No. 24-684

IN THE 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,
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, et al.
Real Parties in Interest.

On Petition for a Writ of Mandamus in No. 6:15-cv-1517-AA

REPLY IN SUPPORT OF MOTION TO STRIKE PORTION OF FILING REQUESTING A STAY IN NONCOMPLIANCE WITH RULES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

I. Striking Defendants' Motion for a Stay is Warranted Because the Motion was Procedurally Improper, and the Department of Justice Knew It.

Counsel for the Department of Justice ("DOJ") are being less than candid with the Court when they claim not to know why Plaintiffs filed this Motion to Strike. *See* Response to Mot. to Strike at 3 ("Plaintiffs, moreover, offer no explanation why this Court should strike the stay request."). Petitioners' ("Defendants'") Motion for a Stay was procedurally improper for two reasons, both of which were known to DOJ counsel when they filed their Response.

First, Defendants improperly filed a combined petition and motion for two requests for relief—a stay, and a writ of mandamus—in a single filing, which is prohibited by the Ninth Circuit's ECF/ACMS filing system. *See* Olson Decl. ¶ 2. Their error prejudiced Respondents ("Plaintiffs") because Plaintiffs have a right to file a responsive brief to a motion for stay, but not for a petition for mandamus unless so ordered by the Court. Circuit Rule 21-4. Due to Defendants' improper filing, Plaintiffs were precluded from filing the response in opposition to Defendants' stay request because the ECF/ACMS filing system barred them from responding to the single filing of the combined Petition for Writ of Mandamus and stay motion. Plaintiffs' sole means to respond to the Motion for Stay within the allotted ten days was to move to strike the motion.

DOJ counsel were fully aware of the filing defect. On February 2, during the parties meet and confer and *before* Defendants filed their Motion for Stay and Petition for Writ of Mandamus, Plaintiffs' counsel wrote the following to DOJ:

> Plaintiffs oppose your motion for a stay.
> Plaintiffs oppose your petition for a writ of mandamus.
> Further, your motion for a stay must comply with FRAP 8 and provide Plaintiffs an opportunity to respond in opposition to your arguments therein. As you know, Plaintiffs do not respond as of right to the Petition for Writ of Mandamus per FRAP 21, until so ordered by the Court. Combining the arguments in one motion and brief is inconsistent with the Federal Rules of Appellate Procedure, conflates the separate issues and standards of review, and prejudices Plaintiffs' ability to respond in opposition. . . .

Olson Decl. ¶ 3. Nevertheless, Defendants did exactly what Plaintiffs advised against and filed one combined Petition. Dkt 1.1. After Plaintiffs filed their Motion to Strike on February 12, Plaintiffs' counsel again emailed DOJ to explain why Defendants' disregard for the filing requirements gave Plaintiffs no choice but to move to strike the Motion for Stay. Olson Decl. ¶ 4. In that e-mail, Plaintiffs' counsel quoted to Defendants the multiple strongly-worded warnings and notices in the e-filing system that defense counsel would have encountered—and disregarded—while filing their Motion to Stay together with their Petition for Writ of Mandamus. *Id.* Counsel did not respond. *Id.*

Second, Defendants' Motion for a Stay was improper because it disregarded Federal Rule of Appellate Procedure 8. *See* Mot. to Strike at 7. Rule 8 states in relevant part that "[a] party must ordinarily move first in the district court for . . . a

stay of the . . . order of a district court pending appeal . . . .” Fed. R. App. P. 8(a)(1)(A). A motion for stay made “to the court of appeals . . . must: (i) show that moving first in the district court would be impractical; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested . . . .” Fed. R. App. P. 8(a)(2). Although Defendants currently have a motion for stay pending in the district court below, Defendants made no showing to this Court that their motion below is impractical, has been denied, or failed to afford the relief requested. On the contrary, Defendants filed their Motion for Stay in this Court *the day after* Plaintiffs filed their opposition brief to Defendants' stay motion in district court; Defendants neither waited for the district court to rule on their fully-briefed motion nor sought expedited treatment. *See* Mot. to Strike at 7. Defendants were aware of the Rule 8 violation before Plaintiffs filed their Motion to Strike because Plaintiffs admonished defense counsel for it in their February 2 email. Olson Decl. ¶ 3. Nevertheless, Defendants did not remedy the defect.

Defendants offer no authority to support their reading of Rule 8, which governs the motion practice for any stay sought in this Court. In sum, because Defendants' Motion for Stay was procedurally improper, this Court should strike it.

II. Striking the Motion for a Stay is Appropriate Because Defendants' Handling of the Substance of Their Motion Lacks Candor with the Court.

Defendants' filings consistently lack candor with the Court. Most glaringly, Defendants' Response brief contains factually false statements about the briefing before this Court. *Compare* Response to Mot. to Strike at 3 ("Plaintiffs do not dispute that" *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999), not *Bauman*, applies here) *with* Plaintiffs' Mot. to Strike at 15 ("Defendants inappropriately rely on *Vizcaino* . . . ."); *See also San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019). Moreover, contrary to Defendants' false representation to this Court, Plaintiffs *did* move to expedite trial in the district court below. *Compare* Response to Mot. to Strike at 10 ("[I]t has been more than four years since this Court ruled that Plaintiffs lack standing, and in that time, Plaintiffs never moved to expedite proceedings in the district court.") *with* ECF No. 543 (Plaintiffs' Motion to Enter Pretrial Order Setting Expedited Trial, with expedited hearing requested).

Defendants' filings also insert arguments that are not properly before this Court, and which also have no basis in law. Although binding precedent, including previous rulings from this Court in this case, forbids the ordinary burdens of litigation from being considered an irreparable injury for purposes of a stay, *see* Mot. to Strike at 24, Defendants' Response now contends, for the first time, that their situation is "analogous" to immunity from suit. *See* Response to Mot. to Strike at 8 (analogizing the denial of Defendants' motion to dismiss for lack of standing to the

denial of an immunity defense). But Defendants' original filing here did not mention immunity, let alone identify it as an error from the court below. *See generally* Mot. for Stay. Moreover, the United States has no immunity from constitutional suits seeking non-monetary relief. *See The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 526 (9th Cir. 1989); 5 U.S.C. § 702; *see also Bell v. Hood*, 327 U.S. 678, 684 (1946); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). And Defendants know it: Defendants included, as an attachment to their Motion for Stay, a binding 2020 opinion in this case by this Court stating that "'the second sentence of [5 U.S.C.] § 702 waives sovereign immunity broadly for all causes of action that meet its terms.'" Mot for Stay, Attach. 4 at 17, *quoting Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017).

Similarly, Defendants' unsupported theory of "clear error" is that the district court should have interpreted this Court's 2020 dismissal for lack of standing as being with prejudice—that is, a final judgment with preclusive effect. However, Defendants' filings ignore the binding precedent cited in Plaintiffs' Motion to Strike that establishes that dismissals for lack of jurisdiction—including Article III standing—are *always without prejudice*. *See* Mot. to Strike at 3, 12, 19–21; *see* Response to Mot. to Strike at 3–4, 7, 9, 12. Defendants' refusal to cite and address binding black letter law is further grounds to strike their improperly filed motion. They not only ignored the Federal Rules of Appellate Procedure, the Circuit Rules,

and multiple warnings in this Court's electronic filing system; worse yet, they ignored Supreme Court and this Court's binding precedent, including law of the case.

Furthermore, Defendants' improperly filed motion for a stay does not occur in isolation. Since 2017, the DOJ has deployed 22 motions for stay and for mandamus as their primary litigation tactic in this case. Thus far, Defendants have moved to stay this litigation 15 times and have petitioned for mandamus seven times. Olson Dec. ¶ 5.

Disregarding this Court's previous rulings and Plaintiffs' uncontested evidence, Defendants also deny outright Plaintiffs' mounting irreparable harm in this case. Plaintiffs have shown repeatedly that any stay harms them. An earlier motion for stay by Defendants caused Plaintiffs to lose their 2018 trial date, and Plaintiffs have shown how, in the years since, their harms have grown worse. *See* Mot. to Strike at 25–30. In fact, this Court has previously found that Plaintiffs have established that "climate change is occurring at an increasingly rapid pace," that "[t]he problem is approaching 'the point of no return,'" and that the challenged conduct "may hasten an environmental apocalypse." *Juliana v. United States*, 947 F.3d 1159, 1164, 1166 (9th Cir. 2020).

Defendants' conduct here is made all the more egregious when compared to a brief the Solicitor General recently filed in the Supreme Court on behalf of Defendant EPA, opposing a motion for a stay in a case where states and industry

filed the motion. The Solicitor General writes therein that important public benefits include reducing levels of pollution that harm air quality and expose people to public-health risks, which amount to serious harms, outweigh any financial impact to states and industry groups. *Ohio v. EPA*, No. 23A349, 2023 WL 7221236, at *17, *43, *45, *49, *50 (U.S. Oct. 30, 2023). The Solicitor General also states on behalf of Defendant EPA that "routine costs" that come with governments performing traditional functions "within their regular duties" is not irreparable injury. *Id.* at *47. Defendants and DOJ cannot in this singular case claim that their "routine costs" "within their regular duties" constitute irreparable harm, whereas reducing air pollution does not, and then claim in a case before the Supreme Court that routine financial costs are not irreparable injury when it suits them, especially when all of the precedent is solidly against them. They owe the Court more candor and consistency. If not for Defendants' relentless efforts to delay this case, the parties would have had a final, appealable judgment on the merits five years ago.

In sum, Defendants' Motion for a Stay and its associated filings demonstrate lack of candor with this Court and a complete disregard of the federal rules and precedent. For this reason, Defendants' motion should be stricken.

III. A New Fifth Circuit Opinion Illuminates How Improper Defendants' Motion for Stay is Here.

On February 9, the Fifth Circuit Court of Appeals denied Texas's motion to stay trial and petition for writ of mandamus in *United States v. Abbott*, No. 23-50632,

2024 WL 551412, at *1 (5th Cir. Feb. 9, 2024). The United States had obtained a preliminary injunction requiring Texas to remove a floating barrier it had erected to thwart the entry of undocumented immigrants, which was then vacated by the Fifth Circuit pending rehearing *en banc*. *Id.* (Willett, J., concurring). Shortly thereafter, the district court set a so-called "draconian," expedited pretrial schedule that would allow the district court to rule on the merits and request for a permanent injunction before the *en banc* rehearing and opinion, thereby potentially mooting the Fifth Circuit proceedings. *Id.* at *2.

On Texas's petition for mandamus and motion for stay, 11 of 18 Circuit Judges found the district court "abused its discretion," behaved "questionabl[y]," or was "insupportable." *See id.* at *1 (Jones, J., concurring); *id.* at *3 (Willett, J., concurring); *id.* at *10 (Oldham, J., dissenting). Nevertheless, the Fifth Circuit denied Texas's petition and motion for a stay in a 13-5 decision. *Id.* at *1. Circuit Judge Willett explained: "The district court's scheduling orders, although questionable, fall shy of showing a 'persistent disregard of the Rules of Civil Procedure' or a pattern of noncompliance that could justify mandamus relief." *Id.* at *3 (Willett, J., concurring) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 31 (1943); *Will v. United States,* 389 U.S. 90, 104–05 (1967)).[1]

[1] The dissent in *Abbott* even references this Court's prior mandamus rulings in the present action: "[T]he Government's mandamus petition in *Juliana* emphasizes the

The district court's conduct here raises none of the issues present in *Abbott*. There, defendant Texas "attempted to voice concerns during the status conference—and was repeatedly interrupted by the district court before it could finish its comments or requests." *Id.* at *2 (Willett, J., concurring). Here, by contrast, the district court took Defendants' arguments about the rule of mandate seriously; devoted many pages to considering them; and explained why it concluded that granting leave to amend was consistent with the rule of mandate. *See* ECF No. 540 at 9–19; ECF No. 565 at 12, 18–21; *see also*, *e.g.*, *Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1106–07 (9th Cir. 2006). Furthermore, in *Abbott*, the Fifth Circuit was concerned the district court's conduct would sacrifice the "meticulous[ness]" of the factual record necessary for resolving the case. *Id.* at *2 (Willett, J., concurring). Here, by contrast, the district court has emphasized the importance of developing a full factual record to resolve the case and is considering a proposal for a December 2024 trial date, which would give the parties over nine months to prepare for trial—a second time around.[2] In short, Defendants have failed to meet their substantial burden to show that a stay is justified in this case.

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same themes presented by the State of Texas [in *Abbott*]—the profound importance of the case, as well as the insubordination of the district judge." *Id.* at *6 (Ho, J., dissenting).

[2] ECF No. 572 at 5. Here, Defendants' motions for stay and mandamus petitions have prolonged the pretrial process for over eight years.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion to Strike Defendants' motion to stay.

DATED this 27th day of February, 2024, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson
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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the length limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,354 words.

s/ Julia A. Olson
Julia A. Olson

Counsel for Real Parties in Interest

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DECLARATION OF JULIA A. OLSON IN SUPPORT OF REPLY IN SUPPORT OF MOTION TO STRIKE PORTION OF FILING

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Attorneys for Real Parties in Interest

I, Julia A. Olson, hereby declare and if called upon would testify as follows:

1. I am an attorney of record in the above-entitled action. I submit this Declaration in support of Reply in support of Motion to Strike Portion of Filing Requesting a Stay in Noncompliance with Rules. I have personal knowledge of the facts stated herein, except as to those stated upon information and belief, and if called to testify, I would and could testify competently thereto.

2. Defense counsel's Petition for a Writ of Mandamus and Opposed Motion for a Stay of Proceedings contains two requests for relief—for a stay, and for a writ of mandamus—in a single filing, which is prohibited by the Ninth Circuit's ECF/ACMS filing system.

3. On February 2, 2024, before they filed their Petition with this Court, I emailed the following to counsel as part of our conferral process:

> Plaintiffs oppose your motion for a stay.
> Plaintiffs oppose your petition for a writ of mandamus.
> Further, your motion for a stay must comply with FRAP 8 and provide Plaintiffs an opportunity to respond in opposition to your arguments therein. As you know, Plaintiffs do not respond as of right to the Petition for Writ of Mandamus per FRAP 21, until so ordered by the Court. Combining the arguments in one motion and brief is inconsistent with the Federal Rules of Appellate Procedure, conflates the separate issues and standards of review, and prejudices Plaintiffs' ability to respond in opposition. Without seeing how you have framed the combined motion, we cannot state a position not to oppose your enlargement of the word limit. If you would like to send it to us to review, we can then make an informed decision about whether to oppose the enlargement of the word limit.

4. On February 12, 2024, after being unable to file our response brief in opposition to Defendants' motion for a stay, I emailed the following to counsel and they never responded:

> When the Government filed its Petition for Writ of Mandamus, the Government did not file a separate Motion for Stay of Proceedings under Rule 8.
>
> As a result, this evening when Plaintiffs tried to file their response within the 10 days provided by Rule 8 to Defendants' Purported Motion for Stay of Proceedings, there was no separate motion for Plaintiffs to link their response because we do not have a right to respond to the Petition for Writ of Mandamus until ordered.
>
> Here is the message we received when we tried to file our response: "Click Respond to a Court Order, Court Notice or a Party Filing to file a response. The system shows you a list of the filings you can respond to. If there are no filings that you can respond to in the case, this option does not appear."
>
> Given that your error in not separately moving for a stay prevented our response, the only way Plaintiffs could timely file their response was for Plaintiffs to bring a motion to strike the portion of your filing that improperly sought multiple requests for relief without filing separate motions per the Court's rules. Thus, we filed a combined motion and in the alternative a response.
>
> As we wrote on February 2, "your motion for a stay must comply with FRAP 8 and provide Plaintiffs an opportunity to respond in opposition to your arguments therein… Combining the arguments in one motion and brief is inconsistent with the Federal Rules of Appellate Procedure, conflates the separate issues and standards of review, and prejudices Plaintiffs' ability to respond in opposition."
>
> The Government chose to ignore our admonition and filed its Petition and Motion as one document, despite the multiple warnings in the ECF/ACMS system.

For instance, you would have received multiple warnings in the e-filing system when you filed the Petition for Writ of Mandamus:

> "IMPORTANT: Each request for relief must be submitted as a separate filing. Do not combine multiple requests for relief into one PDF or one filing. For example, a motion to extend time to respond to a motion and a motion to dismiss for lack jurisdiction must be submitted as two separate motions, each with their own filing type."

Also when filing a motion, a party receives the following notice before a party can file a motion:

- "ATTENTION: You must file a separate motion for each relief requested. Do not file one motion (one pleading) requesting multiple reliefs.
- All pleadings must be submitted in PDF generated from the original word processing file to permit the electronic version of the document to be searched. See Circuit Rule 25-5 for details.
- Do not use special characters (such as quotes, #, & and others) in the names of your PDFs because this may cause errors during filing.
- Do not submit paper copies of an electronically-filed document unless requested by the Court."

5. Defendants have moved to stay this litigation 15 times and have petitioned for mandamus seven times.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 27, 2024.

Respectfully submitted,

/s/ Julia A. Olson
Julia A. Olson