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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-AA

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND TRIAL PENDING SUPREME COURT REVIEW

Expedited Hearing Opposed

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND TRIAL PENDING SUPREME COURT REVIEW

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I. INTRODUCTION

This Court should deny Defendants' Motion to Stay Discovery and Trial Pending Supreme Court Review (ECF No. 361) ("Motion to Stay") because Defendants fail to identify circumstances warranting such relief. Critically, Defendants fail to allege any material change in fact, law, or circumstance which warrants a favorable decision on their behalf. As even Defendants admit, this Court (ECF Nos. 196 and 300), the Court of Appeals for the Ninth Circuit (Exhibit A), and the United States Supreme Court (Exhibit B) previously considered Defendants' stay applications under materially identical circumstances and ruled against Defendants in each case. The only changed circumstance asserted by Defendants is that this Court has not yet ruled on two dispositive motions (ECF No. 195 and 207). In the instant matter, faced with two important dispositive motions referencing thousands of pages of evidence, disputes of material fact, and important constitutional legal analysis on multiple issues, it is reasonable that this Court has not yet rendered a decision. Local Rule 83-13 does not mandate that a decision be issued within 60 days of the matter being taken under advisement. Rather, it provides a mechanism for the Court to hold itself accountable for timely docket disposition. Moreover, the Ninth Circuit and the U.S. Supreme Court have repeatedly reaffirmed the district courts' wide discretion to carefully manage and control dockets. Consistently and throughout the scope of this case, this Court has acted promptly and without delay. There is no evidence to suggest this Court is acting with anything but due diligence in this matter. It would be unreasonable to supplant this Court's ability to handle its docket, particularly when the timing of the filing of the currently pending motions was within the sole discretion of Defendants. The Motion to Stay should be denied.

II. PROCEDURAL HISTORY

In their failed attempts to avoid trial, Defendants have filed five prior motions with this Court:

1. Motion for a Protective Order and for a Stay of All Discovery (ECF No. 195);
2. Motion to Stay Discovery Pending Resolution of Objections (ECF No. 216);
3. Motion for Protective Order (ECF No. 217);
4. Motion to Amend Schedule (ECF No. 305); and
5. Motion for a Stay Pending a Petition for Writ of Mandamus (ECF No. 307).

Defendants also previously filed two emergency motions for a stay of discovery and trial with the Ninth Circuit (ECF No. 308-1). On July 17, Defendants filed an application for a stay of discovery and trial with the U.S. Supreme Court. (ECF No. 321-1) This Court knows the fate of each of these motions and applications.

Defendants continue their efforts to attempt to delay commencement of trial on October 29, 2018 by filing their *sixth* motion before this Court, this time a mere three weeks before trial. Defendants' most recent Motion to Stay is no different than prior iterations in that it, too, lacks any of the requisite evidentiary and factual showings required to prevail. The instant Motion to Stay merely restates, in unsubstantiated and conclusory terms, Defendants' flawed arguments previously rejected by this Court, the Ninth Circuit, and the U.S. Supreme Court.

In this Motion to Stay, Defendants state "the Court has not yet resolved the government's dispositive motions, and has suggested that it has no intention of delaying trial absent an order from a higher court." (ECF No. 361 at 5). Defendants assert "the government cannot wait any longer to seek such relief." *Id.* In truth, Defendants seek to rush this Court to adjudicate important, dispositive motions and in so doing seek to continue to delay trial, after the parties

have expended tremendous resources and time to be prepared to commence trial on October 29, 2018.

III. STANDARD OF REVIEW

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.* v. *United States*, 272 U. S. 658, 672 (1926). It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id*. at 672-673. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *See*, *e.g.*, *Clinton* v. *Jones*, 520 U. S. 681, 708 (1997); *Landis* v. *North American Co.*, 299 U. S. 248, 255 (1936). Courts consider four factors in the analyzing the propriety of a stay:

> (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 v. Holder*, 556 U.S. 418, 433-34 (2009) (internal citations omitted).

"[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).

IV. LEGAL ARGUMENT

Rather than restate arguments made in the Ninth Circuit and the U.S. Supreme Court, Plaintiffs attach and incorporate by reference their briefs filed in the Ninth Circuit (Exhibit C) and the U.S. Supreme Court (Exhibit D) in opposition to Defendants' prior, and in all material

respects, identical Emergency Motion for a Stay. In addition, Plaintiffs submit the following arguments in support of their opposition to Defendants' request to delay trial.

1. Defendants Fail to Carry Their Burden to Justify an Exercise of Discretion

Fundamentally, Defendants fail to make the requisite showing that they will succeed on the merits. To prevail on their Motion to Stay, Defendants must make a strong showing that they are likely to succeed on the merits. *Nken*, 556 U.S. at 433-34. Incredibly, Defendants claim "a stay is warranted because Defendants are likely to succeed on their petition to the Supreme Court." (ECF No. 361 at 2).[1] Yet, Plaintiffs cannot address whether "the Supreme Court is likely to direct this Court to dismiss this case" as Defendants have yet to file or serve the petition on which this factor depends. (ECF No. 361 at 6). Defendants ask this Court to find they have made the requisite showing on the merits without serving the petition on which their relief is based. Given this deficiency, Plaintiffs' response does not address "the government's requests for relief" in their yet to be served petition. (ECF No. 361 at 10).

In their Motion to Stay, Defendants fail to advance *any* other arguments or changed circumstances indicating strong likelihood of success. In fact, Defendants continue to recycle arguments that have already been heard and subsequently rejected by this Court, the Ninth Circuit, and the U.S. Supreme Court. As the party seeking a stay, Defendants bear the burden of showing that the circumstances justify an exercise of discretion. *Clinton*, 520 U.S. at 708. Defendants fail to meet their burden by recycling unsuccessful arguments rejected by this Court

[1] Defendants requested a stay of any further discovery and the trial "pending consideration of the government's forthcoming petition for a writ of mandamus, or in the alternative for a writ of certiorari, to be filed in the United States Supreme Court." (ECF No. 361 at 1-2). As of the filing of this response, Plaintiffs have not been served with Defendants' petition for a writ of mandamus, or in the alternative for a writ of certiorari, to be filed in either the Ninth Circuit or the United States Supreme Court. As a result, Plaintiffs are unable to address the content of that petition.

and the Ninth Circuit, and offer nothing substantive or new for this sixth go-around, 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).

Redundantly, as in each previously denied motion, Defendants assert that: Plaintiffs lack standing; Plaintiffs are required to file claims under the Administrative Procedure Act; and Plaintiffs' due process and public trust claims are impermissible. This Court has repeatedly rejected these arguments in Defendants' first Motion for a Stay (Motion, ECF No. 216; Order, ECF No. 238); Defendants' first Motion for a Protective Order (ECF No. 196); Defendants' objections (ECF No. 215) to Judge Coffin's order denying Defendants' first Motion for a Protective Order (ECF Nos. 212 and 300), and Defendants' Motion for a Stay Pending a Petition for Writ of Mandamus (Motion, ECF No. 307; Order, ECF No. 324). Once again, Defendants fail to meet their burden of showing circumstances conducive to success on the merits in order to justify an exercise of this Court's discretion. As a result, this Court should deny the Motion to Stay.

2. Bare Allegations of Irreparable Injury Unsupported by Any Factual Evidence Fail to Meet the Burden Required to Stay Proceedings

Defendants have put forth no cognizable evidence they will be injured by proceeding to trial. None. In order to prevail on a stay application, Defendants must set forth evidence that they will be irreparably injured. *Nken*, 556 U.S. 433-34. Defendants fail to offer *any* substantiated proof of alleged injury. In pursuing a stay, applicants "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."). Because Defendants fail to carry their evidentiary burden to show irreparable harm, their Motion to Stay should be denied.

The burden resides squarely on Defendants to show irreparable injury. It is simply not enough that Defendants do not desire to "proceed with a 50-day trial" while their belated-filed motions are pending. If that were the legal burden, any litigant, without offering factual support of irreparable injury, could stymie the usual course of litigation by waiting to file dispositive motions in close proximity to trial, and simply request a stay while awaiting a decision. Critically, Defendants fail to provide any affidavits or any other evidence to support the injuries claimed. Given Defendants' lack of evidentiary support, there is insufficient proof to issue a stay.

Pointedly, at this stage of litigation, Defendants are even less likely to suffer injury than when their prior motions for stay were previously filed given that the discovery process is nearly complete and trial is 18 days away. Both Plaintiffs and Defendants have expended significant amounts of time and resources to conduct discovery. Discovery is all but complete. Quite notably, Defendants cite no discovery disputes resulting from the discovery process thus far. What remains is Defendants' unsupported allegation that they will suffer irreparable harm because this case violates separation of powers principles and claims under the Administrative Procedure Act. These alleged harms are no different than those faced by any other litigant. This Court has decided there are no separation of powers or Administrative Procedure Act issues barring Plaintiffs' claims in this case. Moreover, the Ninth Circuit found Defendants' arguments as to the violation of separation of powers and Administrative Procedure Act "fail to establish they will suffer prejudice not correctable in a future appeal." *See* Exhibit E (Ninth Circuit Order

Denying Writ of Mandamus). Defendants offer nothing in the way of factual or legal substantiation of harm required to sustain their burden.

3. Plaintiffs Will Sustain Substantial Injury if Proceedings are Stayed.

In considering a stay application, the Court should consider whether issuance of the stay will substantially injure the other parties interested in the proceeding. *Nken*, 556 U.S. at 433-34. Plaintiffs have put forth a significant body of fact and expert witness evidence indicating that they will be substantially injured if proceedings are stayed. *See, e.g.* ECF Nos. 256-269, 271, 272, 274, 275, 298, and 5-2, 5-3, 5-4. Defendants' continuing violations of Plaintiffs' rights under the Constitution and the Public Trust Doctrine establish irreparable injury. "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). In addition, the irreparable character of environmental injury is well established. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 545 (1987); see also Running Decl., ECF No. 264, ¶¶ 12-14; Wanless Decl., ECF No. 275-1, ¶¶ 16-22. As an illustration, taking into consideration Defendants' ongoing and pervasive actions to expand fossil fuel pollution amidst the urgency of the climate crisis, any stay is likely to result in substantial, irreparable injury to Plaintiffs. Hansen Decl., ECF No. 7-1, ¶¶ 69-76.

Defendants are attempting to short-circuit this Court's ability to hear fully developed trial testimony necessary for considered review of Plaintiffs' claims, analysis, and application of the constitutional principles upon which the claims rest, the climate science upon which they are founded, and the historic and ongoing actions of Defendants. This injures Plaintiffs and infringes upon their fundamental rights. *See* First Am. Compl., ECF No. 7. A fully developed

factual record will demonstrate the profound factual, legal, economic, social, emotional, familial, and scientific bases for the constitutional infringements at issue. For example, absent a determination of facts and a grant of relief premised on the legal violations established thereby, 11-year old Plaintiff Levi D. may witness his family's property in Satellite Beach, Florida succumb to catastrophic sea level rise, flooding, and storm surges. *Id*., ¶¶ 81, 84; Wanless Decl., Ex. 1, ECF No. 275-1, at ¶¶ 2, 24, 28, 30; Decl. of Levi D., ECF No. 41-7; Hansen Decl., ECF No. 7-1, ¶ 42. Importantly, Defendants did not move for summary judgment on Plaintiffs' substantive due process and equal protection claims. Defendants purported not to dispute any material facts relevant to summary judgment despite their denials of material facts in their Answer. *See* ECF Nos. 98 and 255 at 4. Thus, this Court's decision on summary judgment will not prevent trial unless summary judgment is granted as to the standing of each Plaintiff. That issue is an intensely factual inquiry.

For these reasons, Defendants' Motion to Stay should be denied as it perpetuates ongoing and enduring substantial injury to Plaintiffs.

4. The Public Interest and Equities Lie in Fair, Timely Adjudication of the Factual Dispute, Not in Staying These Proceedings

In contrast to the irreversible and omnipresent harms Plaintiffs are suffering on an enduring basis due to Defendants' unconstitutional conduct, Defendants fail to provide any factual evidence establishing that the public interest lies in staying the proceedings for Defendants' benefit. Quite the opposite—the public interest is served by allowing Plaintiffs to vindicate violations of constitutional and public trust rights. *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 a stay. When political branches actively infringe the constitutional rights of citizens, particularly those too young to vote or otherwise voice their injuries, 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 is served in the orderly resolution of cases and in vindicating important constitutional rights after full factual development. Moreover, the public interest favors allowing a district court to consider the record and make factual findings and legal conclusions necessary for later appellate review. A stay, particularly at this phase in the litigation, is "an intrusion into the ordinary processes of administration and judicial review." *Nken*, 556 U.S. at 427 (quotes, citations omitted). Accordingly, this case should be allowed to proceed to trial. Defendants have alternative means of obtaining their desired relief by appealing in the normal course, if justified, and will not be prejudiced in a way not correctable through trial or on appeal.

Finally, Defendants' bald and troubling allegation that this Court intends to usurp congressional and executive authority mischaracterizes Plaintiffs' request for relief and the ability of the parties and this Court to successfully engage in the ordinary course of litigation. This Court has properly recognized that this case, "at its heart," intimately implicates the judiciary's role as the final arbiter and ultimate guardian of constitutional rights and is therefore "squarely within the purview of the judiciary." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016). While Defendants may not want to go to trial, they offer no reasonable basis to suggest that the public interest is served by granting a stay. On the contrary, there are no reasons offered to support stopping trial for the court to decide these motions at this late juncture. In fact, this Court has discretion to defer the motions in its reasoned judgment if needed until

trial. *See* ECF No. 226. The District Court has the inherent authority to control its own docket and calendar. *See Landis,* 299 U.S. at 254-55. Given the magnitude of the issues presented, it is in the public interest to afford the Court the time required to deliberate. Moreover, it is in the public interest to receive a well-reasoned, carefully considered decision. There is no evidence to suggest this Court is acting with anything but promptness and due diligence. It would be unreasonable to disturb this Court's ability to handle its docket. For these reasons the public interest is served by this Court proceeding to trial on October 29, 2018.

V. CONCLUSION

Defendants fail to articulate any legitimate alleged injuries necessitating a stay by this Court. Defendants' repetitive use of arguments already vetted and dismissed by this Court, the Ninth Circuit, and the U.S. Supreme Court demonstrates their incapacity to sustain the burden of proof and strongly suggests that this Motion to Stay was filed for an improper purpose. It is wholly outside the public interest to delay adjudication of these pressing issues amidst the substantiated harm to Plaintiffs. For the reasons stated above, Plaintiffs respectfully request this Court deny this Motion to Stay.

DATED this 11th day of October, 2018.

/s/ Philip L. Gregory

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA; et al.,

UNITED STATES OF AMERICA; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE,

Respondent,

KELSEY CASCADIA ROSE JULIANA; et al.,

Real Parties in Interest.

No. 18-71928

D.C. No. 6:15-cv-01517-TC
District of Oregon,
Eugene

ORDER

Before: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

Petitioners' emergency motion for a stay of discovery and trial is DENIED.

The panel will rule on the petition for writ of mandamus on an expedited basis.

EXHIBIT B

(ORDER LIST: 585 U.S.)

MONDAY, JULY 30, 2018

ORDER IN PENDING CASE

18A65 UNITED STATES, ET AL. V. USDC OR

The application for stay presented to Justice Kennedy and by him referred to the Court is denied.

The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.

EXHIBIT C

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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STATUTORY PROVISIONS

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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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

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

FEDERAL:

RELEVANT STATUTORY PROVISIONS

FEDERAL:

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

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

Federal Rules of 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

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

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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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INDEX OF EXHIBITS

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. 1-1 (June 9, 2017).

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

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
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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.*

---

[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,

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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,

/s/ Julia 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 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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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

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Signature (use "s/" format)

EXHIBIT D

No. 18A-65

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., APPLICANTS,
v.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
and
KELSEY CASCADIA ROSE JULIANA, et al., RESPONDENTS

RESPONSE BRIEF OF RESPONDENTS JULIANA, ET AL., TO APPLICATION FOR A STAY PENDING DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON AND ANY FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN ADMINISTRATIVE STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Real Parties in Interest Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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INTRODUCTION

Respondents, twenty-one children and youth ("Plaintiffs"), respectfully request this Court deny Petitioners' ("Defendants") application for stay ("Application").[1] Plaintiffs' Fifth Amendment substantive due process claims allege that Defendants have deprived Plaintiffs of recognized liberties and other unalienable rights. In response, Defendants concede Plaintiffs have made a *prima facie* case of injury-in-fact and are already in the "danger zone" from climate change. That danger zone is exemplified by one Plaintiff, ten-year-old Levi D., who is losing his Florida barrier island to sea level rise, the security of his home and school to storm water inundation, and the security of his person and mental health to traumatic stress from the government-sanctioned fossil fuel energy system, which is causing climate change. Mischaracterizing the case's procedural posture and status of discovery, and without any credible claim of harm, Defendants ask this Court to micromanage the district court and stay proceedings in this urgent constitutional case.

On July 20, 2018, the Ninth Circuit denied Defendants' most recent petition for writ of mandamus ("second petition"), finding it identical in all material respects in both argument and circumstance to an unsuccessful petition for writ of mandamus Defendants filed on June 9, 2017 ("first petition").[2] On March 7, 2018,

[1] Defendants request that this Court alternatively construe their Application as a petition for writ of mandamus or petition for certiorari from the Ninth Circuit's prior mandamus decision. Application at 38. As requested by the Court, Plaintiffs respond herein only to Defendants' request for a stay pending further review and reserve the right to respond separately to Defendants' alternative requests if invited by this Court.

[2] Appendix ("App.") at 4a.

Chief Judge Sidney Thomas of the Ninth Circuit wrote a well-reasoned opinion denying the first petition as wholly failing to satisfy any of the factors for mandamus. *In re United States*, 884 F.3d 830 (9th Cir. 2018). Defendants chose not to seek immediate review of that denial, instead requesting from this Court two extensions of their deadline for review, belying their present claim of any supposed "emergency" or impending harm.

In again declining "to exercise [their] jurisdiction to grant mandamus relief," App. at 5a, the Ninth Circuit's *per curiam* opinion determined "that the issues that the government raises in its petition are better addressed through the ordinary course of litigation." *Id*. The July 20 opinion reaffirms:

> We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief.
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> The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the district court or in a future appeal. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

Id. at 4a, 9a.

Defendants have not made the showing necessary to justify the extraordinary relief of eliminating the district court's discretion in managing these proceedings in a fundamental rights case brought by children. Defendants' inaccurate portrayal of the current procedural posture of this case is unsupported by the record. While

Defendants allude to "burdensome discovery on a highly compressed timeframe," Application at 36, they fail to cite a single order requiring responses to specific discovery propounded by Plaintiffs. The district court ruled on Defendants' motion for a protective order, which sought to preclude all discovery, correctly denying such overbroad relief. D. Ct. Doc.[3] 212, 300. There are no discovery orders requiring Defendants to produce a single document, respond to a single interrogatory or request for admission, or sit for a single deposition.[4]

In denying the first petition, the Ninth Circuit observed that the record completely lacked any order directing "burdensome or otherwise improper discovery" and that Defendants failed to satisfy *any* of the factors for mandamus. *In re United States*, 884 F.3d at 834-35. The Ninth Circuit reiterated that finding in denying the second petition. App. at 9a-10a.

Contrary to statements made in their Application, all pending discovery requests to which Defendants object have been held in abeyance pursuant to mutual agreement of the parties. Application at 15. In fact, there is no discovery currently pending to which Defendants must respond except notices of deposition of Defendants' eight disclosed experts. Nor is there a burden on Defendants to conduct discovery, other than their decision to take the depositions of Plaintiffs' experts and sit their proffered experts for deposition. Further, the conferral process between the

[3] Plaintiffs refer to the district court docket as "D. Ct. Doc.," the Ninth Circuit docket from Defendants' first petition for writ of mandamus as "Ct. App. I Doc.," and the Ninth Circuit docket for Defendants' second petition for writ of mandamus as "Ct. App. II Doc."

[4] There have been depositions of Defendants' witnesses in this case to which Defendants did not object, further belying their claims regarding discovery burdens. App. at 30a, ¶¶ 51-52; App. at 32a-41a.

parties and regular status conferences with the magistrate judge assigned to pre-trial matters have successfully avoided all discovery disputes to date. As the Ninth Circuit just determined: "the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers." App. at 6a.

Plaintiffs have carefully avoided conducting discovery that would intrude on executive privilege and have not served any discovery on the President. In response to Defendants' pending motion for judgment on the pleadings seeking dismissal of the President, in which Defendants argue that the President is not a necessary party for purposes of Plaintiffs' remedy, Plaintiffs agreed to dismissal of the President without prejudice. App. at 17a, 22a.

Further, in denying the second petition, the Ninth Circuit panel found that preemptive mandamus relief is not appropriate:

> Since that opinion [denying the first petition], the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring all discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

App. at 6a-7a.

At the time they filed this Application, Defendants had pending motions for judgment on the pleadings and for summary judgment in their ongoing effort to

dispose of the children's case or narrow the issues for trial. Both motions were heard by District Court Judge Aiken on July 18, 2018, who said she would rule promptly. Accordingly, the district court is proceeding swiftly to resolve all of Defendants' pending motions, including their motion to dismiss the President. App. at 19a.

Thus, Defendants' principal objection here is simply that they are subject to the normal burdens of litigation because the district court did not dismiss Plaintiffs' important constitutional claims, burdens not cognizable for the extraordinary relief they request. *See, e.g.*, *F.T.C. v. Std. Oil Co. of California*, 449 U.S. 232, 244 (1980). These claims assert that Defendants' systemic affirmative conduct, persisting over decades, in creating, controlling, and perpetuating a national fossil fuel-based energy system, despite reasonable alternatives to that system and despite long-standing knowledge of the resulting destruction to our nation and profound harm to these young Plaintiffs, violates their substantive due process, equal protection, and public trust rights. A fully developed factual record will show that the brunt of Defendants' energy system falls on children who have no voice in the matter and who are too important and too vulnerable to permit the state to trifle with their most sacred constitutional rights, including their recognized liberty right not to be deprived of their personal security by their government.[5]

[5] In *Brown v. Board of Education*, the Court began to recognize the constitutional protections of children. 347 U.S. 483 (1954). A little over a decade later, in *In re Gault*, the Court held that the Due Process Clause and Bill of Rights applied to children. 387 U.S. 1, 13 (1967). More recently, in a line of child-centered Eighth Amendment cases, the Court treated children as similarly situated to adults in terms of the crime they have committed but "constitutionally different from adults in their level of culpability." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (citing *Roper v. Simmons*, 543 U.S. 551 (2005)). In *Obergefell v. Hodges*, this Court recognized the constitutional importance of

The scope of this case is directly proportional to the systemic nature and magnitude of Defendants' constitutionally violative conduct. In their Answer to Plaintiffs' Amended Complaint, Defendants admit the United States' emissions comprise "more than 25 percent of cumulative global CO_2 emissions," that "'business as usual' CO_2 emissions" imperil Plaintiffs with "dangerous and unacceptable economic, social, and environmental risks," that "the use of fossil fuels is a major source of these emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path," and that Defendants "permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation." D. Ct. Doc. 98 ¶¶ 7, 150, 151. 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." App. at 30a-31a ¶¶ 53-54; App. at 33a-35a, 37a.

In their expert reports, Plaintiffs' experts[6] confirm the urgent plight of these youth to secure their rights. Plaintiffs' experts starkly present reliable evidence that

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safeguarding children. 135 S. Ct. 2584, 2600 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. . . . Marriage also affords the permanency and stability important to children's best interests. . . . [Children] also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.").

[6] Expert testimony in this case will come from Nobel laureate economist and scientists, award-winning historians, a former head of the Council on Environmental Quality during the Carter administration, and the top climate scientists in the world, including the former head of NASA's Goddard Institute for Space Studies. Specifically, Plaintiffs experts are Dr. Frank Ackerman, Peter A. Erickson, Howard Frumkin, M.D., Dr. James E. Hansen, Dr. Ove Hoegh-Guldberg, Dr. Mark Jacobson, Susan E. Pacheco, M.D., Jerome A. Paulson, M.D., Dr. Eric Rignot, Dr. G. Philip Robertson, Dr. Steve W. Running, Catherine Smith, J.D., James Gustave Speth, Dr. Joseph E. Stiglitz, Lise Van Susteren, M.D., Dr. Kevin E. Trenberth, Dr. Harold R. Wanless, Dr. James H.

more injuries will undoubtedly befall Plaintiffs because the dangers from CO_2 and other greenhouse gases (collectively "GHGs") are already locked in. D. Ct. Doc. 262-1 (Rignot Expert Report) at 4 ("Thus between the irreversible melting of portions of Greenland's and Antarctica's ice sheets, humanity has already committed itself to a 3-6 m rise in sea level."). Plaintiffs also present reliable evidence of the imminent and substantial risk of injury that projected increasing GHG levels and temperatures will cause Plaintiffs if a remedy is not granted here. D. Ct. Doc. 274-1 (Hansen Expert Report) at 34-41.

In his expert report, Nobel laureate Joseph Stiglitz opines:

> Defendants' continuing support and perpetuation of a national fossil fuel-based energy system and continuing delay in addressing climate change is saddling and will continue to saddle Youth Plaintiffs with an enormous cost burden, as well as tremendous risks, which is causing substantial harm to the economic and personal well-being and security of Youth Plaintiffs.
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> [Transitioning to a low/no carbon economy] is not only feasible, the relief requested will benefit the economy. More importantly, this action is necessary if Defendants are to prevent the extreme cost and damages Youth Plaintiffs and Affected Children are facing and will face to an even greater extent if Defendants continue on a path that does not account for what is scientifically necessary to protect the climate system they depend on for their future well- being and their personal and economic security.

D. Ct. Doc. 266-1 (Stiglitz Expert Report) at 10, 50.

As summarized in the expert opinion of Dr. Lise Van Susteren,

> [T]hese youth Plaintiffs, and many other children, are already experiencing acute and chronic mental health impacts as a result of climate change and its impacts. These mental health impacts are exacerbated because climate change is a direct result of actions taken by the federal defendants, who are

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Williams, and Andrea Wulf. Expert reports were served on Defendants in April, except for Dr. Speth. D. Ct. Docs. 257-269, 271-272, 274, 275, 298; *see also* D. Ct. Doc. 318 at 13.

> supposed to be protecting the Plaintiffs and future generations. Some of the Plaintiffs are in a state of despair, others are angry and have feelings of hopelessness. They are extremely worried about their futures and the world that they will grow up in. Without immediate action by the federal defendants to address climate change, it is my expert opinion that these Plaintiffs will continue to suffer acute and chronic mental health impacts and that their suffering will worsen. These conclusions are consistent with what I have seen in my practice and the literature.

D. Ct. Doc. 271-1 (Van Susteren Expert Report) at 23.

In upholding the denial of Defendants' motion to dismiss under the no clear error standard and denying Defendants' first petition, Chief Judge Thomas' March 7, 2018 opinion directed that this case proceed with discovery and trial so Plaintiffs' important claims can be decided and reviewed on appeal in the clear light of a full factual record. *In re United States*, 884 F.3d at 837. Such a record is indispensable to resolution of the fundamental constitutional issues presented in this case, including the youths' standing. As this Court held in *Obergefell v. Hodges*, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." 135 S. Ct. at 2598.[7] The decision in *Obergefell* continued:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of 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

[7] Important fundamental rights cases were all decided on appeal of merits decisions. *See, e.g.*, *Obergefell*, 135 S. Ct. 2584 (three final decisions for plaintiffs and one preliminary injunction); *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954) (four district court records); *Brown v. Plata*, 563 U.S. 493, 499-500 (2011) (two district courts); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Furman v. Georgia*, 408 U.S. 238 (1972).

> the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id. at 2598. A complete factual record as to Defendants' systemic conduct in creating, controlling, perpetuating, and promoting a national fossil fuel-based energy system and their long-standing knowledge of the resulting global warming dangers currently faced by these Plaintiffs is precisely the type of "new insight" relevant to whether a "claim to liberty must be addressed" here. *Id.*

Allowing such a factual record to be completed and for this case to proceed to decision on dispositive motions and trial is entirely consistent with the separation of powers. As Justice Scalia wrote in his concurrence in *National Labor Relations Board v. Noel Canning*, the Court's jurisprudence on separation of powers "rest[s] on the bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'" 134 S. Ct. 2550, 2593 (2014). Accordingly, this Court should deny Defendants' Application and permit Plaintiffs to continue to develop the factual record necessary for review of their constitutional claims, including eventual review by this Court in the ordinary course of appeal.

Defendants misinform this Court by fundamentally mischaracterizing Plaintiffs' claims, the relief requested, and the rulings of the district court and Ninth Circuit, as explained *infra*. This case does not rest solely on the district court's recognition of a previously unrecognized unenumerated fundamental liberty interest. In order to dismiss this case, this Court would need to reverse over a hundred years of jurisprudence and find the Fifth Amendment does not provide

Americans the fundamental rights to personal security, property, life, family autonomy and security, and equal protection, among other rights. Defendants' radical Application 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 upon a complete record in the ordinary course of judicial review. When Defendants admit the climate system is in the "danger zone" (App. at 31a, ¶ 54; App. at 41a), unsupported claims of inconvenient discovery and trial do not warrant micromanaging the district court by staying this constitutional case. Defendants fail to satisfy their burden for the extraordinary relief they request.

STATEMENT

1. Plaintiffs commenced this action on August 12, 2015 and filed their First Amended Complaint ("FAC") on September 10, 2015. D. Ct. Doc. 7. Plaintiffs allege that Defendants' systemic affirmative ongoing conduct, persisting over decades, in creating, controlling, and perpetuating a national fossil fuel-based energy system, despite long-standing knowledge of the resulting destruction to our nation and profound harm to these young Plaintiffs, violates Plaintiffs' constitutional due process rights. Specifically, Plaintiffs allege Defendants' conduct violates their substantive due process rights to life, liberty, and property, to dignity, to personal security, to a stable climate system capable of sustaining

human lives and liberties, as well as other previously recognized unenumerated liberty interests, and has placed Plaintiffs in a position of danger with deliberate indifference to their safety under a state-created danger theory. *Id.* ¶¶ 277-89, 302-06. Further, Plaintiffs allege Defendants' conduct violates their rights as children to equal protection by discriminating against them with respect to their fundamental rights and as members of a protected or quasi-protected class. *Id.* ¶¶ 290-301. Finally, Plaintiffs allege Defendants' conduct violates their rights as beneficiaries to public trust resources under federal control and management. *Id.* ¶¶ 307-10. With respect to all claims, the FAC seeks a declaration of Plaintiffs' rights and the violation thereof and an order directing Defendants to cease their violations of Plaintiffs' rights, prepare an accounting of the nation's greenhouse gas emissions, and prepare and implement an enforceable national remedial plan to cease the constitutional violation by phasing out fossil fuel emissions and drawing down excess atmospheric CO_2, as well as such other and further relief as may be just and proper. *Id.* at Prayer for Relief.

2. Three trade organizations collectively representing the United States' fossil fuel industry successfully moved to intervene. D. Ct. Doc. 14. These Intervenors moved to dismiss Plaintiffs' claims, arguing that there is no federal public trust doctrine, that any such federal public trust is displaced by the Clean Air Act, that Plaintiffs' claims present non-justiciable political questions, and that Plaintiffs lack standing. D. Ct. Doc. 20.

3. Defendants moved to dismiss Plaintiffs' claims, arguing that Plaintiffs lack standing, that Plaintiffs failed to state constitutional claims, and that there is no federal public trust doctrine. D. Ct. Doc. 27-1

4. After hearing oral argument on March 9, 2016, Magistrate Judge Thomas Coffin recommended on April 8, 2016, that Defendants' and Intervenors' motions to dismiss be denied and Plaintiffs' claims proceed to trial. D. Ct. Doc. 68. Defendants and Intervenors objected to Judge Coffin's findings and recommendations. D. Ct. Doc. 73, 74.

5. After a second round of oral argument on September 13, 2016, Judge Ann Aiken, then Chief Judge for the District of Oregon, denied the motions to dismiss on November 10, 2016. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). Judge Aiken recognized that, "[a]t its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." *Id.* at 1241. In allowing Plaintiffs' claim of infringement of an unenumerated right to a stable climate system capable of sustaining human life to proceed to trial, along with Plaintiffs' other claims, Judge Aiken recognized that such a right, if supported by evidence at later stages of litigation, would be, like the right in *Obergefell*, a right "underlying and supporting other liberties" and "quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Id.* at 1250 (quoting *Obergefell*, 135 S. Ct. at 1298-99). Regarding redressability and remedy, Judge Aiken acknowledged that the district court "would no doubt be compelled to

exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so." *Id.* at 1241 (citations omitted). Ultimately, Judge Aiken concluded that "speculation about the difficulty of crafting a remedy could not support dismissal at this early stage." *Id.* at 1242 (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

6. On December 15, 2016, Intervenors filed their Answer, denying virtually all of Plaintiffs' allegations. D. Ct. Doc. 93. On January 13, 2017, Defendants filed their Answer, admitting many of Plaintiffs' factual allegations. Notably, Defendants' admissions in their Answer to the FAC directly contradict the claim that Plaintiffs will suffer no substantial harm if this Application is granted. Defendants admit, among other significant facts:

> [T]hat current and projected atmospheric concentrations of . . . GHGs, including CO_2, threaten the public health and welfare of current and future generations, and thus will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change.

D. Ct. Doc. 98 ¶ 213; *see also* D. Ct. Doc. 146 at 2-4 (District Court setting forth "non-exclusive sampling" of significant admissions in Defendants' Answer to the FAC).[8]

[8] The best available climate science further illustrates that even a modest delay in resolution of Plaintiffs' claims could substantially injure Plaintiffs. Atmospheric CO_2 concentrations are already well above the level necessary to maintain a safe and stable climate system, dangerous consequences of climate change are already occurring, CO_2 emissions persist for hundreds of years and affect 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, D. Ct. Doc. 7-1. Absent rapid emissions abatement, sea levels could rise by as much as fifteen meters, with dire consequences to Plaintiffs such as Levi D. Decl. of Dr. Harold R. Wanless, Ct. App. II Doc. 5-4 ¶¶ 14-15.

7. As a result of Intervenors' denial of a significant portion of the allegations in the FAC, Plaintiffs were forced to engage in significant discovery against all parties to prepare for trial because of the scope of the contested facts. *See* D. Ct. Doc. 146 at 2-4 (Judge Coffin illustrating non-exhaustive comparison between Answers filed by Defendants and Intervenors).

8. Four months after the denial of their motions to dismiss, Defendants and Intervenors asked the district court to certify its November 10, 2016 order denying their motions to dismiss for interlocutory appeal, restating the arguments in their previous motions. D. Ct. Doc. 120-1, 122-1.

9. On May 1, 2017, Judge Coffin recommended denial of the motions for certification for interlocutory appeal, in part because:

> [A]ny appellate review of the Order of the District Court allowing plaintiffs to proceed on their public trust and due process constitutional claims will only be aided by a full development of the record regarding the contours of those asserted rights and the extent of any harm being posed by the defendants' actions/inactions regarding human-induced global warming. This case, the issues herein, and the fundamental constitutional rights presented are not well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings.

D. Ct. Doc. 146 at 9. With respect to the public trust doctrine, addressing *PPL Montana LLC v. Montana*, 565 U.S. 576 (2012), Judge Coffin concluded the federal public trust doctrine would not be extinguished by a case "that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories." *Id.* at 12-13. Judge Coffin further found that any separation of powers concerns were "purely hypothetical and ignore[d] the court's

ability to fashion reasonable remedies based on the evidence and findings after trial." *Id.* at 9. Defendants and Intervenors objected to Judge Coffin's findings and recommendations. D. Ct. Doc. 149, 152. On June 6, 2017, with their objections having been fully briefed for a mere two weeks, Defendants demanded the district court resolve their objections by June 9, 2017. D. Ct. Doc. 171. After reviewing Defendants' and Intervenors' motions for interlocutory appeal *de novo*, Judge Aiken denied the motions on June 8, 2017. D. Ct. Doc. 172.

10. On June 9, 2017, Defendants filed their first petition for writ of mandamus with the Ninth Circuit. Ct. App. I Doc. 1. Just as they do here, Defendants claimed separation of powers harms from general participation in the discovery and trial process and sought dismissal of Plaintiffs' claims on the basis of standing, the Administrative Procedure Act ("APA"), separation of powers, and the merits of Plaintiffs' constitutional and public trust claims, offering arguments and authorities previously offered in their motions to dismiss and for interlocutory appeal.[9]

11. On June 28, 2017, Judge Coffin granted the motions of all three Intervenors to withdraw. D. Ct. Doc. 182. As a result of the withdrawal of Intervenors, who had denied substantially all of the factual allegations in the FAC,

[9] Beginning with their motion to dismiss, Defendants have consistently and repeatedly presented the argument that Plaintiffs' claims must be pled under the APA and cannot proceed as pled under the Due Process Clause. See D. Ct. Doc. 208 at 5-14 (Excerpting and explaining the numerous instances in which the parties have addressed this argument and the district court and Ninth Circuit's resolution of the same); *see also* D. Ct. Doc. 195 at 10-22; D. Ct. Doc. 196; D. Ct. Doc. 207 at 14-20; D. Ct. Doc. 212; Ct. App. II Doc. 1 at 29-34.

the scope of issues for trial was substantially narrowed, thereby reducing the scope of discovery.

12. On July 20, 2017, Plaintiffs took the deposition testimony of Dr. Michael Kuperburg, biologist for Defendant Department of Energy and director of the U.S. Global Change Research Program. App. at 30a-31a, ¶¶ 52, 54; App. at 38a-41a. Defendants did not object to this deposition. Dr. Kuperberg testified that the United States is currently in the "danger zone" with respect to climate change and that 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." App. at 31a, ¶ 54; App. at 39a-41a.

13. On July 21, 2017, Plaintiffs took the deposition testimony of Dr. C. Mark Eakin, Oceanographer with the National Oceanic and Atmospheric Administration, a division of Defendant Department of Commerce. App. at 30a, ¶¶ 52-53; App. at 32a-37a. Defendants did not object to this deposition. Dr. Eakin similarly testified that NOAA "consider[s] the impact of carbon dioxide and climate change on our oceans to be dangerous." App. at 30a, ¶ 53; App. at 33a.

14. On July 25, 2017, a panel of the Ninth Circuit consisting of Judges Marsha Berzon, Alfred Goodwin, and Alex Kozinski stayed proceedings in the district court pending consideration of Defendants' first petition. Ct. App. I Doc. 7.

15. On August 25, 2017, Judges Aiken and Coffin submitted a letter to the Ninth Circuit, explaining the district court's view that:

> [A]ny error that [it] may have committed (or may commit in the future) can be corrected through the normal route of direct appeal following final

> judgment. Indeed, we believe that permitting this case to proceed to trial will produce better results on appeal by distilling the legal and factual questions that can only emerge from a fully developed record.

Ct. App. I Doc. 12.

16. On August 28, 2017, Plaintiffs answered Defendants' first petition. Ct. App. Doc. 14-1. On September 5, 2017, over 90 *amici* filed eight *amicus* briefs in support of Plaintiffs in the Ninth Circuit. Ct. App. I Doc. 17, 19-24, 30, available at 2017 WL 4157181-86, 4157188. The *amici* included the Global Catholic Climate Movement, Leadership Conference of Women Religious, The Sisters of Mercy of the Americas' Institute Leadership Team, Niskanen Center, League of Women Voters of the United States, Center for International Environmental Law, Union of Concerned Scientists, Sierra Club, and Food & Water Watch. The *amici* also included over 60 legal scholars and law professors, including Dean Erwin Chemerinsky and Dean David Faigman, many of whom are teaching about this case in their classes due to its constitutional import.

17. On December 11, 2017, a panel of the Ninth Circuit consisting of Chief Judge Sidney Thomas and Judges Marsha Berzon and Alex Kozinski heard oral argument on Defendants' first petition. Judge Michelle Friedland joined the panel upon Judge Kozinski's retirement. *In re United States*, 884 F.3d at 833 n.*.

18. On March 7, 2018, Chief Judge Thomas, writing for the Ninth Circuit, denied Defendants' petition, ruling that Defendants had not satisfied any of the factors for mandamus and affirming the district court's denial of Defendants' motion to dismiss as involving no clear error. *In re United States*, 884 F.3d 830.

Specifically, the panel determined that mandamus relief was inappropriate where, as here, Plaintiffs had not moved to compel—nor had the district court compelled—any discovery, the parties were resolving specific discovery disputes through the meet and confer process, and Plaintiffs had withdrawn a number of discovery requests. *Id.* at 834-35; *see* Plaintiffs had withdrawn a number of discovery requests. *Id.* at 834-35; *see* ¶¶ 29, 31, 35-36; Section II, *infra*. The Ninth Circuit explicitly rejected Defendants' contention—which they repeat unaltered in their second petition and in their Application—that all discovery is categorically improper, stating: "If a specific discovery dispute arises, the defendants can challenge that specific discovery request on the basis of privilege or relevance." *Id.* at 835 (citation omitted and emphasis added). The Ninth Circuit reasoned that "defendants will have ample remedies if they believe a specific discovery request from the plaintiffs is too broad or burdensome." *Id.* (emphasis added). Both at oral argument and in its order, the panel made clear that the primary cases on which Defendants rely for dismissal via mandamus are inapposite. *Id.* at 835 ("In both cases, the district court had issued orders compelling document production.") (citing *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 376, 379 (2004); *Credit Suisse v. U.S. Dist. Ct. for Cent. Dist. of California*, 130 F.3d 1342, 1346 (9th Cir. 1997)); *id.* at 835 n.1 (finding *In re United States*, 138 S. Ct. 443 (2017) inapposite because there the district court had "deferred ruling on the defendants' earlier motion to dismiss."). The panel also held that any merits errors were correctable through the ordinary course of litigation and that the district court's denial of Defendants' motion to

dismiss did not present the possibility that the issue of first impression raised by the case would evade appellate review. *In re United States*, 884 F.3d at 836, 837. The panel concluded that the issues Defendants raised were better addressed through the ordinary course of litigation and emphasized that mandamus is not to be "used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Id.* at 834 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). Finally, the Ninth Circuit panel was "not persuaded" by Defendants' argument, repeated here, that "holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten separation of powers," concluding that "simply allowing the usual legal process to go forward will [not] have that effect in a way that is not correctable on appellate review." *Id.* at 836. In ushering Plaintiffs' claims towards trial, the Ninth Circuit noted: "There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of the issues by the trial courts." *Id.* at 837.

19. On April 12, 2018, the district court set this matter for an October 29, 2018 trial date. In terms of scheduling the length of trial, Plaintiffs initially projected 20 days for their case in chief. App. at 28a, ¶ 18. Defendants responded that 20 days would not be enough for Defendants' case and stated that it would be better to ask for more time than less for trial. *Id.* Thus, as a result of meet and confer efforts, the parties agreed jointly to request 50 trial days, 4 days a week, 6 hour days (approx. 12 weeks). *Id.* The next day, at the April 12 Status Conference,

Defendants confirmed the parties' agreement of 5 weeks per side with the Court. D. Ct. Doc. 191 at 8:3-5 (Apr. 12, 2018 Tr.) (Defendants' counsel stating: "Yes, Your Honor, with the understanding that if we don't need five weeks, we don't use five weeks.").

20. Following the Ninth Circuit's denial of Defendants' first petition, Defendants filed a series of motions, each substantively and procedurally duplicative of arguments raised in their motion to dismiss, and all previously rejected by the district court, and by the Ninth Circuit on mandamus with a single exception regarding dismissing the President specifically.

21. First, on May 29, 2018, Defendants filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). D. Ct. Doc. 195. As Defendants acknowledged, a motion under Rule 12(c) is governed by the same standard as a Rule 12(b)(6) motion to dismiss. *Id.* at 6. Defendants' Rule 12(c) motion reasserted two arguments for dismissal previously rejected in their motion to dismiss, whether Plaintiffs' claims must be pled under the APA, and separation of powers concerns, and for the first time since the case was filed in 2015 asked for dismissal of the President as an unnecessary party. *See generally id.* On July 18, 2018, Judge Aiken heard oral argument on Defendants' Rule 12(c) motion. D. Ct. Doc. 325; *see also* App. at 11a-19a (excerpts).

22. Second, on May 9, 2018, the same day they filed their Rule 12(c) motion, Defendants moved for a protective order and stay of *all* discovery pending resolution of their Rule 12(c) motion, arguing as they did in their motion to dismiss

and their first petition, that Plaintiffs' claims must be pled under and subject to the strictures of the APA and that separation of powers principles preclude discovery. D. Ct. Doc. 196.

23. Third, on May 22, 2018, Defendants filed a motion for partial summary judgment, arguing that Plaintiffs lack standing, that two of Plaintiffs' constitutional claims fail on the merits, that there is no federal public trust doctrine, that Plaintiffs' claims must be pled under the APA, and that separation of powers concerns bar Plaintiffs' claims and requested relief. D. Ct. Doc. 207. Defendants did not move for summary judgment on Plaintiffs' other substantive due process and equal protection claims. Oddly, Defendants purported not to dispute any material facts relevant to summary judgment despite their denials of material facts in their Answer. *Id.*; *see also* D. Ct. Doc. 98. In finding that Defendants did not satisfy any of the factors for mandamus, the Ninth Circuit did not, as Defendants contend, issue any "directive" (D. Ct. Doc. 195 at 1) to file duplicative and dilatory motions, but only stated that, as in all cases, Defendants would be able "to raise legal challenges to decisions made by the district court on a more *fully developed record* . . . ." *In re United States*, 884 F.3d at 837 (emphasis added). However, discovery is still underway (primarily expert discovery) and the parties have not yet had sufficient time to develop a full record upon which summary judgment would be appropriate. App. at 27a-28a, ¶¶ 12-17.

24. On May 24, Defendants applied to this Court for an extension within which to file a petition for a writ of certiorari to review the Ninth Circuit's denial of

their first petition. D. Ct. Doc. 211-1. Notably, Defendants conceded that they already presented their APA arguments to the Ninth Circuit, which found no clear error in the district court's denial of the same. *Id.* ¶ 3 ("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 [APA]."). Further, Defendants made no reference to any urgency. Justice Kennedy granted Defendants' application for an extension on May 29, 2018, Ct. App. I Doc. 70, and granted Defendants' application for a further extension (filed on June 25), to and including August 4, 2018. Ct. App. I Doc. 71. Even though it was brought barely three weeks before the instant Application, Defendants' second application for an extension also did not reference any urgency in addressing the underlying proceedings.

25. On May 25, 2018, Magistrate Judge Coffin denied Defendants' motion for protective order and stay of all discovery, reasoning that the APA is not the exclusive means for bringing Plaintiffs' constitutional claims, that the district court had already addressed and rejected Defendants' APA arguments, and that Defendants' arguments failed because they did not address a "specific discovery request." D. Ct. Doc. 212 at 2. Defendants objected to Judge Coffin's ruling. D. Ct. Doc. 215. On June 29, 2018, Judge Aiken sustained Judge Coffin's ruling. D. Ct. Doc. 300.

26. On June 8, 2018, Plaintiffs moved to defer consideration of Defendants' motion for summary judgment until after the conclusion of discovery and in

conjunction with trial. D. Ct. Doc. 226. On July 13, 2018, the district court denied Plaintiffs' motion and simultaneously granted Defendants' request that the district court hold oral argument on Defendants' motion for summary judgment on July 18, 2018 in conjunction with argument on Defendants' Rule 12(c) motion. D. Ct. Doc. 316.

27. There is only one issue that was raised in Defendants' pending motions, their petition, and the instant Application that has not previously been determined by the district court at the motion to dismiss stage and affirmed on mandamus by the Ninth Circuit: their argument in the Rule 12(c) motion that the President should be dismissed from the case. On July 16, prior to Defendants' submission of the instant Application, Plaintiffs met and conferred with Defendants and agreed to Defendants' requested dismissal of the President, provided that such dismissal is without prejudice. App. at 17a, 22a. On July 17, Plaintiffs informed the district court of this development during the status conference, also prior to Defendants' filing with this Court. *Id*. Finally, at oral argument on Defendants' motions for judgment on the pleadings and summary judgment on July 18, 2018, Plaintiffs reiterated their agreement to Defendants' requested dismissal of the President, provided that such dismissal is without prejudice. App. at 17a, 22a.

28. After Judge Aiken sustained Judge Coffin's denial of Defendants' motion for protective order and stay of all discovery, Defendants filed their second petition in the Ninth Circuit. Ct. App. II Doc. 1. The second petition duplicated Defendants' arguments from their motion to dismiss and first petition, arguing that

Plaintiffs' claims should be dismissed on the basis of standing, separation of powers concerns, the merits of Plaintiffs' claims, that Plaintiffs' claims must be pled under the APA, and asserting unsubstantiated harms stemming from the general process of participating in discovery and trial. Ct. App. II Doc. 1. Defendants admit the arguments advanced in their second petition are duplicative and raised under the same standard applicable to their first petition. *Id.* at 10. As part of their second petition, Defendants made an emergency motion to the Ninth Circuit to stay the proceedings in the district court pending its consideration of the petition. *Id.* Defendants also concurrently submitted a motion to the district court to stay proceedings pending the Ninth Circuit's disposition of the second petition. D. Ct. Doc. 317. On July 16, 2018, The Ninth Circuit denied Defendants' request for a stay and indicated that it would rule on Defendant's second petition expeditiously. Ct. App. II Doc. 9. Defendants filed their Application with this Court on July 17, 2018. The district court denied Defendants' motion for stay pending the Ninth Circuit's disposition of their second petition later the same day. D. Ct. Doc. 307.

29. Defendants will suffer no cognizable burden for purposes of mandamus in participating in discovery generally and proceeding through trial. Following the Ninth Circuit's denial of Defendants' first petition, Plaintiffs completed and served expert reports, agreed to make themselves and their experts available for deposition per Defendants' requests, propounded narrowly-tailored requests for admissions based on government documents with footnoted citations to the government source of the fact sought for admission, and noticed Rule 30(b)(6) depositions. Ct. App. II

Doc. 5-1 at 3; App. at 24a, ¶ 3. Plaintiffs did not propound any requests for production of documents.

30. On June 4, 2018, Defendants' moved for a protective order as to some of the requests for admissions and the Rule 30(b)(6) depositions on June 4, 2018. D. Ct. Doc. 217.

31. Through the ordinary meet and confer process, and upon the recommendations of both Judge Coffin and Defendants to streamline discovery, Plaintiffs agreed to hold in abeyance, and the district court entered a corresponding order holding in abeyance, all pending discovery (the propounded requests for admissions and deposition notices). In lieu thereof, the parties agreed to proceed with motions *in limine* seeking judicial notice of publicly available government documents and to propound limited contention interrogatories to discover the bases for Defendants' positions on certain disputed material facts. D. Ct. Doc. 247, 249; Ct. App. II Doc. 5-1 at 3; App. at 26a, ¶ 7.

32. Via letter dated July 12, 2018, Defendants identified a list of eight experts who they may call to testify at trial. In that letter, Defendants stated that they consider the identities of the listed experts to be "Confidential Materials" under the terms of the parties' protective order. Joint Status Report as of July 16, 2018, D. Ct. Doc. 319 at 14; D. Ct. Doc. 221 (Stipulated Protective Order).

33. On July 20, 2018 Plaintiffs issued deposition notices for the expert witnesses Defendants identified in their July 12, 2018 letter.

34. On July 20, 2018, Defendants issued deposition notices for all 18 of Plaintiffs' experts, 17 of whom have served written reports on Defendants.

35. Thus, there is no pending discovery to which Defendants are required to respond. Based on notices served to date, Defendants' sole discovery obligations are to produce expert reports on August 13 pursuant to a schedule to which Defendants agreed; to present their own proffered experts for deposition; and to conduct the depositions of Plaintiffs' experts, which Defendants have noticed. Ct. App. II Doc. 5-1 at 3-4; App. at 25a-26a, ¶ 6. Defendants have not specifically objected to expert discovery. Ct. App. II Doc. 5-1 at 4; App. at 27a, ¶¶ 13, 16. There is no evidence of a discovery burden substantiating a stay.

36. On July 20, 2018, the Ninth Circuit declined to exercise jurisdiction to grant mandamus relief, concluding:

> The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the district court or in a future appeal.

App. at 9a-10a. This Application should meet a similar result.

ARGUMENT

I. STANDARD OF REVIEW

A stay of proceedings "is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). The Court affords considerable deference to a

lower court's decision granting or denying a stay. *See, e.g.*, *Bonura v. CBS, Inc.*, 459 U.S. 1313, 1313 (1983); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973). Defendants bear the "heavy burden" of justifying the "extraordinary" relief occasioned by a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975); *see also* Robert S. Stern, et al., Supreme Court Practice 907 (8th ed. 2002) (A lower courts' disposition of an application for stay "is essentially an act of discretion . . . it is entitled to *prima facie* respect, to be set aside only if deemed clearly erroneous.").[10]

An application for stay may only be granted if the petitioner carries the heavy burden to establish:

> [There is a] (1) reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). "Relief is not warranted unless" all of these elements "counsel in favor of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009). Defendants have the burden to make a clear showing of their injury. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). "An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus*, 463 U.S. at 1317. Delay in seeking a stay "blunt[s] [any] claim of urgency and counsels against the grant of a stay." *Id.* at 1317-18. Finally, the Court

[10] During a recent eight-year period, this Court received more than 1,900 applications for extraordinary writs and granted none. Stephen M. Shapiro, et al., Supreme Court Practice § 11.1, at 661 n. 9 (110th ed. 2013).

balances the equities to determine whether the injury asserted by the applicant outweighs the harm to the other parties. *Rostker*, 448 U.S. at 1308. Under this standard, relief is not warranted and Defendants' Application must be denied.

II. DEFENDANTS HAVE NOT SHOWN IRREPARABLE INJURY FROM THE DENIAL OF THE STAY TO JUSTIFY THIS COURT'S INTERVENTION

To adopt Defendants' argument on irreparable injury would be to find that, every time the federal government is a defendant in a constitutional case about alleged deprivation of the recognized liberty rights of individuals, the government's participation in discovery over a six-month period in preparation for a bench trial of an agreed-upon length, predominantly involving expert testimony and government document evidence, is alone grounds for an emergency stay by the Supreme Court. Specifically, Defendants describe the limited basis of their irreparable injury as:

> Absent relief from the Ninth Circuit or this Court, the government will be forced to participate in a highly compacted period of discovery and trial preparation followed by a 50-day trial, all of which will itself violate bedrock limitations on agency decisionmaking and the judicial process imposed by the APA and the separation of powers.

Application at 5-6. Such a finding would turn irreparable injury on its head, open the floodgates for constant second-guessing by this Court of the conduct of routine discovery and bench trials, and unduly burden individuals seeking constitutional protection from their Article III courts, in this case children, who are already being deprived their rights from the abuses of government power. As the Ninth Circuit just ruled:

> The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute "agency decisionmaking," which the government contends could not occur

> without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA.

App. at 8a.

Moreover, Defendants already allowed, without objection, depositions of government witnesses who answered questions about climate change danger. *See* App. 30a-31a, ¶¶ 51-54. Presently, however, there is no pending discovery that would require agency officials to answer any questions on the topic of climate change or "agency decisionmaking." The proper course for Defendants is to object to, or move for protective order on, any specific discovery they believe is improper. Barring specific objectionable discovery, Defendants have made no showing, and cited no precedent, that any form of routine discovery, and a bench trial generally, in a constitutional case about individual liberties is in and of itself irreparable harm warranting this Court's intervention. Indeed, the discovery and trial burdens in this case pale in comparison to other cases aimed at protecting the nation's resources. For example, the instant case is in stark contrast to the massive discovery in which the government was involved for the *Deepwater Horizon* litigation, wherein more than ten federal agencies produced over 100 million pages of documents; there were over 500 days of depositions; and trial of the government's claims took place in three phases over three years.[11]

[11] John C. Cruden, Steve O'Rourke, & Sarah D. Himmelhoch, *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 Mich. J. Envtl. & Admin. L. 65, 110, 112, 118 (2016).

Here, Defendants have not responded to a single request for admission or produced a single document, Plaintiffs have forgone Rule 30(b)(6) depositions, Plaintiffs anticipate fewer than 1,000 documents at trial, and the number of days of depositions will be fewer than 50 for both sides. App. at 18a. Moreover, given the fewer number of witnesses to be called by Defendants than originally anticipated, the trial should be shorter than the 50 days Defendants requested be calendared by the district court. App. at 18a. Given the record before this Court, particularly as to routine discovery leading to a bench trial, there can be no finding of irreparable injury, and the Application should be denied on that basis alone. *Ruckelshaus*, 463 U.S. at 1317.

III. THIS COURT IS UNLIKELY TO OVERTURN THE DENIAL OF DEFENDANTS' FIRST OR SECOND PETITIONS

In light of the Ninth Circuit's proper denial of Defendants' second petition, this Court would be unlikely to reverse or issue a writ of 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.* at 380 (quotes, citations omitted).[12] As petitioners, Defendants bear the heavy burden of showing: (1) they have "no

[12] "From the very foundation of our judicial system," the general rule has been that "the whole case and every matter in controversy in it [should be] decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-66 (1891). "This final-judgment rule, now codified in [28 U.S.C.] §1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017).

other adequate means to attain the relief [they] desire[]"; (2) their "right to issuance of the writ is clear and indisputable"; and (3) issuance of the writ would be an appropriate exercise of the Court's discretion. *Id.* at 380-81 (quotes, citations omitted). Here, Defendants satisfy none of these requirements.

A. Defendants Have Other Adequate Means to Obtain Their Desired Relief

Defendants' second petition principally seeks dismissal of Plaintiffs' claims on the basis of alleged and unsupported burdens of participating in the ordinary discovery and trial process. In all but the most unique and extraordinary circumstances, inapplicable here,[13] the proper course for seeking a writ of mandamus premised on discovery burdens is to challenge the discovery order under which the alleged burdens arise, not the very existence of the case under which discovery issues. Not only are Defendants alleged harms in participating in discovery and trial not cognizable for purposes of mandamus or a stay, *see* Section II, *infra*, Defendants have no current discovery obligations other than serving their expert reports and presenting their experts for deposition, to which they have long agreed, and deposing Plaintiffs' experts per their own request. Moreover, as the Ninth Circuit noted in denying Defendants' second petition: "Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief." App. at 7a. (emphasis in original) "The government retains the

[13] The cases upon which Defendants rely to argue for dismissal based on alleged discovery harms are inapposite, as the Ninth Circuit properly noted. *In re United States*, 884 F.3d at 835; *see Cheney*, 542 U.S. at 376 (discovery order compelled disclosure of records sought on merits of Federal Advisory Committee Act claim), *dismissed on merits on remand* 406 F.3d 723; *Credit Suisse v. U.S. Dist. Court for Cent. Dist. Of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997) (complying with discovery request would violate "Swiss banking secrecy and other laws which carry criminal penalties.").

ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten separation of powers." *Id.* at 6a; *In re United States*, 884 F.3d at 835 (same). In order to obtain a stay of proceedings, a petitioner must "set out with particularity why relief is not available from any other court." Sup. Ct. R. 23.3. Defendants can clearly avail themselves of relief from the district court with respect to any future *specific* discovery requests to which they object.

B. Defendants Have No Right to Issuance of the Writ of Mandamus on The Merits

Because Defendants' fail to satisfy any of the other criteria for mandamus or a stay, the merits of Plaintiffs' claims are not properly before this Court or the Ninth Circuit at this time. This Court will have the opportunity to review Plaintiffs' legal claims after a final determination on the merits, aided by a fully developed factual record, which does not presently exist. App. at 9a-10a. ("The merits of the case can be resolved by the district court or in a future appeal."). Even were this Court to reach the merits of the district court's denial of Defendants' motion to dismiss, the district court's conclusions are neither "clearly" nor "indisputably" erroneous as would be required to justify mandamus.

1. The District Court's Preliminary Conclusions Regarding Standing Are Not Clearly Nor Indisputably Erroneous[14]

As the district court concluded, and the Ninth Circuit affirmed under the standard applicable here, Plaintiffs plausibly alleged that their injuries are fairly traceable to the systemic conduct of Defendants in authorizing, permitting,

[14] Notwithstanding Defendants' argument in their Application that Plaintiffs' injuries are generalized grievances, Defendants conceded at oral argument before the district court on July 18, 2018 that Plaintiffs made a *prima facie* showing of injury-in-fact. App. at 15a.

promoting, and incentivizing fossil fuel production, consumption, transportation, and combustion. In *Brown v. Plata*, this Court recognized causation based upon aggregate, systemic acts like those at issue here:

> 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" . . . .

563 U.S. 493, 500 n.3 (2011); *see also Wilson v. Seiter,* 501 U.S. 294, 304 (1991) ("Some conditions . . . may establish" a constitutional "violation 'in combination' when each would not do so alone . . . .") (emphasis in original omitted). Similarly, in *Hills v. Gautreaux*, the Court approved a structural remedy to address the systemic actions leading to the "racially segregated public housing system" created by the Department of Housing and Urban Development. 425 U.S. 284, 289 (1976).

Defendants' speculation about third-party behavior is misplaced and misconstrues the nature of Plaintiffs' claims. *Bennett v. Spear* rejected a similar argument about causation, noting the government:

> [W]rongly equates injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is "the result of the *independent* action of some third party not before the court," . . . that does not exclude injury produced by determinative or coercive effect upon the action of someone else.

520 U.S. 154, 168-69 (1997) (internal citations, alterations omitted). Here, Plaintiffs will prove at trial that their injuries are fairly traceable to Defendants' conduct in

authorizing, permitting, promoting, sanctioning, and incentivizing fossil fuel production, consumption, transportation, and combustion. Defendants' actions have a "determinative or coercive" effect on the emissions to which Plaintiffs' injuries are traceable. *Id.*

Defendants' arguments regarding redressability are likewise erroneous.[15] Courts retain broad authority "to fashion practical remedies when faced with complex and intractable constitutional violations" like those alleged here. *Plata*, 563 U.S. at 526. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Hills*, 425 U.S. at 293-94 (quoting *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 744 (1974); citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). Even if the district court did not grant all of the relief Plaintiffs request, it could undoubtedly order Defendants to cease certain actions which substantially cause and sanction CO_2 emissions, thereby reducing, delaying, and remedying Plaintiffs' injuries.

2. Plaintiffs' Claims Comport with the Judiciary's Core Purpose

Notwithstanding Defendants' argument regarding the "courts at Westminster," it is a central jurisprudential precept that "the ability to sue to enjoin

[15] Defendants' reliance on *Simon v. E. Ky. Welfare Rights Org.*, which only challenged the effect of a single revenue ruling by the Internal Revenue Service with respect to tax subsidies on nonprofit hospitals' services to indigents, is misplaced. 426 U.S. 26 (1976). Here, Plaintiffs challenge not only a multitude of federal incentivization actions, but also Defendants' numerous affirmative acts in authorizing, permitting, promoting, and sanctioning fossil fuel production, consumption, transportation, and combustion. In addition, Plaintiffs' injuries are a direct, not speculative, consequence of Defendants' actions, making this case more in line with cases like *Data Processing Serv. v. Camp*, 397 U.S. 150 (1969) and *Barlow v. Collins*, 397 U.S. 159 (1970), that were distinguished in *Simon*, 426 U.S. at 45 n.25.

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

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

In their May 24 application for extension from this Court, Defendants concede that, in denying their first petition, the Ninth Circuit rejected Defendants' argument that the APA provides the exclusive means for challenging the legality of agency conduct. *See* D. Ct. Doc. 211-1 ¶ 3 ("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.").[16] In any event, Defendants restate this argument here even though this Court has ruled on several occasions that constitutional claims are not subject to the APA and may be brought independently.

[16] In deciding a stay application, the Court affords considerable deference to the conclusions of the lower court "both on the merits and on the proper interim disposition of the case[.]" Rostker, 448 U.S. at 1308.

In *Franklin v. Massachusetts*, a case "rais[ing] claims under both the APA and the Constitution," the Court reached the merits of the constitutional claims against the Secretary of Commerce separately from its analysis of the APA claims, which the Court found were not viable for lack of "final agency action." 505 U.S. 788, 796-801, 803-06 (1992). Likewise, in *Hills v. Gautreuax*, a non-APA case brought directly under the Fifth Amendment and 28 U.S.C. § 1331 against the Department of Housing and Urban Development for systemic deprivation of fundamental rights, the Court approved a structural remedy for a comprehensive remedial plan similar to the relief requested here. 425 U.S. 284. Similarly, in *Webster v. Doe*, the Supreme Court held a constitutional claim against an agency official was judicially reviewable even though not viable as an APA claim. 486 U.S. 592, 601, 603-05 (1998). Justice Scalia's lone dissent, in which he postulated with an asterisk that "if relief is not available under the APA it is not available at all" serves only to prove the *Webster* majority's rejection of Defendants' argument that all constitutional claims are subject to the strictures of the APA. *Id.* at 607 n.*. No majority of the Supreme Court has ever agreed that the APA supersedes the Constitution, including the Fifth Amendment.

Defendants erroneously rely on inapposite cases concerning Congress' power to limit the authority of courts to redress violations of statutorily created rights,[17] cases concerning the limitations on actions brought under the APA,[18] and cases

[17] *Armstrong*, 135 S. Ct. 1378; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[18] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). The holding in *Lujan* was confined to whether establishing standing for a discrete number of

where courts have considered extending a claim in damages for constitutional violations.[19] Plaintiffs do not premise their claims on violations of statutorily-granted rights, do not bring their claims under the APA, and do not seek damages for the systemic constitutional violation they allege. Whether cases brought under the APA focus on discrete agency actions rather than programmatic action is irrelevant here. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1851-52 (2017); *id.* at 1862 (stating in direct Due Process challenge to "large-scale policy decisions" that "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief."); *Hills*, 425 U.S. 284 (approving remedy in non-APA direct Fifth Amendment due process challenge to systemic constitutional violations by federal agency).

Defendants' reliance on *Armstrong* is also misplaced because, irrespective of whether the Supremacy Clause or any other constitutional provision creates a right of action, it is well established that Plaintiffs may rest their claims "directly on the Due Process Clause of the Fifth Amendment." *Davis v. Passman*, 442 U.S. 228, 243-44 (1979); *Hills*, 425 U.S. 284; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (remanding for grant of equitable relief in school desegregation case resting directly on the Fifth Amendment). It is a central precept of constitutional law that the Fifth Amendment provides a right of action for equitable relief from systemic infringements of fundamental rights.

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coal leases sufficed to permit a challenge to hundreds of leases under the APA, which were not causing Plaintiffs' injuries, whereas here, Plaintiffs' harm is caused by a system of aggregate actions. Defendants' reliance on these cases is further misdirected as each expressly challenged the violation of statutory law through the APA.

[19] *Seminole Tribe of Fla.,* 517 U.S. 44; *Western Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116 (9th Cir. 2009); *Wilkie v. Robbins*, 551 U.S. 537 (2007).

4. The District Court's Recognition of a Right to A Stable Climate System Capable of Sustaining Human Life Is Not Clearly and Indisputably Erroneous[20]

The district court committed no clear and indisputable error in acknowledging a previously unrecognized fundamental liberty interest within the unique circumstances of this case. This Court has regularly availed itself of its authority to review and recognize new fundamental rights. "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution [and] 'has not been reduced to any formula.'" *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)). In deciding whether to recognize a newly asserted fundamental right, this Court has asked "whether that right is fundamental to the Nation's scheme of ordered liberty . . . or . . . whether it is 'deeply rooted in this Nation's history and tradition.'" *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). A full fundamental rights analysis involves an empirical inquiry.[21] Here, both historical and scientific factual evidence are material to this analysis,[22] which should be fully developed at trial so that the appellate courts have a complete record to consider with findings of fact and conclusions of law. *See* D. Ct. Doc. 255 at

[20] Defendants mischaracterize Plaintiffs' claims and the district court's order, implying that this case involves only two alleged constitutional violations. Application at 28. In addition to Plaintiffs' claims for violations of the public trust doctrine and the right to a stable climate system capable of sustaining human life, Plaintiffs alleged violations of their substantive due process rights to life, liberty, and property and previously recognized unenumerated rights, as well as equal protection violations for discrimination with respect to their fundamental rights and as members of a suspect or quasi-suspect class. Defendants' Application does not confront these claims, all of which present clear questions appropriate for judicial review on the merits in the district court and none of which was dismissed by the district court.

[21] *See* note 7*, supra*.

[22] *See Obergefell*, 135 S. Ct. at 2605 ("There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings.").

42-46. Such a record will reveal precisely the "new insight reveal[ing] discord between the Constitution's central protections" and Defendants' systemic conduct necessary to determine whether "a claim to liberty must be addressed." *Obergefell*, 135 S. Ct. at 2598.

As the district court properly concluded, the right to a stable climate capable of sustaining human life, like the right to marry extended to same-sex couples in *Obergefell*, is "a right underlying and supporting other vital liberties," including rights to move freely, to family, and to personal security, amongst other rights. *Juliana*, 217 F.Supp.3d at 1250 (citing *Obergefell*, 135 S. Ct. at 2599). Defendants contend that "there is no relationship . . . between a distinctly personal and circumscribed right to same-sex marriage and the alleged right to a climate system capable of sustaining human life that apparently would run indiscriminately to every individual in the United States." Application at 29. This argument concedes the point, demonstrating a profound misunderstanding of the very concept of fundamental rights, which by their very nature are those in which everyone may claim an interest. By Defendants' logic, not even our inherent rights to life, liberty, and property would qualify as fundamental since they could be advanced by any person in the nation. Along with Plaintiffs' other Fifth Amendment claims, Plaintiffs' claim with respect to the right to a stable climate system capable of sustaining human life should proceed to trial so this Court may evaluate the propriety of the right's recognition in the full light of a robust factual record. The

district court committed no clear and indisputable error in recognizing this important unenumerated right.

5. The District Court's Recognition of a Federal Public Trust Doctrine Extending to Territorial Seas Is Not Clearly and Indisputably Erroneous

The district court committed no clear and indisputable error in allowing Plaintiffs' public trust claim to proceed to trial. The public trust doctrine is an inherent obligation incumbent on every government, including the United States federal government, "by virtue of its sovereignty" and as such, the trust and its concomitant powers and duties "cannot be relinquished." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453, 455 (1892). As the district court explained, numerous decisions recognize the public trust doctrine's application to the federal government. *Juliana*, 217 F.Supp.3d at 1258-59.

Defendants principally and erroneously rely on two cases for their argument that there is no federal public trust doctrine. In *PPL Montana*, this Court stated in dicta that "the public trust doctrine remains a matter of state law." 565 U.S. at 603. Defendants take the phrase completely out of context. As the district court explained:

> The Court [in *PPL Montana*] was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana's public trust obligations. *PPL* said nothing at all about the viability of public trust claims with respect to federally-owned trust assets.

Juliana, 217 F.Supp.3d at 1257. This Court recognized the deep historical roots of the doctrine in *PPL Montana*:

> The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. See . . . D. Slade, Putting the Public Trust Doctrine to Work 3-8, 15-24 (1990).

PPL Montana, 565 U.S. at 603 (citing D. Slade, Putting the Public Trust Doctrine to Work 3-8, 15-24 (1990)); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 283-87 (1997). In citing the Slade treatise in *PPL Montana*, this Court implicitly acknowledged that "there is no single 'Public Trust Doctrine.' Rather, there are over fifty different applications of the doctrine, one for each State, Territory of Commonwealth, *as well as the federal government*." D. Slade, Putting the Public Trust Doctrine to Work 4 (1990) (emphasis added).

Defendants reliance on *Alec L. ex. rel. Loorz v. McCarthy*, an unpublished opinion from the D.C. Circuit, is likewise misplaced. 561 Fed. Appx. 7 (2014). That case relied solely and erroneously on the dicta Defendants' quote from *PPL Montana*. *Id.* at 8. Defendants' oft-repeated acontextual recitation of a single line of dicta from *PPL Montana* belies the absence of any logical or solid jurisprudential basis for excluding the federal government from the public trust doctrine, in those instances where the federal government owns or exercises jurisdiction over recognized public trust resources, such as navigable waters.[23]

Defendants thus present no convincing argument and fail to carry their heavy burden to establish any clear and indisputable error committed by the

[23] As Judge Coffin noted, if this Court were to have ruled that the public trust doctrine does not apply to the federal government, "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." D. Ct. Doc. 146 at 13-14.

district court in allowing Plaintiffs' claims to proceed to trial. To stay proceedings in this important case would deprive this Court of the record necessary for considered appellate review of Plaintiffs' claims, analysis and 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.

IV. FOUR JUSTICES ARE UNLIKELY TO SUPPORT A STAY WHEN THE DISTRICT COURT HAS ALREADY CONSIDERED DEFENDANTS' THRESHOLD ARGUMENTS AND WHEN NO SPECIFIC DISCOVERY ORDER INTRUDES ON EXECUTIVE PRIVILEGE OR SEPARATION OF POWERS.

Given that this Application attempts to interject this Court into routine discovery and pre-trial issues more properly handled by the district court, and that Defendants have shown no irreparable harm, it is unlikely that four Justices of the Court will vote to grant a stay or certiorari at this stage. Contrary to Defendants' erroneous assertions, this case is incomparable in any material respect to this Court's recent decision regarding a record supplementation dispute in a challenge to the Deferred Action on Childhood Arrival program. *In re United States*, 138 S. Ct. 443 (2017). There, this Court directed the district court to rule on the government's motion to dismiss prior to ordering record supplementation. *Id.* In denying Defendants' second petition, the Ninth Circuit panel used this same procedural posture to distinguish the instant case:

> This fact distinguishes this case from *In re United States*, 138 S. Ct. 443 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an order compelling discovery. In that case, the district court had issued an order compelling the government to complete the administrative record over

> the government's objection that it had filed a complete record properly limited to unprivileged documents. *See id.* at 444. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss. *Id.* at 444-45. In this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests.

App. at 7a.

Here, the district court has already considered and denied Defendants' motion to dismiss and is in the process of deciding Defendants' other dispositive pre-trial motions, which largely restate arguments from their motion to dismiss.[24] *In re United States*, 138 S. Ct. 443, is wholly inapposite.

Any reliance on *Cheney* is also misplaced because there is no specific discovery order at issue and Plaintiffs are not conducting discovery that has any chance of intruding into executive privilege. 542 U.S. 367; App. at 4a, 9a, 12a, App. 27a-28a ¶¶ 12-17.

Finally, even under a strict original intent analysis, which differs from the fundamental rights analysis articulated by this Court in *Obergefell*, the unalienable rights claimed by these children are rights the nation's founders believed were implicit in ordered liberty and deeply rooted in the health and longevity of the new nation. As James Madison said in his celebrated speech of May 12, 1818:

> 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....*

[24] The only exception is Defendants' request to dismiss the President, to which Plaintiffs' agreed, without prejudice, and on which the district court will rule shortly. The President will suffer no prejudice in the interim as Plaintiffs are not seeking any discovery from him.

> * * *
>
> 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.[25]

At the core of the Constitution is a system of intergenerational ethics focused on preservation of the human species. D. Ct. Doc. 60 (citing John Locke, *Two Treatises of Government* ¶¶ 7, 16, 134, 135, 149, 159, 171, 183 (1689) (Peter Laslett ed., 2d ed. 1967). Plaintiffs believe that no four Justices on this Court would vote to stay a case showing no irreparable harm to Defendants, where a full factual record will better position this Court to one day review the rights and injuries for which these children and youth seek redress, unalienable liberty rights our founders intended to preserve for Posterity.

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[25] "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, discussed in the expert report of Andrea Wulf. D. Ct. Doc. 269-1 (Wulf Expert Report), at 11-15.

V. THE BALANCE OF EQUITIES OVERWHELMINGLY FAVORS A DENIAL OF THE STAY

The Court's power to issue a stay is intended to preserve the status quo so that important constitutional questions do not evade the Court's review. *See, e.g.*, *Rosenburg v. United States*, 346 U.S. 273, 286 (1953). Here, the status quo is preserved by allowing Plaintiffs' claims to continue to proceed to trial because Defendants can offer no credible claim of harm in participating in the ordinary process of litigation and trial. Defendants have already considerably delayed this case through their first petition, which is identical to their second petition, both of which the Ninth Circuit found meritless. In contrast, any further delay irreparably prejudices Plaintiffs and exacerbates the injuries and threats to their fundamental rights. D. Ct. Doc. 98 ¶¶ 6, 237, 241.

Notwithstanding Defendants' wholly unsubstantiated claims of allegedly burdensome discovery, Defendants have no outstanding discovery obligations, with the exception of serving a modest number of expert reports, presenting their designated experts for deposition, and conducting their noticed depositions of Plaintiffs' experts. All outstanding discovery requests are currently in abeyance at the suggestion of Defendants and per the mutual agreement of the parties. D. Ct. Doc. 247, 249. Based on the current procedural posture, the only additional discovery requests that Plaintiffs intend to serve are limited contention interrogatories, per an agreement with Defendants. D. Ct. Doc. 247, 249. Further, while the previous discovery requests that Defendants' describe as burdensome were pending, Defendants applied for and received two extensions of time to appeal

the denial of their first petition, belying any claim of urgency or harm here. Moreover, the ordinary burdens of discovery and trial of which Defendants complain are not cognizable for purposes of alleging any harm that may befall them before this Court's review of a final judgment on the merits of Plaintiffs' claims. *See, e.g.*, *F.T.C.*, 449 U.S. at 244 (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm); *Petroleum Expl. v. Pub. Serv. Comm'n of Kentucky*, 304 U.S. 209, 221-22 (1938) ("the expense and annoyance of litigation is 'part of the social burden of living under government.'") (citation omitted); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

Further, the separation of powers principles argued by Defendants counsel the Court to deny Defendants' Application. As the Ninth Circuit properly concluded in denying Defendants second petition, as it had with respect to the first petition: "[A]llowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." App. at 9a (citing *In re United States*, 884 F.3d at 836).[26] When the political branches fail to protect the

[26] None of the cases Defendants cite in pages 34-35 of their Application support their argument that the separation of powers precludes discovery or limits review of Plaintiffs' claims to agency records. In fact, in *Tag Bros. v. Moorhead*, this Court explicitly excepted "issues presenting claims of constitutional rights" from record review limitations at issue. 280 U.S. 420, 443. Defendants' other cases are equally unavailing. *See Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143 (1946) (statutory unemployment claim); *U.S. v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963) (Wunderlich Act limited breach of contract claim to agency record). Further the evidence Plaintiffs will present substantially consists agency documents and expert testimony, to which Defendants have consistently not objected, and goes primarily to establish Plaintiffs' standing, which Defendants dispute as a factual matter. D. Ct. Doc. 98 at ¶¶ 16-97.

constitutional rights of citizens—particularly those too young to vote, whose only recourse is the courts, and actively infringe upon those rights—the separation of powers 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 (1803); *Nat'l Labor Relations Bd.*, 134 S. Ct. at 2593 (Scalia, J., concurring) (Separation of powers "rest[s] on the bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'").[27]

In contrast to Defendants, issuance of a stay would unquestionably result in irreparable harm to Plaintiffs. Defendants cite no evidentiary support or legal authority to substantiate their claim that emissions attributable to them during resolution of their Application "are plainly *de minimis* in context and not a source of irreparable harm." Application at 38. Notably, Defendants' admissions in their Answer to Plaintiffs' FAC directly contradict the claim that Plaintiffs will suffer no substantial harm. D. Ct. Doc. 98 ¶¶ 7, 150-51; *Id.* ¶ 213 ("[C]urrent and projected atmospheric concentrations of six well-mixed GHGs, including CO_2, threaten the public health and welfare of current and future generations, and this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in

[27] The Opinions and Recommendations Clauses cited by Defendants have never been interpreted by any court to preclude relief or judicial review. The relief Plaintiffs seek would not implicate the President's ability to "require the Opinion, in writing, of the principle Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices, U.S. Const. art. II, § 2, cl. 1, nor the ability to "recommend to" Congress for "Consideration such measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Further, it is entirely speculative at this stage to assert that any remedy that might be issued would implicate separation of powers. *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 280 (1977) ("[T]he nature and scope of the . . . remedy is to be determined by the nature and scope of the constitutional violation.").

ever greater rates of climate change."); *see also* D. Ct. Doc. 146 at 2-4 (District court setting forth "non-exclusive sampling" of significant admissions in Defendants' answer).

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: "Environmental injury, by its nature, can seldom be adequately remedies by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see* also Decl. of Steven W. Running, Ct. App. II Doc. 5-3 ¶¶ 12-14; Decl. of Dr. Harold R. Wanless, Ct. App. II Doc. 5-4 ¶¶ 16-22. Both environmental harm and infringement of constitutional rights 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. D. Ct. Doc. 98 ¶¶ 8, 207, 216, 241.

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 evidence, such as 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., Ct. App. I Doc. 14-3 at ¶¶ 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. *Id.* ¶¶ 29-38. Almost 94% of human-caused heating is going into the oceans and melting our planet's largest ice-sheets. *Id.* ¶ 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., Ct. App. I Doc. 14-5 at ¶ 1-3; Wanless Decl., Ct. App. I Doc. 14-3 at ¶ 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., Ct. App. I Doc. 14-3 at ¶ 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. *Id.* ¶¶ 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., Ct. App. I Doc. 14-4 at ¶¶ 1-25. Jacob experiences increasing drought, wildfire threats, threats to air quality, and farming days exceeding 100 degrees F. *Id.* ¶¶ 6-13. Moreover, the harm is not generalized harm, but is particular to Plaintiffs.

Defendants do not dispute with evidence 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 Application. If a stay is entered, Defendants' violations of Plaintiffs' rights would continue, thus establishing irreparable harm per the nature of Plaintiffs' claims. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of" fundamental constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 1984) ("[T]he balance of equities favor[s] preventing the violation of a party's constitutional rights."). As the constitutional and environmental harms Plaintiffs will suffer if their case is stayed before trial are irreparable, the balance of equities clearly disfavors any intervention into the district court's management of these proceedings.

CONCLUSION

Defendants' Application for a stay should be denied. The district court needs to consider these issues further in the first instance. In its opinion denying Defendants' second petition, the Ninth Circuit panel correctly summarized the complete lack of prejudice to Defendants given the current procedural posture: "The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial." App. at 8a. There is no pending discovery to which Defendants must respond. The next important step in the pre-trial process is the routine service by Defendants of their expert reports, set for August 13, and expert depositions. Defendants have already disclosed these experts, evincing no burden. The district court has before it two motions which may narrow this matter; both motions have been argued and are under submission. This Court should no micro-manage the underlying proceedings and this litigation should be allowed to proceed in the district court.

DATED this 23rd day of July, 2018, at Mammoth Lakes, CA.

Respectfully submitted,

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APPENDIX

FILED

JUL 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA; CHRISTY GOLDFUSS; MICK MULVANEY; JOHN HOLDREN; RICK PERRY; U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO; U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS; U.S. DEPARTMENT OF DEFENSE; JAMES N. MATTIS; U.S. DEPARTMENT OF STATE; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP; MICHAEL R. POMPEO; ANDREW WHEELER,

---

UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her official capacity as Director of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget; JOHN HOLDREN, Dr., in his official capacity as Director of the Office of Science and Technology Policy; RICK PERRY, in his official capacity as

No. 18-71928

D.C. No. 6:15-cv-01517-AA

OPINION

Secretary of Energy; UNITED STATES DEPARTMENT OF INTERIOR; RYAN ZINKE, in his official capacity as Secretary of Interior; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; JAMES N. MATTIS, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; ANDREW WHEELER, in his official capacity as Acting Administrator of the EPA; MICHAEL R. POMPEO, in his official capacity as Secretary of State; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

EUGENE,

Respondent,

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamela Vergun; HAZEL V., through her Guardian Margo Van Ummersen; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Real Parties in Interest.

Petition For Writ Of Mandamus

Submitted July 19, 2018*

Before: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

PER CURIAM.

In this petition for a writ of mandamus, the government asks us for the second time to direct the district court to dismiss a case seeking various environmental remedies, or, in the alternative, to stay all discovery and trial. We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief. The factual and procedural history of this case was detailed in our prior opinion, and we need not recount it here. *In re United States*, 884 F.3d at 833-34.

I

We have jurisdiction over this mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651. In considering whether to grant a writ of mandamus, we

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

are guided by the five factors identified in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977):

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

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

"Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

II

The government does not satisfy the *Bauman* factors at this stage of the litigation. It remains the case that the issues that the government raises in its petition are better addressed through the ordinary course of litigation. We thus decline to exercise our discretion to grant mandamus relief.

A

The government does not satisfy the first *Bauman* factor. The government argues that mandamus is its only means of obtaining relief from potentially burdensome or improper discovery. However, the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers.

In our opinion denying the first mandamus petition, we stated:

> The defendants will have ample remedies if they believe *a specific discovery request* from the plaintiffs is too broad or burdensome. Absent any discovery order from the district court, or even any attempt to seek one, however, the defendants have not shown that they have no other means of obtaining relief from burdensome or otherwise improper discovery.

In re United States, 884 F.3d at 835 (emphasis added).

Since that opinion, the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling

discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

This fact distinguishes this case from *In re United States*, 138 S. Ct. 443 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an order compelling discovery. In that case, the district court had issued an order compelling the government to complete the administrative record over the government's objection that it had filed a complete record properly limited to unprivileged documents. *See id*. at 444. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss. *Id.* at 444-45. In this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests. It does not satisfy the first *Bauman* factor.

B

Nor does the government satisfy the second *Bauman* factor. The government makes two arguments for why it will be prejudiced in a way not correctable on appeal. Neither is persuasive.

The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute "agency decisionmaking," which the government contends could not occur without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA.

The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial. This distinguishes this case from others in which we have granted mandamus relief. *See Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997) (granting mandamus relief when a discovery order would force defendants "to choose between being in contempt of court for failing to comply with the district court's order, or violating Swiss banking secrecy and penal laws by complying with the order").

The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first

mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836. As we stated in our prior opinion, allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal. *Id*. No new circumstances disturb that conclusion.[1] *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

C

As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors. *In re United States*, 884 F.3d at 836-37. No new circumstances give us cause to reevaluate these conclusions.

III

Because petitioners have not satisfied the *Bauman* factors, we deny the mandamus petition without prejudice. The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the

[1] Following our previous opinion, the government moved for the first time in the district court for judgment on the pleadings with respect to the inclusion of the President as a named party, and a decision is pending on that motion.

district court or in a future appeal. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

PETITION DENIED WITHOUT PREJUDICE.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. ANN AIKEN, JUDGE PRESIDING

KELSEY CASCADIA ROSE JULIANA, et al.,	)	
Plaintiffs,	)	
v.	)	No. 6:15-cv-01517-TC
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

WEDNESDAY, JULY 18, 2018

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GENERAL INDEX

14:33:56 government at large. He decided to stay at his hand, recognizing that the body that is most equipped to deal with these issues is, by definition, the legislature. That comes from a long line of historical precedent, including AAP with a very similar situation as this where the court also decided that separation of power concerns meant that the agencies best equipped and given the power by Congress to address these issues are the ones that are constitutionally charged with making the decisions at issue here.

The court said, and I quote, the court will stay its hand in favor of solutions by the legislative, executive branches.

I would invite this court to do the same thing here.

I will now turn the argument over to my colleague Frank Singer.

MR. SINGER: Good afternoon, Your Honor. My name is Frank Singer.

I will be addressing two of the issues that are raised in our motion for summary judgment Ms. Piropato did not address. Those issues are standing and the legal sufficiency of plaintiffs' claims.

The Article III standing requirement, as Your Honor knows, has three elements, injury in fact, traceability, and redressability.

14:35:07

At the moment -- the standing arguments were heard and litigated at the pleading stage in the Rule 12 motion, and one question that might arise is what's changed since then.

And the answer is that we now look beyond the complaint. We look at the evidence. At the pleading stage on the Rule 12 motion, Your Honor held that the allegations of certain specific injuries, loss of homes, flooding were sufficient to trigger injury in fact under Article III of the Constitution. And plaintiffs have submitted declarations in support of those allegations. And so those -- there has been a prima facie case made for those injuries.

There are other injuries that plaintiffs allege in their declarations that are not cognizable under Article III standing requirements, and those would be more subjective harms like nightmares or general anxiety or frustration with political bodies.

But be that as it may because there are specific injuries, the question moves to causation. And looking at those injuries, looking at things like flooding, asthma symptoms, allergy symptoms, et cetera, lost skiing opportunities and other aesthetic losses, the question is whether plaintiffs can show a causal connection exists between the injuries they assert and the conduct they

14:51:03

We will point out on the depraved indifference claim that in the cases cited by plaintiffs, there is an affirmative interaction between the government and the individual plaintiffs in this case that is lacking here where the government specifically has taken action with regard to each individual plaintiff in those cases and put them in a worse position than they were in and that that kind of direct interaction between the federal government and the plaintiffs is lacking in this case.

But unless Your Honor has any further questions, I am happy to submit.

MS. PIROPATO: And one other thing, Your Honor.

As we mentioned in our opening, we just respectfully request that if this court were to deny our 12(c) motion and our summary judgment motion that it certify this --

THE COURT: I have heard your request.

MS. PIROPATO: Okay. I just want to reiterate it.

THE COURT: I heard it.

MS. PIROPATO: Thank you very much, Your Honor.

THE COURT: Anything else?

MR. SINGER: No, nothing else, Your Honor.

THE COURT: Ms. Olson.

MS. OLSON: Okay. May it please the court, I'd like to begin my argument today addressing the question of

14:52:25 whether the president should be a defendant in this case in the context of the defendants' Rule 12(c) motion to dismiss.

We believe the issues in the case can be narrowed by the president's dismissal from the case without prejudice.

After I discuss our reasons for asking for dismissal without prejudice, I will move on to the APA and separation of powers arguments.

I will briefly discuss their motion for summary judgment on the merits of plaintiffs' claims and then turn to standing, and at that time I will call counsel Andrea Rodgers to assist.

On Monday the plaintiffs conferred with defendants about their motion to dismiss the president, and we offered, based upon our reading of their reply brief on their 12(c) motion, that we could agree to stipulate to dismiss the president without prejudice.

There are three reasons why we believe the court should order today that the president be dismissed without prejudice.

First, the defendants argue that the president is an unnecessary party in this case because a remedy could be obtained against the other defendants in the place of the president.

And, Your Honor, that's at Pages 6 and 7 of their

15:00:59 be providing testimony.

The defendants have said they'll have potentially eight witnesses, eight to ten witnesses at this point.

And then we anticipate, Your Honor, fewer than a 1,000 documents that the court will have to contend with, and we are working to narrow that even more substantially.

And this is in stark contrast to the massive discovery that the United States was involved in in the *Deepwater Horizon* litigation, which was not about fundamental constitutional rights but where the U.S. produced over 100 million pages of documents, including 17 million pages in a five-month period. There were 500 days of depositions. The trial of the government's claims took place in three phases over three years.

Here, the United States has not responded to a single RFA. They have not produced a single document. We have foregone our 30(b)(6) depositions. We do anticipate documents in the hundreds, not the thousands, and the depositions will probably be under 50 days for both sides.

We also believe, given the more limited number of witnesses of defendants, we can try the case in a shorter number of days.

So I raise those issues because they go also to some of the arguments that have been made regarding separation of powers and the burden on the government to

15:49:16 grant our Rule 12(c) motion and summary judgment in favor of the United States.

We appreciate, again, Your Honor, for your time in holding this oral argument in a compressed time frame.

Thank you, Your Honor.

THE COURT: Anything else?

Thank you. I am taking this under advisement. We'll have something out shortly. Although every single day we seem to be getting new information. We'll just attempt to do our work in a timely fashion and have something out I think in the relatively near future.

So thank you for your time. Appreciate the argument. Appreciate that -- thank you to the staff for accommodating the numbers of people here today, and I hope the other courtroom was able to hear the argument.

Thank you.

MS. PIROPATO: Thank you, Your Honor.

MS. OLSON: Thank you, Your Honor.

THE COURT: We are in recess.

(The proceedings were concluded this 18th day of July, 2018.)

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. THOMAS M. COFFIN, JUDGE PRESIDING

KELSEY CASCADIA ROSE JULIANA, et al.,	)	
Plaintiffs,	)	
v.	)	No. 6:15-cv-01517-TC
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, JULY 17, 2018

PAGES 1 - 34

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10:29:03 testimony, I would think the government would want to cooperate as much as they could.

MR. SINGER: We would, Your Honor, because that would abate the prejudice if we would identify a person by name earlier than later.

So, yes, we understand that the clock is ticking, and if we are going to give individual names for these two subject matters, it behooves us to do it sooner than later.

THE COURT: Yes, I encourage everybody to work together.

Good. Okay. Next thing.

MS. OLSON: The next issue, Your Honor, is yesterday plaintiffs -- in light of the motion to dismiss the president under the Rule 12(c) motion for judgment on the pleadings that's pending before Judge Aiken --

THE COURT: That's going to be heard tomorrow.

MS. OLSON: -- and it will be argued tomorrow, plaintiffs asked whether the defendants would stipulate to dismissing the president without prejudice, and they were going to check with their upper management on that question.

And I don't know if you have any further information on that or if we should leave it for tomorrow.

MS. PIROPATO: Your Honor, we raised it with our management, but that has to be vetted with the White House, and we do not have a response yet.

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.)

DECLARATION OF JULIA A. OLSON IN SUPPORT OF OPPOSITION OF REAL PARTIES IN INTEREST TO PETITIONERS' EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL

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I, Julia A. Olson, hereby declare as follows:

1. I am an attorney of record in the above-entitled action. I make this Declaration in support of Plaintiffs' Opposition to Defendants' Emergency Motion for a Stay of Discovery and Trial. I have personal knowledge of the facts stated herein, except as to those stated on information and belief, and if called to testify, I would and could testify competently thereto.
2. Since the commencement of this litigation, counsel for Plaintiffs have gone to great lengths to collaborate with counsel for Defendants and the district court to tailor and narrow Plaintiffs' discovery requests. Attached as **Exhibit 1** to this Declaration is a true and correct copy of excerpts of the most recent Joint Status Report (Dkt. 218) submitted by the parties to the district court on June 5, which includes a table at pages 4-6 illustrating the current status of discovery and the lengths to which Plaintiffs have gone to narrow discovery.
3. After the Ninth Circuit's March 7, 2018 denial of the government's first Petition for Writ of Mandamus (the "March 7 Denial"), *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692), Plaintiffs have engaged in the following discovery:
    a. completed and served seventeen expert reports;

b. at the request of counsel for Defendants, each of the Youth Plaintiffs have reserved dates to make themselves available for deposition, and counsel for Defendants were provided with these dates and initially agreed to those dates;

c. at the request of counsel for Defendants, on May 29, 2018, Plaintiffs provided Defendants with the availability of their expert witnesses for depositions throughout the summer;

d. propounded requests for admissions based on facts stated in government documents; and

e. noticed Rule 30(b)(6) depositions of agency Defendants as to four specific topics.

4. While requests for production of documents were at issue in the first Petition, since the March 7 Denial, there have been no outstanding requests for production of documents.

5. Since discovery commenced, Plaintiffs have committed to work with Defendants to conduct discovery with the least burdensome requests and to avoid litigating issues such as executive privilege.

6. Plaintiffs have also informed Defendants that they will not propound discovery on the President or the Executive Office of the President. In their Emergency Motion for a Stay, Defendants entirely ignore Plaintiffs'

agreement not to propound discovery against the President or the Executive Office of the President, incorrectly claiming that "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 unlawful discovery and forced to divert substantial resources away from their essential function of 'faithfully execut[ing]' the law. U.S. Const. art. II, § 3." Pet. at 53. In fact, there is no pending discovery served on the President or the Executive Office of the President, and Plaintiffs have committed to Defendants not to serve such discovery in the future. Notably, Defendants do not identify the allegedly "unlawful discovery."

7. Most of Plaintiffs' exhibits at trial will be government documents. Through the ordinary meet and confer process, and upon the recommendations of both Magistrate Judge Thomas Coffin and Defendants to streamline discovery, Plaintiffs agreed to hold in abeyance all pending discovery (the propounded requests for admissions and depositions noticed under Rule 30(b)(6)). In lieu thereof, Plaintiffs agreed to file motions *in limine* seeking judicial notice of publicly available government documents and to propound limited contention interrogatories to discover the bases for Defendants' positions on certain disputed material facts, such as their denials and affirmative defenses in their Answer.

12. Defendants' sole discovery obligation at this time is to identify their expert witnesses on July 12 and to produce their expert reports on August 13, per a schedule Defendants agreed to.

13. Counsel for Defendants did not object to engaging in expert discovery and agreed to identify experts on or before July 12. **Exhibit 1**, at 18.

14. On July 4, 2018, at his request, I, and my co-counsel Philip Gregory, had a telephone call with Frank Singer, counsel for Defendants. During the course of that call, Mr. Singer stated that Defendants have already retained their expert witnesses and Defendants are prepared to disclose their expert witnesses on July 12.

15. During the course of our meet and confer sessions, counsel for Defendants also indicated that Defendants may choose not to rebut each of Plaintiffs' experts and that they may seek to limit the testimony of Plaintiffs' experts through motions *in limine* prior to trial.

16. At no point in these proceedings have Defendants objected to participating in expert discovery.

17. Beyond Defendants' current singular discovery obligation in disclosing experts and producing their expert reports, the only remaining discovery Plaintiffs intend to conduct prior to trial is to depose Defendants' trial witnesses and to propound contention interrogatories to Defendants, as

proposed by Defendants in meet and confers, in order to determine the identity of fact witnesses, determine the evidence supporting denials in Defendants' Answer, and identify issues regarding Defendants' efforts in setting climate change targets.

18. In terms of scheduling the length of trial, at a meet and confer session with counsel for Defendants on April 11, 2018, counsel for Plaintiffs initially projected 20 days for their case in chief. Counsel for Defendants responded that 20 days would not be enough for Defendants' case and stated that it would be better for the parties to ask the Court for more time than less for trial. Thus, as a result of that meet and conferral, the parties agreed to request 50 trial days, 4 days a week, 6 hour days (approx. 12 weeks). The next day, at the April 12 Status Conference, counsel for Defendants confirmed the parties' agreement of 5 weeks per side with the Court. *See* Transcript of Proceedings, Dkt. 191, at 7:19-8:7.

19. Since the First Petition was denied, Defendants filed a motion for judgment on the pleadings under Rule 12(c) and a motion for summary judgment, the former of which will be argued on July 18 and the latter of which will be fully briefed on July 12. 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 as well. Plaintiffs oppose that motion due to the very short amount

Case No. 17-71692

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.)

DECLARATION OF JULIA A. OLSON IN SUPPORT OF ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

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Depositions

51. On March 24, 2017, pursuant to Local Rule 30-2, Plaintiffs informed Federal Defendants of their intent to notice depositions in order to meet and confer on potential witnesses and dates. Dkt. 151-9. On April 11, 2017, Plaintiffs sent Federal Defendants a letter describing the general categories of information likely to be included within the subject areas for the Rule 30(b)(6) depositions.

52. On May 11, 2017, Plaintiffs noticed the depositions of C. Mark Eakin, Coordinator of NOAA's Coral Reef Watch Program, and Michael Kuperberg, Executive Director of the U.S. Global Change Program within the U.S. Office of Science and Technology. The deposition of Dr. Kuperberg was taken on July 20, 2017, and the deposition of Dr. Eakin was taken on July 21, 2017.

53. During his deposition, Dr. Eakin testified that NOAA considers the impact of carbon dioxide and climate change on our oceans to be dangerous and that current levels of atmospheric carbon dioxide are dangerous for coral. Ex. 7 at 31:1-4, 34:25-35:3 (July 21, 2017 Eakin Dep. Tr.). Dr. Eakin also agreed "that carbon dioxide emissions that we emit today and carbon dioxide concentrations today will actually lock in impacts to coral reefs 10 or 20 years from now." *Id*. at 34:12-16. Dr. Eakin testified that he thinks we are in an "emergency situation" with respect to protecting our oceans. *Id.* at 70:19-22.

54. Dr. Kuperberg testified that he is "fearful," as a terrestrial ecologist and biologist about what is happening to our terrestrial climate system and that he "feel[s] that increasing levels of CO_2 pose risks to humans and the natural environment." Ex. 8 at 149:12-16, 150:1-3 (July 20, 2017 Kuperberg Dep. Tr.). Dr. Kuperberg also testified that he does not "think that the current federal actions are adequate to safeguard the future against climate change." *Id*. at 150:13-15. Finally, Dr. Kuperberg testified that "our country is currently in a danger zone when it comes to our climate system." *Id*. at 151:5-8.

55. During the deposition of Dr. Kuperberg, counsel for Federal Defendants instructed the witness not to answer a limited number of questions on deliberative process privilege grounds and counsel conferred as to the applicability of this privilege. *Id*. at 71:10-77:15. The parties agreed to meet and confer on this issue off the record, and the Plaintiffs expect to resolve these deliberative process issues through the meet and confer process or with the assistance of the District Court. *Id.* at 76:19-77:5.

56. Also during the deposition of Dr. Kuperberg, counsel for Federal Defendants raised "concerns" about certain questions "that could involve executive privilege." *Id*. at 100:7-104:8. Specifically:

> So I don't want to instruct you not to answer on executive privilege. But I just would, one, want to know what, the relevance of this is, and two, if it's something that you feel you need to pursue, perhaps we need to try

BEFORE THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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KELSEY CASCADIA ROSE JULIANA, :
XIUHTEZCATL TONATIUH M., :
through his Guardian TAMARA :
ROSKE-MARTINEZ, et. al., :
Plaintiffs, : Civil Action Number
vs. : 6:15-cv-01517-TC
THE UNITED STATES OF AMERICA, :
DONALD TRUMP, in his official :
capacity as President of the :
United States, et al., :
Defendants. :

- - - - - - - - - - - - - - - - -x

Videotaped deposition of C. MARK EAKIN, called for examination pursuant to agreement of counsel, on Friday, July 21, 2017, in Washington, DC, at the offices of the United States Department of Justice, 601 D Street Northwest, at 10:03 a.m., before CARMEN SMITH, a Notary Public within and for the District of Columbia, when were present on behalf of the respective parties.

Job No. 2659793

Pages 1 - 88

Q Sure, sure. Does NOAA consider the impact of carbon dioxide and climate change on our oceans to be dangerous?

A Yes.

Q So just to shift gears for a moment, Mark -- and I'm going to grab my phone so I can track time. 10:45:45

President Trump has a proposed budget for 2018 out, and it's my understanding that the proposed budget would cut NOAA's budget by approximately 16 percent. Is that accurate? 10:46:22

A I don't recall.

Q Are you aware that the proposed budget would cut NOAA's budget?

A Yes. 10:46:40

Q If that were to happen, how might that impact the Coral Reef Watch program and the satellite programs that you help oversee?

A At this point, we're really not sure.

Q Do you believe that budget cuts would affect NOAA's capacity to continue monitoring the oceans and the impacts of climate change? 10:47:04

A It depends on the budget cuts.

Q Has the president proposed to eliminate the Coastal Zone Management Grants Program? 10:47:32

Q Do you know what level of atmospheric carbon dioxide corresponded with those bleaching events?

A I don't recall.

Q Is it accurate that when bleaching events occur, that it's actually based on emissions and carbon dioxide levels that occurred decades earlier? 10:51:37

A Yes.

Q And why is that?

A There is a lag effect in the climate response to CO2 increases in the atmosphere. 10:52:06

Q So is it accurate to say that carbon dioxide emissions that we emit today and carbon dioxide concentrations today will actually lock in impacts to coral reefs 10 or 20 years from now? 10:52:37

A Yes.

Q Are current carbon dioxide levels approximately 405 parts per million as a global mean?

A Approximately. 10:52:57

Q I haven't checked recently, but I think it's --

A Neither have I.

Q -- around that.

Are current atmospheric carbon dioxide 10:53:06

levels of approximately 405 parts per million dangerous for coral?

A Yes.

Q In talking about levels of atmospheric carbon dioxide or temperature increases that protect corals, do you use the word "safe"? 10:53:31

A Not usually.

Q What phrase do you use to describe that maximum threshold?

A Maximum threshold. I mean, I'm sorry, rephrase, please. 10:53:48

Q So when I think of water quality standard for lead that is safe --

A Right.

Q -- for children, I would use the word that's a safe level in water for that amount of a pollutant. And so that's a word I use when I think of atmospheric carbon dioxide levels, I think of is it safe. 10:54:13

But it seems that scientists may use a different phrase, and so I'm trying to figure out what that word is that NOAA may use to describe thresholds. 10:54:28

A Different words may be used depending on the context. 10:54:45

explain what you mean by "urgent and rapid action to reduce global warming"?

A In the context of this, we're talking about actions to address emissions or potentially atmospheric CO2 levels on a scale of years to a few decades. 13:39:42

Q This paper also concludes that the time for recovery of corals is diminishing. Do you agree with that statement?

A I would have to read exactly how it's phrased, because that doesn't quite sound right. 13:40:00

Q Are you a scuba diver?

A Yes.

Q And have you been diving and seen coral reefs? 13:41:46

A Yes.

Q What's your favorite reef to dive on?

A Ant Atoll in Micronesia.

Q Do you have a favorite reef in U.S. waters? 13:42:03

A I'm trying to remember the name, it's something like Coral Gardens in one of the islands of the Commonwealth of the Northern Mariana Islands.

Q Have you seen firsthand coral bleaching on these reefs? 13:42:26

A On those reefs, no.
Q Have you seen coral bleaching firsthand?
A Yes.
Q Have you -- have you been there watching it as the algae are expelled? 13:42:40
A No.
Q Have you seen the effects of bleaching after the fact --
A Yes.
Q -- with the white skeletons? 13:42:52
And have you seen the effects after the coral completely die and then algae take over the skeletons?
A Yes.
Q And what is that process of the coral 13:43:05 going from the white bleached skeleton to the brown or greenish colors?
A I mean, that's the death of the corals.
Q When you witness that firsthand, do you -- do you think that we're in an emergency situation 13:43:42 with respect to protecting our oceans?
A Yes.
MS. OLSON: We're just going to step outside for one moment and then I think we'll be close to wrapping up. 13:44:26

BEFORE THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

- - - - - - - - - - - - - - - - - - - x

KELSEY CASCADIA ROSE JULIANA, :

XIUHTEZCATL TONATIUH M., :

through his Guardian TAMARA :

ROSKE-MARTINEZ, et. al, : Case Number

Plaintiffs, : 6:15-cv-01517-TC

vs. :

THE UNITED STATES OF AMERICA, :

DONALD TRUMP, in his official :

capacity as President of the :

United States, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

VIDEOTAPED DEPOSITION OF JAMES MICHAEL KUPERBERG

Washington, D.C.

Thursday, July 20, 2017

REPORTED BY:

SARA A. WICK, RPR, CRR

by "overshoot."

Q Well, that the CO2 emissions are such that there are consequences that are already threatening and will in the short term rise to, I'll call it, unbearable unless action's taken to abate fossil fuel emissions? 16:51:07

A I'll put this in my words. There are effects of increasing CO2 concentrations in the atmosphere that are currently seen and detectable and that our projections for the future say they're going to get worse. 16:51:31

Q Are you fearful as a terrestrial biologist -- terrestrial ecologist and biologist about what's happening to our terrestrial climate system? 16:51:50

A Yes, I am.

Q As a terrestrial ecologist, do you believe that 450 parts per million and 2 degrees warming are dangerous level of carbon dioxide?

A I can't characterize a specific number as being dangerous, which implies that another specific number is not dangerous. 16:52:03

In general, I feel that increasing levels of CO2 pose risks to humans and the natural environment.

Q Do you think that the U.S. government is currently paying attention to the National Climate Assessment and engaging in climate and energy policies that will protect our climate system? 16:52:28

A You asked two questions. There are certainly parts of the federal government that are paying attention to the National Climate Assessment. 16:52:46

I don't --

Q What -- go ahead. I'm sorry.

A I don't think that the current federal actions are adequate to safeguard the future against climate change. 16:53:02

Q What agency or department do you believe is paying attention to the National Climate Assessment, or departments?

A EPA's endangerment finding is based, to a substantial degree, on findings from the National Climate Assessment. 16:53:25

There are management activities going on within the Department of Interior that take

into account -- that I'm aware of that take into account projections from the National Climate Assessment. Those are two examples that come to mind.

Q Sir, do you believe that our country is currently in a danger zone when it comes to our climate system? 16:53:45

A Yes, I do.

MR. GREGORY: That's all we have.

MR. SINGER: Okay. I have a couple redirect, I think, if I can go through my notes a little bit. 16:54:11

EXAMINATION

BY MR. SINGER:

Q Dr. Kuperberg, I'll ask you to turn to Exhibit 2. You recall being asked questions about this 2012 "National Global Change Research Plan"? 16:54:23

A I do.

Q And I believe you said that this appeared to be a true and accurate copy of the report; correct? 16:54:42

A I did.

EXHIBIT E

FILED

JUL 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA; CHRISTY GOLDFUSS; MICK MULVANEY; JOHN HOLDREN; RICK PERRY; U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO; U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS; U.S. DEPARTMENT OF DEFENSE; JAMES N. MATTIS; U.S. DEPARTMENT OF STATE; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP; MICHAEL R. POMPEO; ANDREW WHEELER,

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UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her official capacity as Director of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget; JOHN HOLDREN, Dr., in his official capacity as Director of the Office of Science and Technology Policy; RICK PERRY, in his official capacity as

No. 18-71928

D.C. No. 6:15-cv-01517-AA

OPINION

Secretary of Energy; UNITED STATES DEPARTMENT OF INTERIOR; RYAN ZINKE, in his official capacity as Secretary of Interior; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; JAMES N. MATTIS, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; ANDREW WHEELER, in his official capacity as Acting Administrator of the EPA; MICHAEL R. POMPEO, in his official capacity as Secretary of State; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

EUGENE,

Respondent,

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamela Vergun; HAZEL V., through her Guardian Margo Van Ummersen; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Real Parties in Interest.

Petition For Writ Of Mandamus

Submitted July 19, 2018*

Before: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

PER CURIAM.

In this petition for a writ of mandamus, the government asks us for the second time to direct the district court to dismiss a case seeking various environmental remedies, or, in the alternative, to stay all discovery and trial. We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief. The factual and procedural history of this case was detailed in our prior opinion, and we need not recount it here. *In re United States*, 884 F.3d at 833-34.

I

We have jurisdiction over this mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651. In considering whether to grant a writ of mandamus, we

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

are guided by the five factors identified in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977):

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

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

"Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

II

The government does not satisfy the *Bauman* factors at this stage of the litigation. It remains the case that the issues that the government raises in its petition are better addressed through the ordinary course of litigation. We thus decline to exercise our discretion to grant mandamus relief.

A

The government does not satisfy the first *Bauman* factor. The government argues that mandamus is its only means of obtaining relief from potentially burdensome or improper discovery. However, the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers.

In our opinion denying the first mandamus petition, we stated:

> The defendants will have ample remedies if they believe *a specific discovery request* from the plaintiffs is too broad or burdensome. Absent any discovery order from the district court, or even any attempt to seek one, however, the defendants have not shown that they have no other means of obtaining relief from burdensome or otherwise improper discovery.

In re United States, 884 F.3d at 835 (emphasis added).

Since that opinion, the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling

discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

This fact distinguishes this case from *In re United States*, 138 S. Ct. 443 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an order compelling discovery. In that case, the district court had issued an order compelling the government to complete the administrative record over the government's objection that it had filed a complete record properly limited to unprivileged documents. *See id*. at 444. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss. *Id.* at 444-45. In this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests. It does not satisfy the first *Bauman* factor.

B

Nor does the government satisfy the second *Bauman* factor. The government makes two arguments for why it will be prejudiced in a way not correctable on appeal. Neither is persuasive.

The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute "agency decisionmaking," which the government contends could not occur without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA.

The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial. This distinguishes this case from others in which we have granted mandamus relief. *See Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997) (granting mandamus relief when a discovery order would force defendants "to choose between being in contempt of court for failing to comply with the district court's order, or violating Swiss banking secrecy and penal laws by complying with the order").

The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first

mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836. As we stated in our prior opinion, allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal. *Id*. No new circumstances disturb that conclusion.[1] *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

C

As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors. *In re United States*, 884 F.3d at 836-37. No new circumstances give us cause to reevaluate these conclusions.

III

Because petitioners have not satisfied the *Bauman* factors, we deny the mandamus petition without prejudice. The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the

[1] Following our previous opinion, the government moved for the first time in the district court for judgment on the pleadings with respect to the inclusion of the President as a named party, and a decision is pending on that motion.

district court or in a future appeal. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

PETITION DENIED WITHOUT PREJUDICE.