and the Executive Branch to adequately address the buildup of CO2 in the global atmosphere.[5] The Supreme Court has made clear that Article III does not permit suits that seek "broad-scale investigation" into

[5] The district court recognized that "[t]his lawsuit challenges decisions defendants have made across a vast set of topics," including "whether and to what extent to regulate CO2 emissions from power plants and vehicles, whether to permit fossil fuel extraction and development to take place on federal lands, how much to charge for use of those lands, whether to give tax breaks to the fossil fuel industry, whether to subsidize or directly fund that industry," and many others. Dkt. 83 at 3-4. But rather than recognizing that these broad policy questions are for the elected branches of government, the court found them to be appropriate for judicial determination because "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Id.* at 31, 32. As shown *infra* at 22-26, this was clear error.

government functions "with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate," because "this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action." *Laird v. Tatum*, 408 U.S. 1, 14–15 (1972). Contrary to the district court's assumption, no additional fact finding could possibly repair the fundamental defects that foreclose standing in this case. The refusal to dismiss on grounds of lack of standing was clear error.

1. Plaintiffs did not allege a cognizable injury that is particularized and concrete.

The Supreme Court has consistently "stressed that the alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). This requires that "the plaintiff have suffered 'an invasion of a legally protected interest which is * * * concrete and particularized,' *Lujan, supra*, at 560 * * * and that the dispute is 'traditionally thought to be capable of resolution through the judicial process,' *Flast v. Cohen*, 392 U.S. 83, 97 (1968)." *Id.* As the Court explained in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21 (1974):

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful.

See also Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) ("[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way'").

The allegations of injury accepted by the district court as adequate to survive the motion to dismiss fell far short of these Article III requirements. The allegations of the complaint involve generalized phenomena such as drought, floods, rising sea levels, reduced agricultural productivity, and fire-prone forests that may affect plaintiffs, but in the same way and to the same extent as they may affect everyone else in the world. Dkt. 7 ¶¶ 16-91. These generalized harms are allegedly caused or exacerbated by a "global" increase in atmospheric CO2 that plaintiffs allege has resulted, in part, from the "aggregate" actions and inactions of the federal government over six decades of implementing congressional policy concerning energy development and environmental protection. *Id.* at ¶129 (defendants "aggregate actions * * * have substantially caused the present climate crisis"); *see also* ¶275. These allegations do not plausibly allege a cognizable injury that is "concrete" and "particularized."

Contrary to the district court, nothing in *Massachusetts v. EPA*, 549 U.S. 497 (2007), supports standing based on non-specific allegations of harm allegedly resulting from decades-long failures by the federal government to enact and implement policies that would lessen the buildup of CO2 in the global atmosphere. In that case, the Court permitted Massachusetts to pursue a claim involving an alleged failure to

comply with a specific provision of the Clean Air Act because it had a "stake in protecting its quasi-sovereign interests" through the exercise of a "procedural right" provided in the statute. *Id.* at 518-20. As this Court has expressly recognized, the standing holding in *Massachusetts v. EPA* does not apply where "the present case neither implicates a procedural right nor involves a sovereign state." *Washington Environmental Council v. Bellon,* 732 F.3d 1131, 1145 (9th Cir. 2013) ("*Bellon*"). There is no equivalent statutory provision giving these plaintiffs a protectable interest in seeking relief from effects allegedly resulting from the aggregate effect of governmental actions and inactions over many decades relating to CO2. And whereas Massachusetts' claim "turn[ed] on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court," 549 U.S. at 516, plaintiffs' claims here do not rely on any statute but instead ask the court to make essentially legislative determinations regarding energy, transportation, public lands and pollution control policies, matters which are far removed from a dispute that is "traditionally thought to be capable of resolution through the judicial process." *Raines, supra,* 521 U.S. at 819.

2. Plaintiffs failed to adequately allege causation.

The Supreme Court observed in *Allen* that allowing standing where the alleged injury could not fairly be traced to a particular government action "would pave the

way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." 468 U.S. at 759-60. That describes this case, where plaintiffs rely on the "aggregate" of everything the federal government has done (or not done) over the past six decades relating to CO2 emissions as the "cause" of their asserted injuries. *See* Dkt. 83 at 14 (district court finds that "the theory of plaintiffs' case is * * * that defendants' *aggregate actions* violate their substantive due process rights and the government's public trust obligations") (emphasis in original).

It is impossible to determine from the complaint what role particular actions of each defendant agency or of various presidents (over decades) supposedly has played or will play in the creation of the alleged injuries, as opposed to the role played by third parties not before the court. Where "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen*, 468 U.S. at 758). The plaintiffs do not allege that they are the object of any government action, but instead that the federal government has engaged in policies that encourage private actors to develop and use fossil fuels, or done too little to regulate the emission of CO2. Where "causation and

redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction — and perhaps on the response of others as well — it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562.

That requirement is rendered meaningless if plaintiffs simply lump together everything the federal government does or does not do that relates to fossil fuels or to the emission of CO2 and then allege that the "aggregate" effect of government conduct and private conduct they wish to see regulated causes them injury through climate change. The district court found it sufficient for plaintiffs to simply allege that "defendants have the power to increase or decrease" CO2 emissions from fossil fuel combustion through policies relating to fossil fuel development and that "DOT and EPA have broad power to set emissions standards" with respect to the transportation and power sectors of the economy. Dkt. 83 at 25-26. But a central part of the Article III inquiry is the requirement that a plaintiff identify *with particularity* a government failure that is a meaningful cause of the plaintiff's injury. That inquiry cannot be avoided by the expedient of aggregating a vaguely-defined category of government actions and inactions relating to vast sectors of the American economy. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("Standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to

complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review.")

The fundamental deficiency in plaintiffs' causation showing is confirmed by this Court's decision in *Bellon*, *supra,* 732 F.3d 1131. Although the plaintiffs in *Bellon*, unlike plaintiffs here, had alleged a specific failure by an agency — not setting standards for CO2 emissions from refineries — that allegation was insufficient for causation. This Court made clear that where standing rests on alleged climate change injuries, "[t]o satisfy the causality element for Article III standing, Plaintiffs must show that the injury is causally linked or 'fairly traceable' to the Agencies' alleged misconduct, and not the result of misconduct of some third party not before the court." *Id.* at 1141, citing *Lujan*, 504 U.S. at 560–61. As the Court noted, "simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing." *Id.* at 1142-43 (quote marks and citation omitted). Plaintiffs here rely on a far more attenuated and diffuse chain of causation, one that fails to point to a specific alleged failure to regulate but relies instead on alleged but unidentified failures over many decades. Contrary to the district court's assumption (Dkt. 83 at 25), this is not a failure that can be corrected by allowing plaintiffs to conduct factual discovery. Basing causation on the "aggregate" effect of all federal policies relating to fossil fuel

production and overall regulatory policy toward CO2 emissions is a fundamental legal flaw that no factual showing could possibly cure.[6]

3. Plaintiffs failed to adequately allege redressability.

The district court similarly assumed that plaintiffs could properly allege redressability by aggregating all sources of CO2 emissions that have any connection with the federal government or federal lands, and then alleging that reducing that aggregate quantity by broad relief directed at the federal government would lessen their injuries. Dkt. 83 at 27 ("If plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO2 and slow climate change, then plaintiffs' requested relief would redress their injuries"). This approach is clearly at odds with *Allen* and *Lujan,* as well as with *Lewis v. Casey*, 518 U.S. at 358 n.6, which affirmed that standing focuses on redress of *particular* administrative

[6] Contrary to the district court (Dkt. 83 at 26), *Massachusetts v. EPA* does not support causation here. The State there alleged that its injuries were caused by a particular failure of the defendant agency (EPA's denial of a rulemaking petition asking for regulation of greenhouse gas emissions under a specific section of the Clean Air Act), and that this failure to follow a statutory duty led to significantly increased greenhouse gas emissions from a specific source (new motor vehicles). 549 U.S. at 510-14, 523-24. Here, the complaint simply lists examples of various regulations, orders, actions and inactions, and then alleges that the entire course of federal government conduct in past decades has caused plaintiffs' injuries.

deficiencies, rather than "confer[ing] the right to complain of *all* administrative deficiencies."

Plaintiffs cannot establish redressability by the simply alleging that the district court can order the federal government to take "'action necessary to ensure that atmospheric CO2 is no more concentrated than 350 ppm by 2100.'" Dkt. 83 at 28 (quoting Dkt. 7 ¶12). The complaint never alleges that the agencies have statutory authority for the sweeping remedial action plaintiffs assert is necessary to remedy their harms, and the district court specifically noted that plaintiffs' theory of the case "requires no citation to particular statutory or regulatory provisions." Dkt. 83 at 14.[7] Nor, under the Constitution's framework of separation of powers, could the court compel Congress to enact the additional authority that would be needed to provide the requested relief.

Equally problematic is the erroneous assumption of the district court that this relief could be obtained against the President. *See, e.g., Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) ("this court has no jurisdiction of a bill to enjoin the President

[7] In a recent filing, plaintiffs claim that they "have adequately alleged existing statutory and regulatory authority under which Federal Defendants can provide the relief requested." Dkt. 129 at 25, citing Dkt. 7 at ¶¶ 98-130, 180, 183, 265, 266. Nothing in those paragraphs of the complaint identifies *any* statutory or regulatory authority that would permit the court to order defendants "to prepare a consumption-based inventory of U.S. CO2 emissions," or "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system." Dkt. 7 at 94.

in the performance of his official duties"). "There is longstanding legal authority that the judiciary lacks the power to issue an injunction or a declaratory judgment against the co-equal branches of government * * *." *Newdow v. Bush*, 355 F. Supp. 2d 265, 280-82 (D.D.C. 2005) (declining to carve an exception to Presidential immunity "where [the President] is claimed to have violated the Constitution"); *see also Clinton v. Jones*, 520 U.S. 681, 718-19 (1997) (Breyer, J. concurring) (acknowledging "the apparently unbroken historical tradition * * * implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (Scalia, J. concurring)).

Plaintiffs' redressability allegations thus also clearly fail to establish an Article III controversy: plaintiffs have failed to identify specific agency actions or inactions that could be redressed by a federal court and they have failed to identify any statutory authority for an order directing the defendants to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Dkt. 7 at 94.

B. The district court clearly erred by allowing plaintiffs to proceed on their claim of a fundamental right under the due process clause.

Even if plaintiffs had shown that this case was within the district court's jurisdiction under Article III, it should have been dismissed for failure to state a claim upon which relief can be granted. "While a complaint attacked [under] Rule 12(b)(6) * * * does not need detailed factual allegations, a plaintiff's obligation to provide the

grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and brackets omitted). The complaint must set forth facts supporting a plausible, not merely possible, claim for relief. *Id.* The complaint here clearly failed to do that.

1. There is no basis in law for a due process right to a particular climate system.

The district court recognized the unprecedented nature of its ruling that plaintiffs could pursue a due process claim against the federal government based on a global phenomenon like climate change. The court nevertheless allowed the case to go forward because "[p]laintiffs purport to challenge the government's failure to limit third-party CO2 emissions pursuant to the danger creation *DeShaney* exception." Dkt. 83 at 33. The district court's attempt to analogize this case involving the entire federal government's alleged contribution to global levels of CO2 to cases involving actions of police officers that placed individual plaintiffs in direct and immediate peril is riddled with error.

No federal court at any level has ever found a right to be protected from a general environmental phenomenon like climate change, and many courts have dismissed similar arguments asserting constitutionally-protected rights to various aspects of the environment. *See Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d

1222, 1237-38 (3d. Cir. 1980) ("[i]t is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment"), *dismissed and vacated in part on other grounds sub nom. by Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-04936 CRB, 2008 WL 859985, at *6-7 (N.D. Cal. Mar. 28, 2008) ("Plaintiffs also allege deprivation of the right to be free of climate change pollution, but that right is not protected by the Fourteenth Amendment [Due Process Clause] either."); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court has not found a guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution."); *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 720-21 (E.D. La. 1976) ("[T]he courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments"), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

The consistent and long-standing refusal of courts to accept a due process right to environmental quality is required by the Supreme Court's cautious approach to considering novel due process claims and its "insistence that the asserted liberty interest be rooted in history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). In *Washington v. Glucksberg*, the Court emphasized that federal courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into"

judicial policy preferences, and lest important issues be placed "outside the arena of public debate and legislative action." 521 U.S. 702, 720 (1997); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'") (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

Neither plaintiffs nor the district court made any attempt to show that the concept of a fundamental right to a stable climate system is "deeply rooted in our legal tradition," as required by *Glucksberg*, 521 U.S. at 722. The district court cited only a single opinion from a Phillipines court to show judicial support for a fundamental right to a "'balanced and healthful ecology.'" Dkt. 83 at 50, citing *Minors Oposa*, 33 I.L.M. at 187; *see also id.* at 32. This is plainly insufficient to show that an asserted right under the United States Constitution to a stable climate system is "deeply rooted in our legal tradition." *See Raich v. Gonzales*, 500 F.3d 850, 865 (9th Cir. 2007).

The interest in a stable climate system is unlike any of the fundamental liberty interests the Supreme Court has accepted. It has no impact on personal autonomy, unlike restraints on the ability to marry. While the plaintiffs and the district court rely on the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015), recognizing a fundamental right to same-sex marriage, that recognition was based on prior decisions

establishing that "[t]he fundamental liberties protected by [the Due Process] Clause include * * * certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id.* at 2597. While *Obergefell* extended that existing line of cases to recognize a fundamental right to marry for same-sex couples, the "fundamental right" found by the district court here has no relation to any subject that has previously been afforded heightened constitutional protection.

The limited due process right recognized by this Court in several post-*DeShaney* cases is grounded in the peculiar duty a governmental body takes on when it has control over a particular individual's person and places him or her in imminent peril. *See Penilla v. City of Huntington Park,* 115 F.3d 707, 710 (9th Cir. 1997) (cause of action for due process violation arose where officers "took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 911 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; they then locked the door and left him there alone * * * after they had examined him and found him to be in serious medical need"); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (due process cause of action arose where officer arrested a female driver, impounded the car, and left driver by the side of the road at night in a high-crime area). This duty of officers not to affirmatively place an individual in a position of imminent risk with deliberate indifference to his or her safety can be

traced to common law roots. But there is no basis in common law or elsewhere for a duty to protect persons (which would presumably include all members of the general population of the United States) against whatever perils are produced by emissions of CO2.[8]

2. Plaintiffs failed to identify any cause of action for their claims.

Neither plaintiffs nor the district court identified a cause of action authorizing suits against federal agencies or the President for declaratory and injunctive relief related to this alleged right. When the district court asserted that "the Fifth Amendment * * * provides the right of action" for both the due process and the public trust claims, it cited only cases upholding a cause of action for damages against federal officers for violations of constitutional rights. Dkt. 83 at 51, citing *Davis v. Passman*, 442 U.S. 228, 245 (1979), and *Carlson v. Green*, 446 U.S. 14, 18 (1980). While the Supreme Court has in limited circumstances implied causes of action against individual federal officers in their personal capacities, in order to vindicate clearly-

[8] Nor have plaintiffs properly alleged another prerequisite to a substantive due process claim: that the challenged conduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848 n. 8 (1998). The complaint cites only instances of federal agencies carrying out statutorily-authorized policies that plaintiffs believe are too encouraging of energy production and give too little consideration to climate change. Such official action that is merely inconsistent with plaintiffs' policy preferences is not remotely the sort of conduct that rises to the conscience-shocking level that can support a due process claim. *See, e.g., Lombardi v. Whitman*, 485 F.3d 73, 84 (2d Cir. 2007).

established constitutional rights, it has emphasized that such implication should be sparing, and that "such power is to be exercised in the light of relevant policy determinations made by the Congress," and only where no other alternative form of relief is available. *Bush v. Lucas*, 462 U.S. 367, 373-744 (1983); *see also Davis,* 442 U.S. at 245.

No court has ever recognized an implied Fifth Amendment cause of action directly against the federal government itself that would allow plaintiffs to seek, through injunctive and declaratory relief, a fundamental re-ordering of national priorities to address an environmental problem. Any such implied cause of action would run contrary to the consistent refusal of Congress to authorize causes of action for programmatic challenges. As the district court recognized, Dkt. 83 at 52, plaintiffs could not have brought this broadly programmatic challenge under any statutorily-created causes of action such as the APA. *See Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 892–93 (1990) ("it is at least entirely certain that the flaws in the entire 'program' * * * referenced in the complaint, and presumably actions yet to be taken as well * * * cannot be laid before the courts for wholesale correction under the APA"); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("'respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made'") (quoting *Lujan,* 497 U.S. at 64-65). Nor could plaintiffs have

invoked the narrow and specific Clean Air Act cause of action at issue in *Massachusetts v. EPA,* 549 U.S. at 519-20. The district court's failure to dismiss these programmatic claims here further warrants a writ of mandamus.

C. The district court clearly erred in holding that plaintiffs stated an actionable "public trust" claim against the federal government.

As with its due process holding, the district court was unable to point to any authority supporting the proposition that the "public trust" doctrine authorizes suit against the federal government writ large to require it to protect the global atmosphere or other alleged public trust resources. Moreover, plaintiffs' public trust theory was convincingly rejected in a recent, nearly-identical suit brought in the District of Columbia by some of the same individuals who are plaintiffs and their counsel here. In *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd, Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x 7 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 774 (2014), plaintiffs alleged that several Executive Branch departments and agencies had violated their alleged fiduciary duties to preserve and protect the atmosphere as a commonly-shared public resource under the public trust doctrine. They invoked the federal question statute, 28 U.S.C. §1331, as the basis for subject matter jurisdiction over this "public trust" claim. The district court in *Alec L.* found no support for the assertion that the public trust doctrine or claims based on it arise under the Constitution or laws of the United States. The court cited the Supreme Court's

reaffirmation in *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012), that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution."

The district court in *Alec L.* also ruled that even if the public trust doctrine had provided a claim under federal law at one time, that claim has been displaced by federal regulation, specifically the Clean Air Act. The district court relied for this alternative ruling on *American Electric Power Company v. Connecticut*, 564 U.S. 410, 423-24 (2011), where the Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."

The D.C. Circuit affirmed in an unpublished memorandum decision, concluding that the district court had correctly dismissed the suit for lack of subject matter jurisdiction since the public trust doctrine is a matter of state law, not federal law. *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x at 8, citing *PPL Montana*. This Court has also interpreted *PPL Montana* as establishing that the public trust doctrine is purely a matter of state law, and as such does not (for example) restrict the power of the United States to condemn a parcel of former tidelands in fee. *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038-39 (9th Cir. 2012).

The district court recognized that "*Alec L.* was substantially similar to the instant action." Dkt. 83 at 45. Nevertheless, it was "not persuaded by the reasoning

of the *Alec L.* courts," because, in its view "a close reading of *PPL Montana* reveals that it says nothing about the viability of federal public trust claims." *Id.* at 46. But although *PPL Montana* did not involve a federal public trust claim, its holding that "the public trust doctrine remains a matter of state law" clearly precludes the possibility that the doctrine could form the basis for suit against the federal government in federal court.

Even if the public trust doctrine could be invoked against federal agencies acting pursuant to statutes, the district court cited no case that had ever applied the doctrine beyond the context of tidelands and navigable freshwater bodies. The Supreme Court has always addressed the public trust doctrine in connection with state management of coastal regions and navigable waterways. *See, e.g., PPL Montana*, 132 S. Ct. at 1235; *Philipps Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988). The district court attempted to shoehorn plaintiffs' claim into the traditional scope of the public trust doctrine by finding that, "[b]ecause a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets." Dkt. 83 at 42 (footnote omitted). But there is no support in the public trust law of any state for bringing a claim based on allegations that depend on such an indirect chain of causation; *i.e.*, that CO2 emissions from challenged actions and non-actions, when combined with all other worldwide emissions of CO2 over decades, leads to warmer and more acidic waters in the earth's

vast oceans, which in turn might affect particular coastal areas that may be subject to the public trust doctrine.[9]

II. Mandamus is warranted to confine the district court to the lawful exercise of its jurisdiction.

Even if it were not so plain that the district court committed clear errors in denying the motion to dismiss, it would be appropriate for this Court to exercise its supervisory mandamus authority over the district court "to ensure that the judicial system operates in an orderly and efficient manner." *See In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982); *see also LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). The district court's rulings in this case show a clear and continuing intent to usurp the power of Congress to determine national policy regarding energy development, use of public lands, and environmental protection by constructing out of whole cloth a novel constitutional right to a "climate system capable of sustaining human life," thus allowing the plaintiffs and the court to ignore statutory limits and directions. *See, e.g.,* Dkt. 83 at 52. The rulings similarly show a clear intent to usurp the authority of the President to "take Care that the Laws be faithfully executed," Art. II, § 3, and of the federal agencies to exercise the authority that Congress has

[9] Even scholars who are sympathetic to the broad goals pursued by the plaintiffs here acknowledge that plaintiffs' arguments "take the public trust doctrine far beyond its historic moorings." Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENVTL. L. 1139, 1152 (2015).

delegated to administer statutes governing the federal government's approach to energy and environmental policy. This usurpation of congressional, presidential and agency authority is not correctable by way of an appeal after final judgment, and so should be corrected by issuance of a writ of mandamus. *See Perry v. Schwarzenegger,* 591 F.3d at 1157-59 (supervisory mandamus appropriate where important constitutional interests could be compromised before appellate review is available).

III. Defendants have no other means of obtaining immediate review needed to avoid a serious intrusion on the separation of powers, and without action by this court the defendants will be prejudiced in a way not correctable on appeal.

The defendants have no adequate means, other than by a writ of mandamus, to obtain needed immediate review of these significant rulings and relief from onerous and disruptive discovery based on claims that have no basis in law. This Court found that a writ of mandamus was appropriate in similar circumstances where a district court denied a motion to dismiss an action against foreign banks on grounds of the Act of State doctrine, refused to certify that decision for interlocutory appeal pursuant to 28 U.S.C. §1292(b), and allowed discovery against the banks to proceed. *Credit Suisse v. United States District Court for the Central District of California,* 130 F.3d 1342, 1346 (9th Cir. 1997) ("*Credit Suisse*"). After finding that "[t]he Banks thus have no other means of obtaining immediate review of the denial of their motion to dismiss," the Court issued a writ of mandamus directing the district court to vacate its denial of the

Banks' motion to dismiss and to dismiss the action. *Id* at 1348. Here as well, defendants have no other means of obtaining immediate review of the denial of the motion to dismiss, and the burden and cost of complying with the extraordinarily intrusive and inappropriate discovery sought by plaintiffs cannot be corrected in a subsequent appeal from a final judgment. *See also Medhekar v. U.S. Dist. Court for the N. Dist. of California*, 99 F.3d 325, 326 (9th Cir. 1996) (finding second *Bauman* factor satisfied since "the harm sought to be avoided, the burden and cost of providing the initial disclosures, cannot be corrected in a subsequent appeal from a final judgment in the absence of mandamus relief").

The extraordinary scope of this litigation and the enormous burden of discovery became evident with plaintiffs' January 24, 2017, litigation hold demand letter, which demanded that all defendants (including the President) preserve "[a]ll Documents related to climate change," "[a]ll Documents related to national energy policies or systems," "[a]ll Documents related to federal public lands, navigable waters, territorial waters, navigable air space or atmosphere;" and "[a]ll Documents related to greenhouse gas emissions or carbon sequestration as those terms apply to agriculture, forestry, or oceans," going back at least six decades. Dkt. 121-1 at 5-6. The intrusion on the separation of powers has been vividly highlighted by plaintiffs' requests for production of documents, none more so than the RFPs directed at the

President.[10] That RFP, as revised on May 19, 2017, seeks a vast array of documents and communications relating to climate change from the current administration and every previous administration going back to the Administration of President Lyndon Johnson. *See* Dkt. 159-6 at ¶¶1-29. Many of the requests relate to sensitive internal workings of the Office of the President, including the seeking of advice from agency and department heads (*e.g.,* ¶¶ 8-10), and communications relating to international negotiations (¶¶ 25-29).[11] These requests seriously infringe upon the President's constitutional authority to require opinions from department heads and to conduct foreign relations.

As the Supreme Court made clear in *Cheney*, mandamus is appropriate where discovery threatens to disrupt the confidentiality that is essential to Presidential or Vice-Presidential decision-making, or to burden the Office of the President in ways

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[10] Plaintiffs therein define "the President" broadly to include "the President, Vice President, Executive Office of the President, the President's Cabinet, Presidential advisory boards, [and] Presidential and Vice Presidential task forces," as well as the Council on Environmental Quality, the Office of Management and Budget, and Office of Science and Technology Policy, along with "all current and former principals, employees, agents, attorneys, consultants and other representatives of the President." RFP at 3-4.

[11] Similarly, the Revised RFP to the State Department dated May 19, 2017, demands "Each DOCUMENT that REFERS, RELATES, REGARDS, OR PERTAINS TO COMMUNICATIONS between Secretary of State Rex Tillerson and President Donald Trump on the issue of CLIMATE CHANGE" as well as on "the issue of ENERGY POLICY" since January 20, 2017, and communications and documents relating to a host of international negotiations going back as far as 1979. Dkt. 159-3 at ¶¶ 9-10, 17-48.

that distract from the performance of constitutional duties. 542 U.S. at 381-82 ("the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice,' and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties") (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)). In *Cheney,* the Court ruled that the court of appeals erred in concluding it lacked authority to issue mandamus regarding discovery requested by the Sierra Club and others against Vice President Cheney relating to the National Energy Policy Development Group; the Court emphasized in particular that "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President." *Id.* at 382.[12] The plaintiffs' discovery efforts here constitute an even broader threat of disruption to confidentiality than was present in *Cheney,* since this case involves not just a specific Vice-Presidential task force, but everything having to do with climate change over the course of many decades.

[12] On remand, the Court of Appeals granted the petition for mandamus and ordered the case dismissed. *In re Cheney*, 406 F.3d 723, 731 (D.C. Cir. 2005).

Plaintiffs' discovery requests directed at the federal agencies are equally inappropriate and disruptive. Plaintiffs have made clear that they intend to seek discovery regarding virtually all of the federal government's activities relating to control of CO2 emissions, fossil fuels production and transportation, alternative energy sources, and public lands, transportation and energy policy. Thus, plaintiffs have stated (Dkt. 159 at 6):

> The discovery phase of this case will develop a factual record, in part, establishing with scientific and factual certainty: (1) the causal mechanisms underlying climate change; (2) the global and national injuries and unique personal injuries to Plaintiffs resulting from climate change; (3) the degree to which Federal Defendants' actions have caused those impacts; (4) the factual context within which Federal Defendants have taken, authorized, and permitted the actions resulting in those impacts; and (5) the degree to which Federal Defendants can mitigate and reverse those impacts through exercise of their authority over our nation's energy system.

Because they are proceeding on clearly erroneous theories as to the sort of claims that plaintiffs may bring in this context, neither the magistrate judge nor the district court can be expected to rein in this improper discovery. Thus, in recommending denial of the motion to certify an interlocutory appeal, the magistrate judge specifically cited an alleged need "to develop the record," reasoning that that since "[t]he plaintiffs contend that the federal defendants are denying their basic right to a habitable climate system, * * * [t]he fossil fuel production regulatory practices of federal defendants both historically and going forward will provide an evidentiary framework for their claims." Dkt. 146 at 10, 11. The district court adopted the

magistrate's findings *in toto*. Dkt. 172. This extraordinarily broad discovery based on clearly incorrect legal theories is already proving to be highly time-consuming and resource-intensive and is significantly affecting the operations of the defendant agencies. The damage this will do to vital federal operations cannot be remedied by an appeal from a final judgment.

IV. The order raises new and important problems and issues of first impression.

The district court conceded that "plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws." Dkt. 83 at 52. But in the court's view, "that argument misses the point," which is that "[t]his action is of a different order than the typical environmental case." *Id.* Since the plaintiffs here are alleging that the defendants' actions and inactions "profoundly damaged our home planet," then "whether or not they violate any specific statutory duty" is simply irrelevant. *Id.* The court conceded that its ruling was "unprecedented," but ultimately concluded that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."

The district court is the first in the country to recognize this "different order" of case that permits a federal court to run roughshod over both judgments of Congress embodied in statutes and limits on justiciability established over decades of

Supreme Court precedents. The need for this Court to intervene through a writ of mandamus is clear.

V. A stay of proceedings is warranted.

Defendants also ask this Court to exercise its authority under the All Writs Act to stay district court proceedings while it considers this mandamus petition. *See* 9th Cir. General Order 6.8a (motions panel "may also issue a stay or injunction pending further consideration of the application").[13] Whether to issue a stay is "an exercise of judicial discretion * * * to be guided by sound legal principles," *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (internal citations omitted), based on the following factors: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (*Nken* requires a showing of irreparable harm, but applies a balancing test showing "that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily

[13] Fed. R. App. P. 8(a)(1) does not expressly refer to a stay pending review of a petition for a writ of mandamus under Fed. R. App. P. 21. Nevertheless, defendants sought a stay pending resolution of a requested interlocutory appeal, which was denied by the magistrate. Dkt. 146. Defendants renewed that request for stay in their objection to the magistrate's denial of stay, Dkt. 151, but the district court denied that request in its June 8, 2017, order. Dkt. 172 at 4.

against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor"). Each of these factors counsels in favor of a stay.

The arguments set out above show that the defendants have a strong likelihood of success in obtaining mandamus. Absent a stay, the President and the federal departments and agencies that are subject to the discovery propounded by plaintiffs will be irreparably harmed because of the disruption to important functions that this sweeping and improper discovery is causing. A stay of proceedings during the pendency of this mandamus petition is not likely to appreciably harm plaintiffs, since their alleged injuries stem from the cumulative effects of CO2 emissions from every source in the world over decades; whatever additions to the global atmosphere that may somehow be attributed to the defendants over the time it takes to resolve the petition are plainly *de minimis* and not a source of irreparable harm. Finally, the public interest strongly favors a stay, because absent such relief the Executive Branch and its agencies (including the Executive Office of the President) would be subject to continued discovery and forced to divert substantial resources away from their essential function of "faithfully execut[ing]" the law. U.S. CONST. art. II, § 3.

CONCLUSION

The Court should grant a stay of proceedings in the district court while it considers this petition. The petition should be granted and the district court directed to vacate its November 10, 2016 Order and dismiss the case.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases.

/s/ David C. Shilton
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CERTIFICATE REGARDING COMPLIANCE WITH FRAP 21(d)

Petitioners are today filing a motion for permission to file an over-length petition for mandamus and request for stay. This petition for mandamus and request for stay contains 9,926 words, exclusive of the material specified in FRAP 32(f).

/s/ David C. Shilton
David C. Shilton

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. On this date, a notice of filing of this petition, including the petition itself, will be lodged in the district court in the underlying matter, and service in compliance with Federal Rule of Appellate Procedure 21(a)(1) will be accomplished through the district court's CM/ECF system. All counsel in this case are participants in the district court's CM/ECF system. In addition, a courtesy copy of the foregoing brief has been provided via e-mail to the following counsel:

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Exhibit B

Answer of Real Parties in Interest to Petition for Writ of Mandamus, Case No. 17-71692, Doc. 14-1 (Aug. 28, 2017).

Case No. 17-71692

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-TC-AA (D. Or.)

ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Real Party 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

Real Parties in Interest ("Plaintiffs") brought this constitutional case against Petitioners ("Defendants") because the affirmative aggregate and systemic actions of Defendants infringe Plaintiffs' fundamental rights to life, liberty, and property. Defendants admit their actions imperil Plaintiffs with "dangerous, and unacceptable economic, social, and environmental risks," and that "the use of fossil fuels is a major source of [greenhouse gas] emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path." Dkt. 98 ¶¶ 7, 150.[1] Depositions of Defendants' witnesses independently confirm that current levels of atmospheric CO_2 and climate change are "dangerous," and that our nation is in an "emergency situation." Declaration of Julia A. Olson ("Olson Decl.") ¶¶ 53-54. In his deposition, the head of the federal climate research program testified he is "fearful," that "increasing levels of CO_2 pose risks to humans and the natural environment," and that he does not "think current federal actions are adequate to safeguard the future." *Id*. at ¶ 54.

In spite of these threats, Defendants claim this Court's intervention is necessary solely due to discovery issues, which they erroneously characterize as burdensome. However, the parties have been meeting and conferring, and Plaintiffs are reasonably responding to Defendants' concerns and assertions of privilege. No

[1] Plaintiffs refer to the District Court docket as "Dkt." and to the Ninth Circuit docket as "Doc."

[2] The National Association of Manufacturers, the American Fuel & Petrochemical

discovery motions have been filed and no discovery orders have been entered. Plaintiffs have no interest in overburdening Defendants or in drawing out discovery disputes given the urgency of the climate crisis. They intend to begin trial, as ordered by the District Court, on February 5, 2018.

Defendants also fundamentally mislead this Court by suggesting that Plaintiffs' case hangs on an unenumerated right supposedly recognized for the first time by the District Court. That is false. In order to grant the writ and dismiss this case, this Court would also need to reverse over a hundred years of Supreme Court jurisprudence and find the Fifth Amendment does not provide Americans the fundamental rights to personal security, property, life, or family autonomy and security. The radical request made by Defendants seeks to deny these children access to their third branch of government when they allege infringement of fundamental rights long recognized by the judiciary and when Defendants themselves admit the threat to Plaintiffs' lives and security. This case raises constitutional questions that must first be answered by the very capable District Court in the ordinary course of judicial review. When Defendants admit the climate system is in the "danger zone," unsupported claims of inconvenient discovery do not warrant staying this constitutional case.

STATEMENT OF THE RELEVANT FACTS

On August 12, 2015, 21 youth Plaintiffs brought this action against the United States government. Compl., Dkt. 1. Plaintiffs allege Defendants have known for decades that CO_2 pollution has been causing catastrophic climate change, and that continuing to burn fossil fuels would destabilize the climate system and threaten the personal security, lives, liberties, and property of our nation's present and future generations, including Plaintiffs. First Am. Compl. ("FAC") ¶¶ 1, 279, Dkt. 7. Despite their knowledge, Defendants affirmatively acted, and continue to act, to promote and allow increasing extraction, production, consumption, transportation, and exportation of fossil fuels, as part of the national energy system, which has resulted in dangerous levels of carbon pollution.[2] FAC ¶¶ 5, 98, 105, 111, 114, 117, 119, 121, 123, 125, 129, 130, 151-200.

In their Answer, Defendants made significant admissions, such as "'business as usual' CO_2 emissions" imperil Plaintiffs with "dangerous, and unacceptable economic, social, and environmental risks." Dkt. 98 at ¶ 150. Dr. Michael Kuperberg, Executive Director of the U.S. Global Change Program, testified: "our

[2] The National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute (collectively, "Intervenors") successfully intervened in this action. Dkt. 14, 15, 50. After losing their motions to dismiss and for interlocutory appeal, and faced with answering Requests for Admissions, Intervenors subsequently withdrew from this case. Dkt. 182; Olson Decl. ¶ 24-25.

country is currently in a danger zone when it comes to our climate system." Olson Decl. ¶ 54. Plaintiffs seek an order declaring their fundamental rights and the infringement thereof and compelling Defendants to prepare a national emissions inventory and plan to protect our nation's climate system, according to factual findings on the best available science. Dkt. 7.

After reasoned analyses on four occasions, two judges rejected the merits of Defendants' Motion to Dismiss. *See* Dkts. 68, 83, 146, 172. On April 8, 2016, Magistrate Judge Coffin recommended denying Defendants' Motion to Dismiss. Dkt. 68. On November 10, District Court Judge Aiken denied Defendants' Motion to Dismiss. Dkt. 83. Nearly two months after Defendants answered the FAC, Dkt. 98, and four months after Judge Aiken's Order, on March 7, 2017, Defendants moved to certify the November 10 Order for interlocutory appeal, arguing for a stay pending interlocutory review. Dkts. 120, 121. Judges Coffin and Aiken both rejected these motions. Dkts. 146, 172.

On June 9, 2017, Defendants filed this Petition. Doc 1-1. On June 19, Plaintiffs opposed Defendants' request for stay. Doc. 4. On July 25, this Court issued a temporary stay, Doc. 7, and on July 28, ordered Plaintiffs to respond to Defendants' Petition, Doc. 8.

ARGUMENT

I. THE DISCOVERY PROCESS IN THIS CASE DOES NOT WARRANT THE EXTRAORDINARY REMEDY SOUGHT.

Defendants' claim of "an unbounded discovery process" is factually inaccurate and fails to justify mandamus. Pet. at 2. The discovery propounded does not present a "staggering burden," as the parties have met and conferred to resolve discovery issues without the need for court intervention. *Id.*; Olson Decl. ¶¶ 8-10. To date, the District Court has issued ***no*** discovery orders to Defendants. *Id.* at ¶ 3. Defendants have presented ***no*** evidence demonstrating any harm from participating in discovery or that the District Court will not properly manage discovery. A purely hypothetical "discovery burden" does not justify mandamus relief.

A. Defendants Mischaracterize the Status of Discovery.

Defendants omit that the parties have successfully met and conferred to resolve all discovery disputes without the need for motion practice or formal court intervention. *Id.* at ¶ 3-10. In addition, Intervenors withdrew from the case on June 28, 2017, substantially narrowing the scope of discovery that Plaintiffs were required to conduct. Defendants, unlike Intervenors, admit many of the core facts of the case.[3] *Id.* at ¶¶ 25-27; Dkt. 182. Finally, the District Court has successfully

[3] The District Court repeatedly directed Intervenors to take a position on Defendants' admissions to narrow the issues for trial. Olson Decl. ¶¶ 12-27. Intervenors refused, necessitating more expansive discovery. *Id.*; Dkt. 98; Dkt. 146 at 2-4.

used monthly status conferences to facilitate informal resolution of potential discovery disputes. *Id.* at ¶ 5.

Defendants overstate the significance of Plaintiffs' standard-practice Notice of Litigation Hold and Request for Preservation served on January 24, 2017. *See* Pet. at 33; *see also* Olson Decl. at ¶¶ 32-34. This letter was prompted by news reports of the Trump Administration removing and destroying records regarding climate change. *Id.* at ¶ 32. Plaintiffs repeatedly assured Defendants the January 24 letter is not a request for production. *Id.* at ¶ 33. Ultimately, Defendants promised Plaintiffs the relevant evidence was being preserved and there are no ongoing concerns regarding the January 24 letter. *Id*. at ¶ 34.

Plaintiffs have taken extraordinary efforts to narrow the scope of discovery. *Id.* at ¶ 3. First, Plaintiffs spent years conducting informal discovery, their primary discovery tool, to build their case. *Id.* at ¶ 11, 61. Second, Plaintiffs withdrew many of the discovery requests that Defendants contend "intru[de] on the separation of powers." Pet. at 33. Specifically, Plaintiffs withdrew their Third Set of Requests for Production ("RFPs") seeking emails of Rex Tillerson when he was CEO at ExxonMobil and withdrew RFPs to the Executive Office of the President ("EOP") and the President. *Id.* at ¶ 37-38. Plaintiffs also narrowed RFPs submitted to Departments of State, Defense and Agriculture. *Id.* at ¶ 39, 42. Third, Plaintiffs are not seeking discovery as to senior executive officials. *Id*. at ¶ 57.

Defendants' claim that they "will be forced to respond in the coming weeks to document requests that seek material dating back over at least five decades," is far from the truth. Pet. at 8. The primary historical documents requested by Plaintiffs are housed at Presidential libraries or the U.S. National Archives and Records Administration ("NARA"). On February 21 and March 7, Plaintiffs' RFPs identified specific documents by file and box sought from presidential libraries and NARA facilities. *Id.* at ¶¶ 35-36. Defendants agreed to make non-privileged documents available for viewing at NARA upon entry of a protective order. *Id.* at ¶ 36, 44. On January 20, 2017, Plaintiffs served ten Requests for Admission ("RFAs") on the EOP and the Environmental Protection Agency ("EPA"), to which Defendants served responses and objections. *Id*. at ¶ 28-30. Plaintiffs do not intend to move to compel further responses to these RFAs. *Id*. at ¶ 31.

On March 31, 2017, Plaintiffs served RFPs on the Departments of Agriculture, Defense, and State. *Id*. at ¶ 39. After conferring, Plaintiffs served Revised RFPs and Defendants committed to provide a document production plan by June 23, identifying proposed search terms, custodians, time periods, and media. *Id*. at ¶ 39-42. Defendants later identified responsive documents to be produced, prior to the temporary stay. *Id*. at ¶ 41. Plaintiffs continue to narrow RFPs and work with Defendants to identify responsive documents for production without implicating separation of powers issues, as indicated in Plaintiffs' most

recent correspondence. *Id.* at ¶ 39-42.

To date, Plaintiffs have taken two depositions: (1) Mark Eakin, Coordinator of NOAA's Coral Reef Watch program; and (2) Michael Kuperberg, Executive Director, U.S. Global Change Research Program. *Id*. at ¶¶ 52-54. During Dr. Kuperberg's deposition, the executive and deliberative process privileges were raised and resolved in a manner that did not impose any burden on Defendants nor implicate separation of powers concerns.[4] *Id.* at ¶ 55-56. Plaintiffs served Federal Rule of Civil Procedure 30(b)(6) deposition notices on the Departments of Defense, Energy, Interior, Transportation, State, Agriculture, and EPA. Plaintiffs expect to resolve any issues through meet and confer.[5] *Id.* at ¶ 49, 51, 58-59.

To date there have been no discovery disputes as to experts. *Id*. at ¶ 46-50. Plaintiffs disclosed expert witnesses on March 24, 2017; on June 26, the District Court scheduled the exchange of expert reports. *Id*. at ¶¶ 47-48. Many expert reports have been served on Defendants; the remaining reports will be served when the stay is lifted. *Id*. at ¶ 49. Plaintiffs do not anticipate any disputes associated with scheduling expert depositions or the exchange of expert reports. *Id*. at ¶ 50.

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[4] One outstanding issue is the scope of the deliberative process privilege as to outstanding discovery requests. *Id*. at ¶ 55. Plaintiffs anticipate resolving this issue. *Id.*

[5] While Plaintiffs initially conferred on deposing four agency officials, as required by Local Rule 30-2, Dkt.151-9, no deposition notices were served and Plaintiffs will not seek to depose these officials. *Id.* at 57.

B. Defendants Provided No Evidence of Burdensome Discovery.

Defendants contend "the burden and cost of complying with the extraordinarily intrusive and inappropriate discovery sought by plaintiffs cannot be corrected" through the appellate process. Pet. at 33. However, Defendants offered ***no*** evidence of the burden they allegedly would suffer by responding to existing discovery. Nor do Defendants present evidence to show "[t]he damage this will do to vital federal operations." Pet. at 37. In fact, Defendants misleadingly submit only the discovery requests themselves (many of which have been resolved through meeting and conferring and/or withdrawn). *See* Olson Decl. ¶¶ 2-70.

A party seeking mandamus must show that he will be "damaged or prejudiced in a way not correctable on appeal." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2009). This Circuit held irreparable harm must be supported by actual evidence; cursory and conclusory statements are insufficient. *Herb Reed Enterprises, LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013). Responding to discovery is a normal part of litigation and does not constitute irreparable harm, let alone damage or prejudice not correctable on appeal. *See F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (citing *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938)); *Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24, (1974).

Absent affirmative evidence justifying mandamus, the petition should be denied. The federal government is capable of submitting testimony from federal employees as evidence that a discovery order is unduly burdensome. *See, e.g., In re: Thomas E. Price, Secretary of Health & Human Serv., et al.*, No. 17-71121 (Pet. for Writ of Mandamus) (filed April 19, 2017) at 19-20 ("As explained in declarations submitted below . . . reviewers would require more than three years to complete review of the hundreds of thousands of pages of material amassed thus far in response to the district court's order."). In the instant case, no such evidence exists. Pet. at 2.

This case presents a notable *absence* of discovery issues. Defendants have produced no documents in response to Plaintiffs' discovery requests. Olson Decl. at ¶ 9. No discovery orders have been entered by the District Court. The meet and confer process has thus far successfully eliminated the need for discovery motions. *Id.* at ¶ 8-10. Only two depositions have been conducted, imposing minimal burden and expense.[6] *Id*. at ¶ 9. Defendants have failed to show mandamus is warranted.

[6] In *Medhekar v. U.S. Dist. Court for the Dist. of California*, 99 F.3d 325, 326 (9th Cir. 1996), cited by Defendants, the petitioners submitted evidence showing tremendous burden and expense associated with complying with disclosures ordered by the court. Similarly, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004) presented a court approved discovery plan and "entered a series of orders allowing discovery to proceed." *Id.* at 376. Here, no orders exist directing Defendants to produce privileged information. In *Cheney*, the government had asked the district court to narrow the scope of discovery, but "its arguments were ignored." *Id.* at 388. Finally, the high stakes of this constitutional

Defendants insinuate that *all* forms of discovery against the federal government are impermissible as overly burdensome and intrusive based on separation of powers. That is not the law. "When the government is named as a party to an action, it is placed in the same position as a private litigant, and the rules of discovery in the Federal Rules of Civil Procedure apply." *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 776 n.4 (9th Cir. 1994); *United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958); Sisk, A Primer on Civil Discovery Against the Federal Government, 52-June Fed. Law. 28, 29 (2005);

Plaintiffs acknowledge the federal government can invoke privileges to constrain discovery sought from senior officials. *See, e.g.*, *Cheney*, 542 U.S. at 390; *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231-32 (9th Cir. 1979). While some forms of discovery against agency heads have been upheld by this Court, s*ee, e.g., Kyle Engineering Co.*, 600 F.2d at 231-32, that issue is not present here. Plaintiffs have no pending discovery requests for information from senior officials, nor do Plaintiffs intend to seek discovery from senior officials. Olson Decl. ¶ 57.

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case differentiate it from the factual scenario in *Cheney* where the Supreme Court found that vindication of Congress' policy objectives under FACA did not rise to the level of impairment of "a court's Article III authority or Congress' central Article I powers." *Id.* at 384-85. The instant case is more similar to cases referenced in *Cheney* where efforts were taken "to explore other avenues, short of forcing the Executive to invoke privilege" to avoid separation of powers issues. *Id.* at 390.

C. The District Court Should Be Afforded Wide Discretion to Manage Discovery and Resolve Discovery Disputes.

While Plaintiffs do not anticipate protracted discovery disputes, the District Court must be allowed broad discretion to first address them. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); Olson Decl. ¶ 64-70. "[D]istrict courts can, and will balance the government's concerns under the general rules of discovery." *Exxon Shipping Co.*, 34 F.3d at 779. District courts can quash or modify subpoenas, protect privileged information, and limit discovery of documents or testimony of officials. *Id*. at 779-80. Similarly, the District Court can ensure Plaintiffs are entitled only to discovery appropriate under the federal rules. *Kyle Engineering Co.*, 600 F.2d at 231-32.

The *Cheney* decision does not change this analysis: "there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas." 542 U.S. at 390. That is what the District Court has encouraged here. Olson Decl. ¶ 4, 5, 10, 23, 64-65. Plaintiffs do not anticipate discovery disputes that cannot be resolved by the District Court, that implicate separation of powers issues, or that will delay trial of these critical claims. *Id*. at ¶ 63-70.

II. THE DISTRICT COURT HAS JURISDICTION OVER PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO SECTION 201 OF THE ENERGY POLICY ACT.

In a footnote citing one out-of-circuit case, Defendants insinuate for the first time that the District Court is without jurisdiction to decide Plaintiffs' constitutional challenge to Section 201 of the Energy Policy Act, 15 U.S.C. § 717b(c). However, the District Court has original jurisdiction over Plaintiffs' constitutional challenge to Section 201 alongside other aggregate acts identified in the FAC. 28 U.S.C. § 1331. This is so notwithstanding 15 U.S.C. § 717r, which provides for exclusive appellate court review of certain Department of Energy ("DOE") orders following agency rehearing.

The District Court retains federal question jurisdiction over a facial constitutional challenge to a statute, "unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within the statutory structure.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207, 212 (1994)). Courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting *Thunder Basin,* 510 U.S. at 212-13).

Plaintiffs' constitutional challenge is not "of the type Congress intended to be reviewed within" the Natural Gas Act's review scheme, which provides for agency rehearing of certain *discretionary* DOE orders. *Id.*; 15 U.S.C. § 717r. First, because approval of export authorization permits under Section 201 is mandatory, Section 717r's venue provision is inapplicable. Defendants admit DOE's approval did not provide "any opportunity for public participation in the decision-making process." Dkt. 98 ¶ 96. For this reason, precluding District Court jurisdiction would foreclose any judicial review of Plaintiffs' constitutional challenge. Second, because Plaintiffs "do not claim that DOE/FE Order No. 3041 suffers from any procedural or facial defect," but instead challenge the constitutional validity of the underlying statute, their challenge is wholly collateral to Section 717r's review scheme and implicates issues outside the DOE's expertise. Dkt. 27 at 3.

A. There Is No "Fairly Discernable" Congressional Intent to Channel Review of Mandatory Natural Gas Export Authorizations Pursuant to Section 201.

Whether a statutory review scheme displays a "fairly discernable" intent to limit jurisdiction "is determined from the statute's language, structure, and purpose." *Thunder Basin,* 510 U.S. at 207. Where these factors show the statutory review scheme is inapplicable to a claim, the district court retains jurisdiction. *Latif v. Holder*, 686 F.3d 1122, 1127-29 (9th Cir. 2012).

Here, because Section 201's export authorizations are mandatory, and therefore not reviewable under Section 717r, the statutory scheme does not display a fairly discernable intent to limit district court jurisdiction. 15 U.S.C. § 717b(c). Defendants concede Section 201 does not "include any environmental review or other public interest analysis by DOE," and "the requirement for public notice of applications and other hearing-type procedures" are inapplicable, which means further review of the Commission's order in the Court of Appeals is precluded. Dkt. 98 at ¶ 96; DOE/FE Order No. 3041 at 11 n.5; 15 U.S.C. § 717r(a). As in *Latif*, Section 717r's review scheme – limiting judicial review to parties to the proceeding who have sought agency rehearing – is inapplicable to authorizations under Section 201, for which intervention and rehearing are not possible. *Latif*, 686 F.3d at 1127-29.

Furthermore, allowing district court jurisdiction over such claims could not undermine Section 717r's "integrated scheme of review," since the scheme does not apply. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 14 (2012); *see McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479, 497 (1991). Pursuit of such claims in the district court could not be "a way of evading entirely established administrative procedures." *Latif*, 686 F.3d at 1128. Ultimately, Plaintiffs' claims, which could not be brought pursuant to Section 717r's review scheme, are not "of the type Congress intended to be reviewed within the statutory structure." *Thunder*

Basin, 510 U.S. at 212. In contrast, orders issued pursuant to Section 717b(a) are discretionary, subject to a public interest analysis, a public hearing, and are reviewable.

B. Precluding District Court Jurisdiction Would Foreclose All Meaningful Judicial Review.

For Plaintiffs, *all* meaningful judicial review would be foreclosed under Section 717r's review scheme. *McNary,* 498 U.S. at 496-97; *see NO Gas Pipeline v. F.E.R.C.*, 756 F.3d 764, 768–69 (D.C. Cir. 2014) (appellate court lacked jurisdiction under Section 717r because petitioner had not challenged FERC ruling as to its reasoning or findings).

Intervention in an export authorization proceeding under Section 201 is not allowed, since approval is mandatory under the statute "without modification or delay." 15 U.S.C. § 717b(c); 15 U.S.C. § 717r(a); Olson Decl. ¶ 71. DOE does not even publish notices in the Federal Register when it reviews permit applications under Section 201. *See* DOE/FE Order No. 3041 at 8. Accepting Defendants' argument would make it impossible to bring a constitutional challenge to Section 201. This Court should "presume that Congress does not intend to limit jurisdiction." *Free Enter. Fund*, 561 U.S. at 489.

Here, paralleling *NO Gas Pipeline*, Plaintiffs challenge the constitutionality of the underlying statute and Defendants admit Plaintiffs are not challenging the order itself. Dkt. 27 at 3-4. Plaintiffs' challenge thus does not "depend on the

merits of any given individual" order. *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 876 (9th Cir. 2009).

C. Plaintiffs' Constitutional Challenge Is Wholly Collateral to Section 717r's Provisions and Outside DOE's Expertise

Constitutional claims challenging the underlying statutory authority are wholly collateral to a statute's review provisions and courts cannot infer Congressional intent to "limi[t] judicial review of these claims to the procedures set forth in [the statutory scheme]," including "general collateral challenges to unconstitutional practices and policies." *McNary,* 498 U.S. at 491-493; *Free Enter. Fund*, 561 U.S. at 489; *cf. Johnson v. Robison*, 415 U.S. 361, 373–74 (1974); *Latif*, 686 F.3d at 1128-29.

Plaintiffs' constitutional challenge is "wholly collateral" to Section 717r's review scheme and implicates constitutional questions outside DOE's expertise. *Thunder Basin,* 510 U.S. at 212-13, 215. The fact that Plaintiffs also mount an as-applied challenge to DOE/FE Order No. 3041 does not alter this analysis. The challenge to Order No. 3041 is a logical extension of Plaintiffs' facial challenge: if the statutory provision is unconstitutional, then orders issued pursuant to it are also unconstitutional. The line between facial and as-applied constitutional challenges is "hazy at best," and no talismanic invocation of this distinction can change that Plaintiffs are not seeking review of the merits of any order but instead raise constitutional claims. *Elgin*, 567 U.S. at 15, 22; *Latif*, 686 F.3d at 1129. Unlike

Elgin, Plaintiffs do not bring their claim against Section 201 as a "vehicle" to overturn a particular order, but as a facial challenge to a statute mandating promotion of fossil fuels, in the context of a larger set of challenges to government actions that infringe on Plaintiffs' constitutional rights. *Elgin*, 567 U.S. at 22; FAC ¶ 288, 299.

III. THIS CASE SATISFIES *NONE* OF THE *BAUMAN* REQUIREMENTS FOR MANDAMUS

"Mandamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 369 (citation omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* (quotes, citations omitted). As petitioners, Defendants bear the heavy burden of showing that their "right to issuance of the writ is clear and indisputable." *Id.* (quotes, citations omitted).

As the Supreme Court recently 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, 582 U.S. __ (2017) (slip op., at 11-12).

The guidelines employed by this Court to determine "whether mandamus is appropriate" are:

> (1) [W]hether 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 a 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.[7]

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2009) (citing *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Because this case does not implicate *any* of the *Bauman* guidelines, Defendants' request for this Court to employ "one of 'the most potent weapons in the judicial arsenal'" should be denied outright. *Cheney*, 542 U.S. at 380.

A. Defendants Will Not Be Prejudiced in a Way Not Correctable On Appeal, and Have Obvious and Effective Alternative Means to Obtain the Relief Requested

Defendants' claimed prejudice rests entirely upon unsubstantiated, conclusory allegations as to the burdens of responding to discovery, which Plaintiffs fully refute above. Pet. at 32-37. *See* Section I, *supra*.

[7] Defendants do not argue the fourth guideline applies. Plaintiffs' response to arguments with respect to the fifth guideline are in Plaintiffs' prior briefing, Resp. Br. to Request for Stay, Doc. 4 at 12-13, as is Plaintiffs' response to Defendants' argument that supervisory mandamus is appropriate. *Id.* at 13-15.

Further, the lack of a single discovery motion to, or order from, the District Court is fatal to Defendants' request: a petitioner must "have no other means…to obtain the relief requested." *Perry*, 591 F.3d at 1156.[8] If discovery in this matter becomes unduly burdensome, Defendants' remedy is a protective order under Federal Rule of Civil Procedure 26(c). *McDaniel v. U.S. Dist. Ct. for the Dist. of Nevada*, 127 F.3d 886, 888-89 (9th Cir. 1997) (per curiam); *Id.* at 890 (Rymer, concurring). For this reason alone, the petition should be denied.

The very cases upon which Defendants rely establish the impropriety of the drastic relief they seek. *Cheney* and *Credit Suisse v. United States District Court for the Central District of California*, 130 F.3d 1342 (9th Cir. 1997) are the ***only cases ever dismissed*** on mandamus due to alleged discovery prejudices. Crucially, the parties in both cases first sought resolution of the disputes in district court, and the district courts subsequently *ordered* production. *Cheney*, 542 U.S. at 379, 384; *Credit Suisse*, 130 F.3d at 1346. In addition, both cases presented rare circumstances not present here. *Cheney*, 542 U.S. at 385, 394 (Stevens, J., concurring) (ordering disclosure of the records would effectively prejudge the merits of the case); *Credit Suisse,* 130 F.3d at 1346 (discovery order violated Swiss banking secrecy and other laws which carried criminal penalties if petitioners

[8] *See In re Ozenne*, 841 F.3d 810, 816 (9th Cir. 2016) (en banc); *Washington Public Utilities Group v. U.S. Dist. Court for Western Dist. of Washington*, 843 F.2d 319, 325 (9th Cir. 1987).

complied); *see DeGeorge v. U.S. Dist. Ct. for Cent. Dist. of California*, 219 F.3d 930, 935 (9th Cir. 2000) (confirming *Credit Suisse* was limited to its unique circumstances). These circumstances do not apply here.

Defendants' premature and improper focus on discovery, unsubstantiated by anything but conclusory statements, really presents an inappropriate collateral attack on denial of their motion to dismiss. Defendants claim prejudice arising from discovery requests, yet improperly seek dismissal of this entire case, rather than relief from those requests. The proper course for seeking mandamus premised on discovery burdens is to challenge a *discovery order* under which the alleged burdens arise, not the very existence of the case under which discovery issues. Without a discovery order to challenge, even the more typical mandamus cases are inapposite. *See, e.g., Medhekar v. U.S. Dist. Court for the N. Dist. Of Cal.*, 99 F.3d 325 (9th Cir. 1996); *Perez v. United States Dist. Court*, 749 F.3d 849 (9th Cir. 2014); *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011); *Kerr v. United States Dist. Court for N. Dist. of California*, 511 F.2d 192, 199 (9th Cir. 1975), *aff'd* 426 U.S. 394 (1976). Defendants' Petition is not actually about discovery issues; rather, it presents an improper, premature attack on denial of the motion to dismiss, demonstrating abuse of the mandamus process.

The rarity of circumstances justifying mandamus "is particularly salient in the discovery context because the courts of appeals cannot afford to become

involved with the daily details of discovery," although courts of appeals "have exercised mandamus jurisdiction to review *discovery orders*" in exceptional circumstances. *In re Anonymous Online Speakers*, 661 F.3d at 1173 (quotes, citations omitted and emphasis added).

Defendants provide no other justification why denial of their motion to dismiss or the District Court's underlying conclusions will damage or prejudice them "in a way not correctable upon appeal." *Perry*, 591 F.3d at 1156. "If writs of mandamus could be obtained merely because an order [denying dismissal] was not immediately appealable…mandamus would eviscerate the statutory scheme established by Congress to strictly circumscribe piecemeal appeal and mandamus would become a substitute for the normal appellate process." *DeGeorge*, 219 F.3d at 935 (quotes, citations omitted). Similarly, the time and expense spent litigating a case, even if resulting from an erroneous legal ruling, does not constitute prejudice warranting mandamus, even in "massive civil actions." *Washington Public Utilities Group*, 843 F.2d at 325; *see also, e.g., Calderon v. U.S. Dist. Court for Cent. Dist. Of California*, 163 F.3d 530, 534-35 (9th Cir. 1998) *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003). "There is no reason why this motion to dismiss should be treated differently, *i.e.*, reviewed by mandamus rather than on appeal from a final judgment, than the dozens of 12(b)(6) rulings that district courts in this circuit make every day." *Calderon*, 163 F.3d at 535 n. 4.

B. The District Court Committed No Clear Error Denying Defendants' Motion to Dismiss

"The key factor to be examined" in resolving a petition is whether Defendants "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). "[T]he absence of the third factor, clear error, is dispositive." *Burlington Northern v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005). Judge Aiken's reasoned and thorough opinion, denying the Motion to Dismiss based on Supreme Court and Ninth Circuit precedent, amply demonstrates absence of error, let alone error so obvious that it is "'clear' to all." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016); *see* Dkt. 83.

1. Plaintiffs Indisputably Have Properly Plead Standing

Defendants mischaracterize Plaintiffs' claims as running afoul of Article III principles. For more than fifty years, Defendants knowingly and substantially contributed to the dangerous climate emergency upon which Plaintiffs' claims are founded. The judiciary represents Plaintiffs' "last resort" and exercise of judicial jurisdiction is a "necessity." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Plaintiffs' claims, and the standing allegations supporting them, are eminently suitable for judicial resolution without implicating separation of powers concerns. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Defendants' arguments to the contrary are premised on significant

misunderstandings of the pleading requirements for standing. *See Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855 (5th Cir. 2009) (finding standing to bring negligence, trespass, and nuisance claims based on climate change);[9] *Connecticut v. Am. Elec. Power Co., Inc.,* 582 F.3d 309, 347 (2d Cir. 2009) (causation in climate change cases is "best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing"), *rev'd on other grounds, Am. Elec. Power Co., Inc. v. Connecticut,* 564 U.S. 410, 429 (2011).

a. Plaintiffs' Alleged Injuries Are Concrete and Particularized

Plaintiffs have satisfied the standard for injury-in-fact, demonstrating unique and highly personalized ways in which Defendants' actions are affecting them. Defendants erroneously claim Plaintiffs' climate change harms are "generalized phenomena" which affect Plaintiffs the same way as everyone in the world. Pet. 14. A simple reading of Plaintiffs' pleadings shows the unique ways in which Plaintiffs' injuries vary according to their particular locations, interests, and circumstances. Dkt. 7 ¶¶ 16-97; *see also* Dkt. 78 (supplemental declaration of Jayden F. detailing inundation of her home with sewer water due to increased storm severity directly attributable to climate change); *see also* Declaration of Levi

[9] *Comer* was vacated for rehearing *en banc* which never occurred. *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 465 (5th Cir. 2015).

D. ("Levi Decl.") ¶¶ 1-19; Declaration of Jacob L. ("Jacob Decl.") ¶¶ 1-25; Declaration of Dr. Harold R. Wanless ("Wanless Decl.") ¶¶ 3, 51-63; Dkt. 47 (Supplemental Declaration of Dr. James Hansen).

Defendants' generalized grievance argument is equally mistaken on the law. A generalized grievance insufficient to establish injury is one claiming harm only to an abstract interest such as the "proper application of the Constitution and laws . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992). However, if an alleged harm is personally and concretely manifested in an individual, it does not matter how many people share in its effect. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). "It would surely be an irrational limitation on standing which allowed isolated incidents of deprivation of constitutional rights to be actionable, but not those reaching pandemic proportions." Dkt. 146 at 14.

Contrary to Defendants' incomplete quote, Pet. at 12-13, it *is* the role of courts to address "actual present or immediately threatened injury resulting from unlawful government action." *Allen*, 468 U.S. at 760.

Defendants' reliance on *Washington Environmental Council v. Bellon*, is misplaced. 732 F.3d 1131 (9th Cir. 2013). In *Bellon*, this Court assumed, without deciding, that the plaintiffs had made a satisfactory showing of injury-in-fact, *on summary judgment*, by submitting affidavits attesting to specific climate change impacts. *Id.* at 1140-41.

Notwithstanding Defendants' mischaracterization of *Massachusetts v. EPA*, extension of standing based on personal and concrete manifestation of a widely-shared harm is not limited to claims involving quasi-sovereign interests. 549 U.S. 497 (2007); *see, e.g., Novak*, 795 F.3d at 1018; *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998). Likewise, there is "[a]bsolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Notwithstanding this clear principle, Defendants incongruously assert Plaintiffs' claims, because they are constitutionally rather than statutorily based, are not "traditionally thought to be capable of resolution through the judicial process." Pet. at 15 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)), and are not "eminently suitable to resolution in federal court." *Id.* (quoting *Mass. v. EPA*, 549 U.S. at 516). However, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. In fulfilling this duty, "courts of the United States" are "the ultimate guardians of the Constitution…." *Hannah v. U.S.*, 260 F.2d 723, 728 (D.C. Cir. 1958). The *Raines* Court recognized "the irreplaceable value of the power articulated [in *Marbury*] lies in the protection it has afforded the *constitutional* rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." 521 U.S. at 829 (emphasis added). Plaintiffs properly pleaded injury-in-fact.

b. Plaintiffs Have Adequately Pleaded Causation

Plaintiffs' allegations are sufficient to adequately plead injuries "fairly traceable" to the challenged actions and omissions of Defendants. *Lujan*, 504 U.S. at 590. Defendants' arguments rely solely on mischaracterizations of Plaintiffs' pleadings and a misunderstanding of the law. Objecting that their aggregate acts and omissions cannot be used to establish causation for Plaintiffs' injuries, Defendants attempt to create a new obstacle to standing by foreclosing constitutional claims that arise from multiple actions, irrespective of the relatedness of those actions or the common identities of the actors. Pet. at 15-19. In so arguing, Defendants ignore clear precedent recognizing such claims, *see, e.g., Brown v. Plata*, 563 U.S. 493 (2011), as well as the proper standard for analyzing the sufficiency and specificity of causation in pleadings.

"At the pleading stage, general factual allegations" suffice to establish standing, "for, on a motion to dismiss" courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561; Fed. R. Civ. P. 8(a)(2). Standing, when challenged in a motion to dismiss, is judged based on allegations in the complaint. *See Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2342 (2014). Though Plaintiffs' allegations contain *more* than the requisite specificity, a complaint need only present sufficient allegations, which, accepted as true, "state a claim to relief that is plausible on its

face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). In deciding whether a claim is plausible on its face, a court relies on "its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Plaintiffs alleged with *significant* specificity particular categories of Defendants' systemic affirmative actions, distinct failures to use delegated authority, and specific examples of the same, delineated by specific Defendant, which caused and are causing Plaintiffs' injuries. Dkt. 7. For instance, comparable to the complaint in *Brown v. Plata*, the FAC describes discrete categories of government policies, practices, and actions, showing how each Defendant permits, licenses, leases, authorizes, and/or incentivizes the extraction, development, processing, combustion, and transportation of fossil fuels, which cause Plaintiffs' injuries. Dkt. 7 ¶¶ 5, 7, 11, 97, 99, 112, 115, 117, 119, 123, 125, 129-130, 151, 171, 179-181, 183, 186-187; *See* First Amended Complaint Class Action, *Brown v. Plata*, 563 U.S. 493 at ¶ 192(a) – (q) (N.D. Cal. Aug. 2001). In addition, Plaintiffs provided particular examples of actions, with numeric quantification by category, for particular Defendants. Dkt. 7 *e.g.* ¶¶ 160, 161, 164-70, 171-78, 180-84. After delineating specific actions within each category, Plaintiffs allege that, through each of these categories, "Defendants authorize the combustion of all fossil fuels in the U.S." and that historically, the United States is responsible for emitting 25.5% of the worlds cumulative CO2 emissions," thereby establishing Defendants' causal

contribution to Plaintiffs' injuries. Dkt. 7 ¶¶ 151, 185.[10]

Plaintiffs' exhaustive allegations, and the specific facts provided, are indisputably sufficient to "give the [D]efendant[s] fair notice of what the…claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citation and quotation marks omitted).[11]

Defendants' argument that individual actions in the aggregate cannot establish causation directly contradicts Supreme Court precedent. In *Brown v. Plata*, the Court determined the collective policies and actions of California's state prison officials resulted in a "systemic" violation of prisoners' constitutional rights. 563 U.S. at 551. The Court recognized causation based upon aggregate acts:

> Because plaintiffs do not base their case on deficiencies in care provided on any one occasion, this Court has no occasion to consider whether these instances of delay–or any other particular deficiency in medical care complained of by the plaintiffs–would violate the Constitution…if considered in isolation. Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to 'substantial risk of serious harm'….

Id. at 500 n.3 (citations omitted).

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[10] The significance of this share of global emissions renders Defendants' reliance on *Bellon* wholly misplaced. *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1158 (9th Cir. 2015) ("such minor contributors to greenhouse gas emissions…that the contribution 'was scientifically indiscernible.'"). The causation ruling in *Bellon* was made at summary judgment, rather than a motion to dismiss. 732 F.3d at 1143 n. 6.

[11] That Defendants admitted key paragraphs of Plaintiffs' FAC on causation demonstrates *actual* notice of Plaintiffs' claims. Dkt. 98 ¶¶ 7, 150, 151.

Similarly, in *Wilson v. Seiter*, discrete elements, which might not in themselves establish causation of a constitutional violation, established causation in the aggregate. 501 U.S. 294, 304 (1991). As in *Plata* and *Wilson*, each of Defendants' acts with respect to fossil fuel emissions might not individually violate the Constitution. However, taken "in combination" and on a "systemwide" basis, these aggregate acts have a "mutually enforcing effect" in violation of Plaintiffs' rights. *Id.*

Defendants cite only two cases in their attempt to invent a new "particular causation" requirement in the constitutional standing analysis—tellingly, they severely mischaracterize both. Contrary to Defendants' implication, Pet. at 17-18, the Court was not discussing causation and aggregated causal elements when it stated: "If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, the Court merely reiterated the uncontroversial principle that a plaintiff "who has been subject to injurious conduct of one kind" does not have standing to challenge unrelated harms "to which he has not been subject." *Id.* This, of course, is irrelevant to the instant case, in which each of Defendants' aggregate actions and omissions, taken together, cause Plaintiffs' injuries.

The Court in *Allen v. Wright* established that, where there is "actual present or immediately threatened injury *resulting* from unlawful governmental action," it is the courts' duty to review those actions, be they systemic or insular. 468 U.S. at 760 (citation and quotation marks omitted). In contrast to *Allen*, Defendants' responsibility for a major share of global CO_2 emissions is "enough" such that their elimination would "make an appreciable difference" as to the devastating injuries upon which Plaintiffs' claims are founded. *See* Dkt. 98 ¶¶ 7, 150, 151.

c. Plaintiffs Adequately Pleaded Redressability

Defendants object to the prospect of any relief in this case, mistakenly asserting "the complaint never alleges that the agencies have statutory authority" to remedy Plaintiffs' harms. Pet. at 20. The FAC clearly alleges statutory and regulatory authority of Defendants to provide the relief requested.[12] Moreover, no reference to statutory authority need be provided in order to enjoin Defendants from engaging in affirmative actions to a degree that violates Plaintiffs'

[12] Dkt. 7 ¶¶ 98-130, 137, 147, 180, 183, 265, 266 (setting forth Defendants' authorities under the Clean Air Act, the EPA's endangerment finding, the Clean Water Act, the Rivers and Harbors Act, RCRA, CERCLA, the Safe Drinking Water Act, the National Science and Technology Policy, Organization and Priorities Act, the Natural Gas Act, the Energy Policy Act, the Department of Energy Organization Act, the Energy Policy and Conservation Act, the Mineral Leasing Act, the Federal Land Policy and Management Act, the Outer Continental Shelf Lands Act, the Department of Transportation Act, the Energy Independence and Security Act, and the National Climate Program Act.).

constitutional rights.

Defendants' arguments are also unfounded because courts retain broad authority "to fashion practical remedies when faced with complex and intractable constitutional violations." *Plata*, 363 U.S. at 526. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15 (1971).

Defendants' rehash of *Lewis, Lujan*, and *Allen*, and their unfounded assertion that Plaintiffs must "identify specific agency actions or inactions that could be redressed," do not upend the redressability of Plaintiffs' injuries. Pet. at 21; *see Bellon*, 732 F.3d at 1146 (causation and redressability are two facets of single requirement). While the FAC puts Defendants on notice of the actions that may be redressed, it is not Plaintiffs' obligation to specify a step-by-step plan for Defendants to remedy their own unconstitutional behavior. *See* Section (III)(B)(1)(b), *infra*. "Traditionally, equity has been characterized by a practical flexibility in shaping remedies . . . ." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

As in *Plata*, the District Court can set the constitutional floor necessary for preservation of Plaintiffs' rights– the minimum safe level of atmospheric CO_2 concentrations and the timeframe in which that level must be achieved – and leave

to Defendants the specifics of developing and implementing a compliant plan. 563 U.S. at 533; Dkt. 83 at 17, Dkt. 146 at 8.[13]

Likewise, Defendants' argument that no relief in this case "could be obtained against the President", Pet. at 7, is without merit and has been flatly rejected by this Court as "contrary to the fundamental structure of our constitutional democracy" in *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017). Defendants improperly attempt an "aggrandizement of one of the three co-equal branches of the Government at the expense of another." *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (citations omitted). The judiciary may "severely burden the Executive Branch by reviewing the legality of the President's official conduct," *Id.* at 682, 705, and "direct appropriate process to the President himself." *Id.*

Further, Defendants' arguments on this topic were waived, as they were not presented to the District Court until Defendants' motion to certify this case for interlocutory appeal, Dkt. 120, and the District Court has not yet addressed the issue. *Westinghouse Elec. Corp. v. Weigel*, 426 F.2d 1356, 1357 (9th Cir. 1970). Even were the District Court to decide that no relief could be obtained against the

[13] Like the determination in *Plata* that prison populations needed to be reduced by a specific percentage to preserve prisoners' constitutional rights, determining the scientific level of atmospheric CO_2 concentrations necessary to preserve Plaintiffs' constitutional rights no more requires "essentially legislative determinations," Pet. at 15, than in any other case in which governmental action violates constitutional principles. *See, e.g.*, *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

President, relief would still be available against agency officials. *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Plaintiffs have adequately pleaded redressability.

2. Plaintiffs' Due Process Claims are Grounded in Well-Established Law

Defendants frame their objections to Plaintiffs' due process claims as not setting forth sufficient supporting facts. Pet. at 22. However, the FAC delineates the causal mechanisms underlying climate change, the national injuries and unique personal injuries to Plaintiffs resulting from climate change, and Defendants' responsibility for those injuries. Dkt. 7. "Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards." Dkt. 83 at 13.

Defendants misconstrue Plaintiffs' claims to suggest this case turns exclusively on recognition of the right to a "climate system capable of sustaining human life." Contrary to Defendants' mischaracterizations, in addition to their claim seeking recognition of this right, the FAC alleges violations of enumerated and unenumerated rights recognized in Fifth Amendment jurisprudence, including infringement of fundamental rights to personal security, to property, to life, to family autonomy and security, and to freedom from discrimination as a protected class and with respect to their fundamental rights, as well as violations of rights under the Public Trust Doctrine. FAC ¶¶ 277-310.

a. The Right to the Ability to Sustain Human Life is Well-Grounded

The District Court properly recognized a fundamental right to a "climate system capable of sustaining human life." Dkt. 83 at 32. When deciding upon previously unrecognized fundamental rights, the Supreme Court has inquired whether such rights are *either* "fundamental to our scheme of ordered liberty, *or*…deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (citations and quotations marks omitted and emphasis added). However, "identification and protection of fundamental rights…has not been reduced to any formula." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015) (citation and quotation marks omitted). The right to a climate system capable of sustaining human life unquestionably meets the standard under any "formula."

Here, the District Court indisputably "exercise[d] the utmost care" in recognizing the right at issue by "beginning with a careful description" of the right, *Reno v. Flores*, 507 U.S. 292, 302 (1993), as that to a climate system *capable of sustaining human life*. Dkt. 83 at 32-33. That other courts rejected the existence of significantly broader and easily distinguishable rights to a "healthy" or "pollution-free environment" in cases presenting significantly different factual scenarios does not alter the propriety of recognizing the narrowly-cabined right within the

particular circumstances of this case.[14] Further, the unique facts underlying Plaintiffs' claims inform the fundamental rights inquiry.

> The generations that wrote and ratified the Bill of Rights…did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S.Ct. at 2598. The unprecedented circumstances of the climate crisis and Defendants' responsibility for that crisis are the kind of "new insight" justifying recognition of the "claim to liberty" asserted.

The right to a climate system capable of sustaining human life is both "deeply rooted in this Nation's history and tradition" and "fundamental to our scheme of ordered liberty." *McDonald*, 561 U.S. at 767*; see* Decl. of John E. Davidson, Dkt. 46 and Amicus Curiae Brief ISO Plaintiffs, Dkt. 60 (delineating the deep historical roots of the right). At the core of the Constitution is a system of intergenerational ethics focused on preservation of the human species. Dkt. 60 (citing John Locke, *Two Treatises of Government*, ¶¶ 7, 16, 134, 135, 149, 159, 171, 183 (1689) (Peter Laslett ed., 2d ed. 1967). These ideals were widely shared by the framers, and the principle that government may not deplete the resources

[14] *S.F. Chapter of A. Phillip Randolph Inst. v. EPA*, in which the plaintiffs asserted a "right to be free of global warming pollution" is not to the contrary. No. C 07-04936 CRB, 2008 WL 859985, at *6 (N.D. Cal. Mar. 28, 2008). Plaintiffs in that case challenged only the issuance of permits for two power plants. *Id.* at *1.

upon which later generations needed to survive served as a foundational principle to the Bill of Rights. *Id*. at 20-28. In his celebrated speech of May 12, 1818, James Madison expounded the importance of the balance and symmetry of nature and nature's laws:

> Animals, including man, and plants may be regarded as the most important part of the terrestrial creation…. ***To all of them, the atmosphere is the breath of life. Deprived of it, they all equally perish….***
>
> ***The atmosphere is not a simple but a compound body. In its least compound state, it is understood to contain, besides what is called vital air, others noxious in themselves, yet without a portion of which, the vital air becomes noxious. … Is it unreasonable to suppose, that if, instead of the actual composition and character of the animal and vegetable creation, to which the atmosphere is now accommodated, such a composition and character of that creation, were substituted, as would result from a reduction of the whole to man and a few kinds of animals and plants; is the supposition unreasonable, that the change might essentially affect the aptitude of the atmosphere for the functions required of it; and that so great an innovation might be found, in this respect, not to accord with the order and economy of nature?***
>
> ***
>
> The immensity of the atmosphere, compared with the mass of animals and vegetables, forms an apparent objection only to this view of the subject. ***The comparison could at most suggest questions as to the period of time necessary to exhaust the atmosphere of its unrenewed capacity to keep alive animal or vegetable nature***, when deprived, either, of the support of the other.[15]

[15] "Address to the Agricultural Society of Albemarle, 12 May 1818," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Madison/04-01-02-0244.

The foundational importance of our atmosphere and climate system to the nation was unequivocally recognized by the Founding Fathers. These deep roots of the right to a stable climate system capable of sustaining human life are exemplified in our nation's conservation legislation. *See, e.g.,* Clean Air Act § 101, 42 U.S.C. § 7401; National Environmental Policy Act § 101, 42 U.S.C. § 4331(b)(1) ("[I]t is the responsibility of the Federal Government to…fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.")

Further, the Supreme Court has long championed recognizing rights necessary to preserve other fundamental rights. *See*. *e.g*., *Yick Wo v*. *Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "a fundamental political right, because [it is] preservative of all rights."); *Obergefell*, 135 S.Ct. at 2602. As the District Court properly recognized, the right to a climate system capable of sustaining human life is similarly preservative of all rights. "Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization, nor progress.'" Dkt. 83 at 32. The rights to life, liberty, and property depend upon preservation of a climate system capable of sustaining their meaningful exercise. Our previously recognized unenumerated rights rest upon a climate system capable of sustaining human life, including rights touching upon "deeply personal choices central to individual dignity and autonomy," *Obergefell*, 135 S.Ct. at 2597, including, among others, the right to

safely raise families and control the upbringing of children, to practice religious beliefs, to maintain bodily integrity and personal security, and to safely provide for basic human needs. Dkt. 7 ¶ 283. The right to a stable climate system capable of sustaining human life preserves the baseline conditions on which each of these rights depend.

b. Plaintiffs Properly Alleged a Valid Post-*DeShaney* Claim

Under the state-created danger exception to *DeShaney*,[16] the government has an affirmative obligation to act when its conduct places a person "in peril with deliberate indifference to their safety." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). State-created danger claims are not, as Defendants assert, limited "to cases involving actions of police officers that placed individual plaintiffs in direct and immediate peril." Pet. at 22; *see Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016) (employee's long-term exposure to toxic mold). In fact, this Court's interpretation of the state-created danger exception establishes its applicability to claims involving exposure to adverse environmental conditions. *Pauluk*, 836 F.3d 1117 (toxic mold); *Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (freezing weather). Defendants' knowing contributions to the climate crisis put this case on all fours with this body of law.

[16] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

Defendants' causation of and failure to address the climate crisis clearly "shocks the conscience." Pet. at 26 n.8. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850, 853 (1998). For over five decades, Defendants knew of the extreme dangers that their actions create. Dkt. 7 ¶¶ 1, 4, 131-150. Despite "extended opportunities" over this same period, Defendants deliberately persisted in those actions, failing to safeguard Plaintiffs from the perils in which Defendants placed them. *Id.* ¶¶ 151-191. This shocks the conscience. Each of Plaintiffs' due process claims are well-grounded and properly before the District Court.[17]

c. Plaintiffs' Claims Rest Directly On the Constitution

Equitable relief is available directly under the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Defendants' argument to the contrary, while correctly identifying the distinction between "a cause of action for damages" and a claim seeking equitable relief, misses the reason the

[17] Defendants disjointedly address Plaintiffs' post-*DeShaney* claim alongside Plaintiffs' claim to a right to a stable climate system capable of sustaining human life. Pet. at 22-24. These separate claims present distinct standards. Courts apply strict scrutiny to governmental action implicating a fundamental right. Whether the government has an affirmative duty to act to preserve a claimant's personal security is determined by whether the government has placed the claimant "in peril with deliberate indifference to their safety." *Penilla*, 115 F.3d at 709. Plaintiffs also bring claims alleging direct infringement of their enumerated and previously recognized unenumerated rights, as well as claims arising under the Equal Protection Clause and the Public Trust Doctrine. Dkt. 7.

Supreme Court developed the distinction in the first place. Pet. at 26. In *Davis v. Passman*, the Court recognized a private right of action for damages under the Fifth Amendment. 442 U.S. 228 (1979). In doing so, the Court first asked whether the Fifth Amendment provides a right of action, irrespective of the remedy sought, concluding a party may "rest[] her claim directly on the Due Process Clause of the Fifth Amendment." *Id.* at 243-244. Only then did the Court "consider whether a damages remedy is an appropriate form of relief." *Id.* at 244. The Court's subsequent jurisprudence on this issue focuses entirely on whether *monetary damages* are available, absent statutory authorization, as a remedy for constitutional violations. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983).

Courts need not conduct a comparable inquiry as to whether equitable remedies are available for constitutional violations.

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution….Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

Bell v. Hood, 327 U.S. 678 (1946). The right of every citizen to injunctive relief from ongoing and prospective "official conduct prohibited" by the Constitution does not "depend on a decision by" the legislature "to afford him a remedy. Such a position would be incompatible with the presumed availability of federal equitable

relief…." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring). The Supreme Court confirmed this reasoning in *Ziglar v. Abbasi*, where plaintiffs sought money damages against "executive officers," challenging "large-scale policy decisions" as violative of their Fifth Amendment substantive due process rights and the Court stated "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief.". 582 U.S. __, slip op. at 2, 5, 16-17 (2017).

3. The Public Trust Doctrine Applies to Defendants

As an inherent attribute of sovereignty, the Public Trust Doctrine applies to all governments, state and federal. *Ill Cent. R. Co. v. State of Ill.*, 146 U.S. 387, 455 (1892). Defendants' argument that the federal government holds no Public Trust Doctrine obligations rests upon a single, erroneously decided case, affirmed by unpublished decision, reliant upon dictum from a case that did not even address the existence of a federal Public Trust.

The district court in *Alec L. v. Jackson* erroneously rejected the existence of the federal Public Trust based on the Supreme Court's dictum that "the public trust doctrine remains a matter of state law." 863 F.Supp.2d 11, 15 (D.D.C. 2012) (quoting *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012)).[18] In a

[18] Defendants misstate that some Plaintiffs in this case were plaintiffs in *Alec L.* Pet. at 28. The plaintiffs are not the same.

similarly inattentive opinion, the D.C. Circuit affirmed on the same basis. *Alec L. v. McCarthy*, 561 Fed.Appx. 7 (D.C. Cir. 2014).

Importantly, *PPL Montana* did not even involve, let alone address, whether the Public Trust Doctrine applies to the federal government and, accordingly, *Alec L.*'s reliance on *PPL* dicta without analysis improperly avoided the merits of the plaintiffs' claims. *See* M. Blumm and L. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 418- 421, 421 (Spring 2015). In contrast, the District Court provided a thorough and reasoned analysis of *PPL Montana*, concluding the case does not foreclose the existence of a federal Public Trust. Dkt. 83 at 43-46. As Magistrate Judge Coffin observed: "If the doctrine were to be extinguished, it assuredly would not be in the form of tangential dicta in the context of a Supreme Court ruling on a matter that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories." Dkt. 146 at 13-14.

Like *PPL Montana*, *United States v. 34.42 Acres of Land* did not involve, and this Court did not consider, the existence of the federal Public Trust. 683 F.3d 1030 (9th Cir. 2012). In *34.42 Acres*, this Court invoked *PPL Montana*, and its proclamation that a state's Public Trust is a matter of state law, to support the proposition that when the federal government condemns state lands, it takes title

free from the *state's* Public Trust obligations by virtue of the Supremacy clause. *Id.* at 1038. That holding is wholly inapplicable to this case. The applicability of a state's Public Trust doctrine to the federal government does not speak to the existence of a separate federal Public Trust. Because the Public Trust Doctrine is an attribute of sovereignty, its contours and applicability are necessarily a matter of each sovereign's law. *Ill. Cent. R. Co.*, 146 U.S. at 455. Importantly, the district court in *34.42 Acres* had ruled the tidelands included in the parcel condemned by the federal government were subject to the federal Public Trust. 683 F.3d at 1033, 1039 n. 2. This ruling was not overturned on appeal. *Id.* Further, as the District Court noted, two additional cases recognized that where the federal government condemns state Public Trust assets, it takes title free of the state's Public Trust obligations, but subject to obligations under the federal Public Trust Doctrine. Dkt. 83 at 46-47 (citing *United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cnty., Mass*. 523 F.Supp. 120, 124 (D. Mass. 1981); *City of Alameda v. Todd Shipyards Corp.*, 635 F.Supp. 1447 (N.D. Cal. 1986)). The District Court committed no clear error.

IV. ANY DELAY IN RESOLVING THIS CONSTITUTIONAL CASE AT TRIAL IRREPARABLY HARMS PLAINTIFFS AND THE PUBLIC INTEREST.

The harm Plaintiffs will suffer if their case is stayed before trial is irreparable. Environmental harm is by nature irreparable as is often infringement of

constitutional rights. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Both are threatened here by the ongoing actions of Defendants. Unlike other cases where environmental harm is threatened, here, the harm to the climate system threatens the very foundation of life, including the personal security, liberties, and property of Plaintiffs. Unlike other cases, ***Defendants concede the scope of harm***, admitting that existing harm has already put our nation in the danger zone, and that the harm could be irreversible for millennia. *See* Statement of Relevant Facts.

Because atmospheric CO_2 levels are already dangerous, every day of more carbon emissions and increased fossil fuel extraction and infrastructure exacerbates the danger. Defendants have provided no expert testimony to support their bald assertion that delay of months or years to resolve Plaintiffs' claims will not cause Plaintiffs harm. Dr. Harold Wanless, a highly respected geologist and climate expert, explains how urgent the climate emergency is and how even a short delay causes Plaintiffs harm. Wanless Decl. ¶¶ 1-5, 18-19, 22, 25-63. Dr. Wanless explicates that sea level rise of 15-40 feet is very likely by the end of the century and that Defendants' estimates of up to 8 feet of sea level rise by 2100, while still devastating to coastal cities, properties, and populations, does not present the full risks and magnitude of sea level rise we are very likely locking in by heating the

oceans. Wanless Decl. ¶¶ 29-38. Almost 94% of human-caused heating is going into the oceans and melting our planet's largest ice-sheets. Wanless Decl. ¶ 25. The U.S. is responsible for more than 25% of that heat. Dkt. 98 ¶ 7.

Moreover, the harm is not generalized harm, but is particular to Plaintiffs. Plaintiff Levi D. lives on an island off the Atlantic coast of Florida at 3 feet above sea level. Levi Decl. ¶ 1-3; Wanless Decl. ¶ 50. Already locked-in ocean heating and sea level rise could inundate Levi's island and home by mid-century, making it unlivable. Wanless Decl. ¶ 50. The only chance Levi has to protect his home, his personal security, and his health from the ongoing systemic actions of Defendants depends upon an injunction that requires carbon emissions to decline quickly. Wanless Decl. ¶¶ 51-63. "We are in the danger zone in southern Florida and any delay in a judicial remedy for Plaintiff Levi poses clear and irreversible harm to his interests and his future." *Id.* ¶ 62.

Plaintiff Jacob Lebel moved to Oregon with his family to start a farm and grow nearly all of their own food. Jacob's land and livelihood are uniquely threatened by climate change and Defendants' ongoing fossil fuel energy system. Jacob Decl. ¶¶ 1-25. Jacob experiences increasing drought, wildfire threats, threats to air quality, and farming days exceeding 100 degrees F. Jacob Decl. ¶¶ 6-13.

Defendants do not dispute the irreparable harms asserted by Levi, Jacob, or Plaintiffs' experts. Because these irreparable environmental and human harms are

undisputed and because fundamental rights are at stake, the balance of harm clearly favors denying the requested stay and mandamus.

The public interest is served by allowing Plaintiffs to vindicate constitutional violations. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). "The public interest is fundamentally harmed by ongoing fossil fuel combustion, which urgently needs reparation." Wanless Decl. ¶ 63.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants' Petition for Writ of Mandamus.

DATED this 28th day of August, 2017, at Eugene, OR.

Respectfully submitted,

/s/ Julia Olson

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: August 28th, 2017

Respectfully Submitted,

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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 11233 words (based on the word processing system used to prepare the brief).

Dated: August 28th, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing Answer of Real Parties In Interest to Petition for Writ of Mandamus with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. In addition, a courtesy copy of the foregoing brief has been provided via-email to the following counsel:

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Signature (use "s/" format) s/ Julia A. Olson

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