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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; et al.,

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY LITIGATION (ECF No. 552)

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INTRODUCTION

This Court should deny Defendants' Motion to Stay Litigation ("Motion to Stay"), Doc. 552, and allow this case to proceed towards a prompt trial, pursuant to Plaintiffs' Motion for an expedited trial date. Over eight years, Defendants have attempted to stay this litigation thirteen times, and have employed countless other extraordinary legal tools to avoid reaching the merits of the case. *See* Olson Decl. ¶¶ 3, 8, Doc. 544. As this Court stated, this case would be best served by factual development at trial. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) ("This Court stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial."). Even so, after spanning three presidential administrations, the case again sits at the motion to dismiss stage, once again facing Defendants' repetitive motions and attempts at delay, all while these Plaintiffs experience devastating injuries at the hands of their government.

In seeking another halt to these proceedings, Defendants fail to even include the legal standard for what justifies a stay, much less proffer any facts to support staying this litigation, which should conclusively establish there is no justification for a stay. Defendants ignore record evidence with which they are familiar that a stay threatens to harm Plaintiffs irreparably and runs counter to the public interest. Defendants instead fixate ironically on the concept of "judicial economy," failing to address that, after eight years of delay, efficiency is best served by further factual development and an appellate resolution of legal issues only "*if and when* they are presented [ ] after final judgment." *Juliana v. United States,* 949 F.3d 1125, 1128 (9th Cir. 2018) (Friedland, J., dissenting) (emphasis added). Defendants' newfound concern for judicial economy is betrayed by their constant filing of redundant motions, excessive petitions for writs of mandamus, and attempts at needless interlocutory appeal. *See, e.g.*, Pls.' Opp'n to Defs.' Mot. to Dismiss Second Am. Compl. ("MTD Opp.") at 5-9, 17-19, Doc. 549 (detailing Defendants'

repetitive motion practice); Pls.' Mot. to Set Pretrial Conf. at 5-6, Doc. 543 (recounting Defendants' past attempts at seeking mandamus relief); Defs.' Mot. to Certify, Doc. 551. A general interest in "judicial economy" divorced from the facts simply does not satisfy a movant's "heavy burden" to compel the opposing party to cease litigating in district court.

Putting aside their "judicial economy" posturing, Defendants have not shown a genuine necessity for the proposed stay. Defendants fail to satisfy their heavy burden to establish how a stay can be justified when this case is virtually ready to commence trial and Plaintiffs' constitutional injuries worsen with each passing day. Because eight years of delay is already too long, Plaintiffs respectfully request this Motion to Stay be denied.

STANDARD OF REVIEW

"Where a discretionary stay is proposed, something close to genuine necessity should be the mother of its invocation." *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n.6 (5th Cir. 1985). A stay represents an "intrusion into the ordinary processes of administration and judicial review" and, as a result, is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations and citations omitted). A stay of proceedings is an exercise of judicial discretion, dependent upon the specific facts of a particular case. *Id.* at 433. The burden of justifying departure from the regular track of continued proceedings "lay[s] heavily on the petitioners . . . ." *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936); *see also Nken*, 556 U.S. at 433-34 ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."); *Clinton v. Jones*, 520 U.S. 681, 708 (1997). In *Landis*, the Supreme Court reversed a district court's grant of a stay pending appeal in a parallel case in which a law's constitutionality was at issue. *See* 299 U.S. at 259. The Supreme Court held that "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners." *Id*. at 256

Courts traditionally consider four factors in determining whether issuance of a stay is appropriate:

> (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 (internal citations omitted); *see Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. Standing alone, case management is not necessarily a sufficient ground to stay proceedings. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). As the *Lockyer* court noted, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' . . . ." *Id. Accord, e.g.*, *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1485 (10th Cir. 1983) ("[T]he consideration of judicial economy . . . . should rarely if ever lead to such broad curtailment of the access to the courts [by way of stay of proceedings]."); *GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 193 (D.D.C. 2003) ("[T]he interests of efficiency and judicial economy . . . . [do not] establish a 'clear case of hardship' [under *Landis*].").

Finally, Defendants' motion must be denied unless they can show the likelihood of irreparable harm absent a stay. No stay may issue without a finding that the threatened harm to the moving party is genuinely "irreparable" and that such irreparable harm is at least probable. *See Nken*, 556 U.S. at 435 (the "'possibility' standard is too lenient"); *id*. at 434-35. "[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm. *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970) (quotation omitted). In particular, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft*

Clothing Co., 415 U.S. 1, 24 (1974). "'[I]f there is even a fair possibility that the stay . . . will work damage to some one 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) (internal citations omitted).

ARGUMENT

Defendants' Motion to Stay fails to address the legal standard for a stay of litigation and, as has been the situation numerous times before, provides no evidence to satisfy the stay requirements under the circumstances of this case. *See, e.g.*, Pls.' Opp'n to Stay Mot., Doc. 134, Pls.' Opp'n to Stay Mot., Doc. 429. Defendants' failure to provide this evidence is a failure to bear their burden as the moving party. Their failure to even apply the correct standard and law to their motion subjects Plaintiffs to yet another unsupported harassing motion. *See* MTD Opp. at 4, Doc. 549. While Plaintiffs believe this failure alone justifies the Court denying Defendants' Motion to Stay, Plaintiffs will show why: (1) Defendants have *not* made *any* showing that they are likely to succeed on the merits, much less a "strong showing"; (2) Defendants will *not* be irreparably injured without a stay, much less injured at all; (3) Plaintiffs *will be* substantially injured if a stay is granted; and (4) a stay is *not* in the public interest.

I. Defendants Are Not Likely to Succeed on the Merits

Defendants have made no showing that they are likely to succeed on the merits, and so have not discharged their burden for demonstrating the propriety of a stay. Defendants' Motion to Stay merely cites the prior Supreme Court and Ninth Circuit orders with broad, conclusory language regarding the Amended Complaint that has now been superseded by the Second Amended Complaint. *See* Stay Mot., Doc. 552. The Motion to Stay lacks any discussion of the factors considered in granting a stay, much less a discussion of why Defendants believe their currently filed motions are likely to succeed on the merits. The motions to which Defendants refer

are repetitive of ones that have already been denied by this Court and, without more, Defendants cannot demonstrate likelihood of success.

The order of the Ninth Circuit does not mandate dismissal of the Second Amended Complaint. The order of the Ninth Circuit, as Defendants have previously conceded, narrowly decided that redressability was the only definitive issue requiring dismissal. *See* Mot. to Certify at 9; *see also* Defs.' Resp. to Pls.' Mot. to Set Pretrial Conf. at 2, Doc. 548 ("The narrow issue of redressability was the only issue necessary to justify that mandate . . . ."). Plaintiffs have since filed a Second Amended Complaint that conformed the complaint and relief requested to the Ninth Circuit's opinion on redressability. *See* Second Amend. Compl. ("SAC"), Doc. 542; MTD Opp., Doc. 549. Once again, Defendants fail to engage with the substantive amendments to Plaintiffs' Second Amended Complaint, instead rehashing *ad nauseum* the same arguments that have been reviewed and rejected by this Court. Most of their Motion to Dismiss is duplicative, not warranting renewed consideration by this Court, much less imposition of a complete halt on litigation.

Similarly, Defendants make no argument why their new motions for interlocutory appeal are likely to succeed on the merits. Interlocutory appeal is "the exception rather than the rule." *Juliana*, 2018 WL 6303774, at *2. Defendants fail to show why another interlocutory appeal might clear that high bar under the current circumstances. *See* Pls.' Opp'n to Mot. to Certify.

The underlying principle in determining whether to grant or deny a stay is that "[t]he right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Comm'n*, 713 F.2d at 1484 (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)). Given the current posture of the instant case, where most of Defendants' arguments on interlocutory appeal were rejected and where Plaintiffs have since amended their complaint to address the singular narrow issue of concern in the Ninth Circuit's opinion, to the

satisfaction of this Court, under its broad discretion, Defendants' mere reference to the 2018 certification for interlocutory appeal does not assure success in their newest attempt at interlocutory appeal. Defendants wholly fail to respond to changes made in Plaintiffs' Second Amended Complaint and, thus, have not demonstrated likely success on the merits.

II. Defendants Will Not Suffer Irreparable Injury Absent a Stay

An applicant for stay *must* "show that an irreparable injury is the more probable or likely outcome" if the stay is not granted. *Leiva-Perez*, 640 F.3d at 968. Recognizing there is no possibility of irreparable injury, Defendants completely fail to address this important point. Defendants only briefly suggest a stay will avoid the "burden and cost of additional discovery or other-pre-trial activities." Stay Mot. at 4, Doc. 552.

Defendants do not assert irreparable harm, let alone any injury, absent a stay. Instead, Defendants vaguely mention that the "cost and burden" of pre-trial litigation should be avoided to allow "the parties to avoid wasting resources." *See* Stay Mot. at 2, 3-4, Doc. 552. However, a stay applicant cannot demonstrate irreparable harm where they are faced with the routine rigors associated with complex civil litigation. *See In re United States*, 884 F.3d 830, 835-36 (9th Cir. 2018) ("[D]efendants must demonstrate some burden . . . other than the mere cost and delay that are regrettable, yet normal, features of our imperfect legal system.") (internal quotations omitted). S*ee also, e.g.*, *Am. Axel & Mfg., Inc. v. Neapco Holdings LLC,* 977 F.3d 1379, 1381 (Fed. Cir. 2020) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (quotations and citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau,* 849 F.3d 1129, 1135 (D.C. Cir. 2017); *Nara v. Frank,* 494 F.3d 1132, 1133 (3d Cir. 2007) (need to "prepar[e] to commence trial within 120 days while simultaneously filing a petition for *certiorari*" was not irreparable injury under Rule 41); *Linden v. X2 Biosystems, Inc.*, No. C17-

966RSM, 2018 WL 1603387, at *3 (W.D. Wash. Apr. 3, 2018); *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. CV H-14-3428, 2017 WL 3620590, at *4 (S.D. Tex. Aug. 23, 2017); *In re BP P.L.C. Sec. Litig.*, No. 4:10-CV-4214, 2016 WL 164109, at *2 (S.D. Tex. Jan. 14, 2016); *DL v. District of Columbia*, 6 F. Supp. 3d 133, 135 (D.D.C. 2014). Defendants' professed concern for judicial economy is merely a desire to avoid routine pre-trial activities—a necessary part of litigation—and does not constitute irreparable injury.

Importantly, Defendants fail to address that their conduct in attempting to delay this litigation—including the now thirteen largely unsuccessful motions to stay—is the cause of this case's extended eight-year duration.[1,2] *See Juliana*, 949 F.3d at 1127 n.1 (Friedland, J., dissenting) (explaining in response to Defendants' requests for interlocutory appeal and mandamus relief that "[i]f anything has wasted judicial resources in this case, it was those efforts."). Defendants' pending request for a stay will only lead to more judicial waste by further delaying Plaintiffs' day in court.

III. A Litigation Stay Will Substantially Injure Plaintiffs

Defendants' moving papers also fail to address the extent to which a stay would certainly and substantially injure Plaintiffs. "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (quotations and citations omitted). "[I]f there is even a fair possibility that the stay . . . will work damage to some one else, the stay may be inappropriate absent a showing by the moving party of hardship or

[1] *See* Pls.' Opp'n to Stay Mot. at 5, Doc. 429; "Based on Plaintiffs' research and upon information and belief, in no prior case has the Department of Justice filed as many petitions for writs of mandamus as it has filed in this case." Olson Decl. ¶ 8, Doc. 544.
[2] Olson Decl. ¶ 3, Doc. 544.

inequity." *Dependable Highway Exp.*, 498 F.3d at 1066 (internal citations omitted). Plaintiffs, who ranged from ages 8 to 19 when this case was filed in 2015, face an ever-worsening climate crisis and with it, risks to their health, their future, and their constitutional due process rights as the result of Defendants' ongoing actions. *See* SAC, Doc. 542; *Juliana v. United States*, 947 F.3d 1159, 1168-69 (9th Cir. 2020). In addition to violating Plaintiffs' right to life, liberty, and property, Defendants discriminate against these youth, who will endure the most severe climate impacts as they are forced to grow up in a destabilized climate system.[3] SAC at 3, Doc. 542; Pls.' Mot. for Prelim. Inj. at 30, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 7, 2019).

"[D]eprivation of a constitutional right 'unquestionably constitutes irreparable injury' . . . ." *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1038 (S.D. Cal. 2022) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *see also Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991) ("We have stated that an alleged constitutional infringement will often alone constitute irreparable harm.") (quotations and citations omitted); *Goldie's Bookstore, Inc. v. Superior Ct. of State of Cal.,* 739 F.2d 466, 472 (9th Cir. 1984) ("[A]lleged constitutional infringement will often alone constitute irreparable harm."). Furthermore, "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." *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011) (quotations and citations omitted and alterations normalized). Plaintiffs' substantial injuries are incontrovertibly constitutional harms caused by Defendants.

[3] The Biden Administration itself has recognized that "Children are uniquely vulnerable to climate change . . . . Climate impacts experienced during childhood can have lifelong consequences stemming from effects on learning, physical development, chronic disease, or other complications." U.S. EPA, *Climate Change and Children's Health and Well-Being in the United States* 4 (Apr. 2023), https://www.epa.gov/cira/climate-change-and-childrens-health-report.

Throughout this litigation, Plaintiffs have provided extensive, uncontradicted, and science-backed evidence that Defendants contribute to the ever-worsening climate crisis with their efforts to expand fossil fuel production and pollution. *See, e.g.,* Docs. 256-269, 271-275, 298, 542; *see also Juliana*, 947 F.3d at 1164 ("A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."). While Defendants admit that "'business as usual' CO_2 emissions will imperil future generations," they willfully ignore their ongoing role in the production and emission of fossil fuels that contribute to dangerous global climate change and concretely harm Plaintiffs' lives. *See* Defs.' Answer to First Amend. Compl. ¶ 150, Doc. 98. As anthropogenic climate change worsens and intensifies, Defendants continue to attempt to further delay this case with increased relentlessness. July 3rd, July 4th, and July 5th —just a little over two weeks ago—were the hottest days on Earth on record.[4]

This summer, good swaths of the United States have been shrouded under smoke from uncontrollable wildfires across North America during what is predicted to be the hottest summer on record after the hottest June ever recorded.[5] This is a pattern of worsening climate records and catastrophes. In the past eight years, Oregon has recorded its worst urban air quality, endured three of its ten hottest years on record and witnessed one of the most severe wildfire seasons ever. *See*

[4] Brad Plumer & Elena Shao, *Heat Records Are Broken Around the Globe as Earth Warms, Fast,* N.Y. Times (July 6, 2023), https://www.nytimes.com/2023/07/06/climate/climate-change-record-heat.html.

[5] Christine Hauser & Claire Moses, *Smoke Pollution From Canadian Wildfires Blankets U.S. Cities, Again,* N.Y. Times (July 17, 2023), http://www.nytimes.com/2023/07/17/us/wildfire-smoke-canada-ny-air-quality.html; Oliver Milman, *Fears of Hottest Year on Record as Global Temperatures Spike,* The Guardian (June 15, 2023), https://www.theguardian.com/environment/2023/jun/15/record-temperatures-global-heating.

MTD Opp. at 27, Doc. 549. This included the Pacific Northwest "Heat Dome" in June 2021, which caused temperatures across the region to increase up to 16-20°C above normal, killing hundreds of people from excess temperatures and causing unprecedented loss of marine life.[6]

In addition to Defendants' harmful support of and collaboration with the fossil fuel industry, Defendants also harm Plaintiffs by further delaying this litigation. As a result of this case's repeated and extended delays caused by Defendants' barrage of motions, writs, and appeals to three different federal courts over eight years, Plaintiffs experience trauma and continue to endure cultural, economic, physical, psychological, and mental injuries. *See* Olson Decl. ¶ 5, Doc. 544. If this litigation is further delayed, it will necessarily and irreversibly aggravate Plaintiffs' injuries by closing the window of opportunity for Defendants to take steps to return to or below 350 parts per million ("ppm") and preserve a habitable climate system for Plaintiffs and this nation. *See* SAC ¶ 259, Doc. 542. There is no doubt that an additional delay in this case "locks in additional impending catastrophes on top of those already occurring." *See* Olson Decl. ¶ 9, Doc. 544. In moving for a stay, Defendants chose to ignore all of this evidence in violation of their ethical responsibilities to this Court to accurately represent the law and the evidence. Because Defendants failed to address the third grounds for a stay, and the evidence of irreparable harm to Plaintiffs is uncontroverted, this Court should deny Defendants' Motion to Stay.

IV. The Public Interest Requires a Denial of a Stay of Proceedings

The public interest strongly favors a denial of Defendants' Motion to Stay. Like government leaders before him, President Biden has identified the climate crisis as an "existential

[6] Rachel H. White et al., *The Unprecedented Pacific Northwest Heatwave of June 2021*, 14 Nature Commc'ns 727 (2023).

threat to humanity."[7] Plaintiffs will bear the brunt of the climate crisis—both because they will mature in a destabilized climate and because of their biological predisposition to climate change-related injuries. Across the country, the Climate Extremes Index reached four of its ten highest levels in the past seven years and millions of American children have been exposed to dangerous air quality conditions due to climate change-induced wildfires, including these youth. *See* MTD Opp. at 27, Doc. 549. Accordingly, the public interest will benefit when Plaintiffs are provided their long-overdue opportunity to present their evidence at trial—as is their due process right. *See, e.g.*, *Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 WL 1730084, at *7 (N.D. Cal. May 2, 2016) ("The Court recognizes the public interest of protecting the public health and safety as well as preserving the environment . . . ."); *Ctr. for Biological Diversity v. E.P.A.*, 722 F.3d 401, 415 (D.C. Cir. 2013) ("The task of dealing with global warming is urgent and important at the national and international level.") (Kavanaugh, J., concurring).

Plaintiffs yet again remind Defendants that courts across the Ninth Circuit have long affirmed that the public interest is well-served by the protection of constitutional rights. "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)); *see also Vayeghan v. Kelly*, No. CV 17-0702, 2017 WL 396531, at *1 (C.D. Cal. Jan. 29, 2017) ("The Court must consider the public interest in upholding constitutional rights.") (citation omitted); *Guy v. Cnty. of Hawaii,* No. CIV. 14-00400 SOM/KSC, 2014 WL 4702289, at *6 (D. Haw. Sept. 19, 2014) ("[P]reventing constitutional violations is in the public interest."); *Melendres*, 695 F.3d at

[7] The White House, *Remarks by President Biden on Climate Resilience | Palo Alto, CA* (June 19, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/19/remarks-by-president-biden-on-climate-resilience-palo-alto-ca/.

1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). The general public also has an interest in knowing what the law is. *Id*.

Defendants' thirteen attempts to stay this litigation over eight years suggests their motion practice, purportedly justified by claims of judicial efficiency, is aimed solely at roadblocking this case from trial and shielding themselves from ultimate accountability. Such behavior is unsuitable here, and in any court of law. *See* MTD Opp. at 17, Doc. 549 ("Defendants have now repeatedly engaged in conduct that is heavily disfavored by the Ninth Circuit and may amount to an abuse of this Court's process."). The climate crisis will wait for no one. This Court is Plaintiffs' last hope to remedy their constitutional injuries and preserve their reasonable safety from the harm caused by Defendants while time allows. Any further delay in this case before trial is deleterious to remedying Plaintiffs' constitutional injuries caused by Defendants and the wider public that will benefit from this meritorious case.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Stay.

DATED this 21st day of July, 2023.

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