Case No. 17-71692

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, EUGENE,
Respondent,

and

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

On Petition For A Writ of Mandamus
In Case No. 6:15-cv-01517-TC-AA (D. Or.)

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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To assist this Court in resolving the issues presented by the Government's mandamus petition, the following parties respectfully move this Court for permission to participate as *amici curiae*: EarthRights International; Center for Biological Diversity, Defenders of Wildlife, and the Union of Concerned Scientists; Defenders of Wildlife; and the Center for Biological Diversity (collectively, *Amici*). If leave to participate is granted, *Amici* will file an *amicus* brief in support of the Answer of Real Parties In Interest to Petition for Writ of Mandamus, which urges denial of the Government's petition. *Amici* submit this motion pursuant to Fed. R. App. P. 29(a)(3) and Fed. R. App. P. 21(b)(4). Neither the Government nor the Real Parties In Interest oppose *Amici*'s submission.

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* certify that their counsel authored this *amicus curiae* brief in its entirety. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

INTERESTS OF THE *AMICI*

Amici are non-profit organizations that engage in advocacy, including litigation, to hold polluters and government accountable for environmental and climate harms that injure the organizations, their members, and their clients. They regularly pursue enforcement actions under citizen suit provisions in federal environmental statutes, as well as administrative, common law and constitutional

causes of action, to seek justice through the federal courts. The government's arguments to restrict due process rights, the public trust doctrine, and standing could deprive *Amici* of legal remedies for harm to their members. *Amici*'s specific organizational interests are as follows:

EarthRights International is a non-profit organization dedicated to representing individuals and communities suffering human rights abuses, particularly where those abuses arise out of the destruction or exploitation of the environment. For over 20 years, EarthRights International has litigated cases under state, federal, and international law in U.S. federal courts—including cases in which individuals have suffered harm due to major environmental catastrophes, where their injuries are shared by large numbers of people—and therefore it has a substantial interest in the proper application of standing under Article III of the United States Constitution.

The **Center for Biological Diversity** (the "Center") is a non-profit corporation with offices in Oregon, California, and throughout the United States. The Center works to protect wild places and their inhabitants. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. Combining conservation biology with litigation, policy advocacy, and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the wilderness

they need to survive, and by extension, for the spiritual welfare of generations to come.

One of the Center's practice areas and programs is the Climate Law Institute, an internal institution with the primary mission of curbing global warming, and sharply limiting its damaging effects on endangered species, the habitats on which they depend, and the health of all of us who depend on clean air, a safe climate, and a healthy web of life. Global warming represents the most significant and pervasive threat to biodiversity worldwide, affecting both terrestrial and marine species from the tropics to the poles. Absent major reductions in greenhouse gas emissions, by the middle of this century upwards of 35 percent of the earth's species could be extinct or committed to extinction as a result of global warming. The Center works on behalf of its members, who rely upon the organization to advocate for their interests in front of state, local and federal entities, including federal government agencies and the courts. The Center currently has approximately 61,000 members and over one million activist supporters.

Defenders of Wildlife ("Defenders") is a not-for-profit conservation organization recognized as one of the nation's leading advocates for wildlife and their habitat. Founded in 1947, Defenders is headquartered in Washington, D.C., with field offices in Alaska, California, Colorado, Florida, New Mexico, North

Carolina, Idaho, Montana, Oregon, Washington, and Mexico. Defenders supports more than 372,000 active members and nearly 1.2 million members, donors, and online activists. Defenders is dedicated to the appreciation and protection of wild animals and plants in their ecological roles within the natural environment. Defenders accomplishes its goals with partners at local, state, regional, and national scales through demonstrated on-the-ground conservation, research, policy development, advocacy, and litigation. Defenders advocates sound, scientifically-based approaches to wildlife conservation that are geared to restoring imperiled species and preventing others from becoming threatened or endangered.

The **Union of Concerned Scientists** ("UCS"), an organization of more than a half-million citizens and scientists, is the leading non-profit group in the United States dedicated to putting rigorous, independent science into action for a healthier planet and a safer world. Tackling global warming is a primary focus for the organization, and has been for over twenty years. UCS has pushed the federal government to take strong action to reduce the emissions of heat-trapping gases that cause climate change, including supporting legislation to create a national cap-and-trade program, legislation and regulations to make our passenger cars and trucks cleaner and more fuel efficient, legislation and regulations to boost renewable energy and energy efficiency, and many other policies. As a science-based organization, UCS is keenly aware that the federal policies that have been

put in place to date are wholly inadequate to stave off the worst effects of climate change, yet many of the modest first steps that have been taken are at risk as the Trump Administration has vowed to roll them back and has taken preliminary steps to do so. UCS therefore has a stake in this litigation, because a court order compelling the United States government to address climate change would advance the interests of UCS and its members to avoid catastrophic damage due to rising temperatures, sea level rise, severe storms, droughts, fires, and other impacts.

IMPORTANCE OF AN *AMICUS CURIAE* BRIEF AND ITS RELEVANCE TO THE ISSUES BEFORE THE COURT

The Government's petition asks this Court to weigh in prematurely to overturn the district court's sound decision, applying well-settled standing case law, finding that the plaintiffs' complaint presented allegations sufficient to show standing on a motion to dismiss. Granting the Government's request could improperly constrain the scope of Article III standing, which would impede the ability of individuals who suffer harms related to climate change to establish standing to pursue judicial remedies. *Amici*'s collective experiences in helping to develop case law on issues related to standing, cumulatively suffered injury, and causation in environmental cases are directly relevant to the issues before this Court.

Granting mandamus in this case would also undermine the "general rule [that] 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court,'" *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (*quoting Will v. United States*, 389 U.S. 90, 96 (1967)), and change the basic rules governing our system of federal civil procedure. As regular litigants in federal courts, *Amici* oppose—and would be harmed by judicial acceptance of—the Government's effort to establish a new procedure whereby unsuccessful challenges to plaintiffs' standing, and motions to dismiss on substantive grounds, could be immediately appealed by means of mandamus. Such mandamus petitions would cause vast delays in many cases in which standing is ultimately upheld and would also greatly increase the cost of challenging governmental compliance with the law.

CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court grant them leave to file the *amicus curiae* brief submitted contemporaneously with this Unopposed Motion.

Dated: September 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 5, 2017. 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.

Dated: September 5, 2017

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND REAL PARTIES IN INTEREST

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* EarthRights International, Center for Biological Diversity, Defenders of Wildlife, and Union of Concerned Scientists certify that they have no parent corporations and that no publicly held corporation owns more than 10% of the *Amici Curiae*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

INTRODUCTION

Although styled as a petition for a writ of mandamus, this petition presents the federal Government's impermissible interlocutory appeal of the district court's order denying the motions to dismiss the complaint. In doing so, the petition breaches fundamental constraints on writs of mandamus and upends the rule of finality by inviting this Court to rule on legal issues mid-stream before discovery and trial crystalize and narrow the dispute.

Most important to *Amici*, the petition asks this Court to reverse the district court's standing decision on broad grounds, which, if adopted, could close the courtroom door to many who suffer direct environmental harm. *Amici* file this brief to urge the Court to deny the petition and refrain from expanding the extraordinary remedy of mandamus to review of a pleading-stage standing challenge before the issues are refined through further district court proceedings.

STATEMENT OF INTEREST

Amici are non-profit organizations that engage in advocacy, including litigation, to hold polluters and government accountable for environmental and climate harms that injure the organizations and their members. *Amici* all seek to mitigate the unprecedented hazards of climate change. They pursue enforcement actions under citizen suit provisions in federal environmental statutes, as well as administrative, common law and constitutional causes of action, to seek justice

through the federal courts.[1]

As frequent civil litigants in the federal courts, all of these organizations strongly oppose—and would be harmed by judicial acceptance of—the Government's effort to establish a new procedure whereby unsuccessful challenges to plaintiffs' standing, and motions to dismiss on substantive grounds, could be immediately appealed by means of mandamus.

ARGUMENT

A writ of mandamus is a drastic and extraordinary remedy, invoked only when there is a clear error of law and no other adequate legal remedy. *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Petitioners must demonstrate an entitlement to mandamus relief that is "clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978) (citations omitted). The Government's petition falls far short of this exacting standard, inviting this Court to rule on the merits of weighty constitutional and public trust issues and to review, in the guise of a mandamus petition, a rejection of a pleadings-stage standing defense. The Court should reject this effort, which, if successful, would upend basic principles of finality.

This case is in its early stages and that procedural posture shaped the district court's order. *See, e.g.*, Dkt. 83 at 52 ("This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss.").

[1] *Amici* describe their respective interests in the motion for leave to file this brief.

The court accepted the facts pled in the complaint, noting that the plaintiffs had not yet had the opportunity to present evidence and many factual issues cannot be resolved at the motion to dismiss stage. *Id.* at 25, 28. As to standing, the court stated:

> Each link in these causal chains may be difficult to prove, but the "spectre of difficulty down the road does not inform [the] justiciability determination at this early stage of the proceedings." At the pleading stage, plaintiffs have adequately alleged a causal link between defendants' conduct and the asserted injuries.

Id. at 25 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 539 (9th Cir. 2005)). While holding that the complaint stated due process and public trust claims sufficient to overcome the Government's motion to dismiss, the court observed that "[q]uestions about difficulty of proof . . . must be left for another day." *Id.* at 36.

The harm the Government asserts in support of its petition is the burden of "onerous and disruptive discovery." Pet. at 32. But instead of requesting that this Court instruct the district court to limit discovery, the Government seeks reversal on the merits of the district court's order denying the Government's motion to dismiss. *Id.* at 40. While this Court has entertained mandamus petitions in its supervisory capacity to review *discovery orders* that hinge on the meaning of the Federal Rules of Civil Procedure or the legal viability of claims of privilege, this petition challenges no discovery orders; indeed, the Government has not objected

to any discovery order before the district court. The Government's failure to avail itself of remedies available in the district court to cabin discovery and protect any privileges is fatal to its petition. *See Cole v. U.S. Dist. Ct. for Dist. of Idaho*, 366 F.3d 813, 822-23 (9th Cir. 2004) (denying mandamus, despite magistrate's clear error in disqualifying plaintiffs' counsel, because petitioners did not avail themselves of review of the magistrate's order in the district court). This Court should defer to the district court and magistrate's long experience managing discovery and refrain from any supervisory intervention until a discrete discovery issue has been aired and decided below.

I. The Government Improperly Seeks to Transform a Writ of Mandamus into a Substitute for an Appeal of the Motion to Dismiss.

To guard against the temptation to expand the use of mandamus relief, and ensure it remains an "extraordinary remedy," this Court has articulated a set of factors to be considered in applying the court's mandamus powers. *See Bauman v. U.S. Dist. Ct. for N. Dist. of Cal.*, 557 F.2d 650, 654-55 (9th Cir. 1977) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). The relevant factors here are whether the petitioner has alternative means for relief and whether the district court's ruling was clearly erroneous as a matter of law.

A. The Government Has Alternative Means of Obtaining Relief Through an Appeal of Final Judgment.

A writ of mandamus is appropriate only when the party seeking the writ has no other adequate remedy. *Id.* This is to ensure that the writ will not be used as a substitute for appeal "even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

The Government acknowledges this prerequisite, Pet. at 2, 8, yet urges the Court to disregard it even though the Government will have the ability to assert interests of undue burden and any applicable privileges through the normal discovery process and to appeal the final judgment should it lose on the merits. Allowing a party to appeal multiple merits rulings through a writ of mandamus would run afoul of the finality rule and would invite mandamus petitions whenever defendants believe their motions to dismiss were wrongly denied and discovery might be inconvenient. This is contrary to the basic rules that govern our system of federal civil procedure: "It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (quoting *Will*, 389 U.S. at 96). As the district court proceedings move forward, some claims may drop out or be honed based on the evidence, the plaintiffs will attempt to prove causation and redressability, and the court will likely tailor any remedies to avoid the intrusion

into separation of powers that the Government fears. Entertaining the Government's petition would improperly circumvent the final judgment rule and would prematurely address weighty issues that would benefit from development in the district court.

B. It is Inappropriate to Determine on a Writ of Mandamus Whether Plaintiffs Have Adequately Pled Standing, and the Government Has Not Shown a Manifest Violation of Settled Law Warranting Mandamus Relief.

The district court applied well-settled standing case law to determine that the complaint presented allegations sufficient to show standing on a motion to dismiss. It broke no new legal ground, and it recognized the preliminary nature of the ruling since the plaintiffs must still prove facts supporting the complaint's allegations.

The Government has cited no case in which a court has granted a writ of mandamus to review a district court's refusal to dismiss a case on standing grounds. Nor should that be surprising: standing defenses are raised in vast numbers of public law actions, including in environmental cases. If a defendant's claim that a trial court "got it wrong" on standing could justify mandamus review, mandamus petitions would become routine. The result would be circumvention of the final judgment rule, and vast delays in many cases in which standing is ultimately upheld. Such mandamus petitions would also greatly increase the cost of challenging governmental compliance with the law.

Regardless, the Government has failed to demonstrate that the district

court's denial of the Government's motion to dismiss on standing grounds was error at all, let alone so clearly wrong as to justify mandamus relief. Nor does the Government show why it lacks an adequate remedy through appeal of the court's ultimate decision on standing in the normal course after final judgment.

1. The district court's ruling that the complaint alleged sufficient injuries for standing does not warrant mandamus relief.

The Government does not contest that "climate change is happening [and] human activity is driving it," Dkt. 83 at 4, or that the plaintiffs have suffered injuries from climate change that directly impact them, Dkt. 83 at 19-20. In an attempt to manufacture a legal error, the Government argues that plaintiffs' harms, because they "affect . . . plaintiffs . . . in the same way and to the same extent as they may affect everyone else in the world," are not sufficiently "particularized." Pet. at 13-14. This argument runs counter to both the case law and the specific injuries alleged in this case. *See* Answer of Real Parties in Interest at 24-25 (describing unique ways in which plaintiffs' injuries vary according to their particular locations, interests, and circumstances).

Injuries shared by many are sufficient to confer standing as long as plaintiffs can demonstrate they themselves are injured. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal

protection through the judicial process" as long as "the party seeking review be himself among the injured."); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) ("[D]eny[ing] standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'") (citation omitted). Indeed, the Supreme Court has upheld standing to pursue judicial relief from climate harms resulting from greenhouse gas emissions, despite arguments that those harms were "widely shared." *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 522 (2007). *See also Comer v. Murphy Oil USA*, 585 F.3d 855, 863 (5th Cir. 2009), *vacated*, 607 F.3d 1049, 1053-55 (5th Cir. 2010)[2] (finding standing to pursue state law tort claims for climate change harms where plaintiffs alleged "sustained actual, concrete injury in fact to their particular lands and property").

In short, the district court's finding that the plaintiffs adequately pled injury sufficient to support standing does not produce the clear entitlement needed to justify mandamus relief.

[2] *Comer* was vacated for rehearing en banc, 598 F.3d 208 (5th Cir. 2010), which never occurred. Thus, the original panel opinion remains persuasive.

2. The district court's ruling that the complaint met the causation requirement of standing does not warrant mandamus relief.

The Government admits that "[c]limate change poses a monumental threat to Americans' health and welfare by driving long-lasting changes in our climate, leading to an array of severe negative effects, which will worsen over time." Dkt. 74 at 1. It also admits that the buildup of greenhouse gases due to human activities is threatening human health and the natural environment, Dkt. 98, ¶ 202, and that climate change is increasing the risk of loss of life, extinction, and harm to the welfare of current and future generations, *id.* ¶ 213. The district court found sufficient allegations linking this harm to the Government's actions and inactions. Dkt. 83 at 25-26.

There is no percentage contribution threshold necessary to meet the causation requirement. Plaintiffs must demonstrate that their injury is "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result of the independent action of some third party not before the court.'" *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994-95 (9th Cir. 2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To satisfy this requirement, "[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Id.*

(quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000)).

Nonetheless, the emissions traceable to the Government's actions and inactions described in the complaint—including granting coal leases on public lands, Dkt. 7, ¶ 166; permitting drilling for oil on federal lands, *id.* ¶ 170; subsidizing fossil fuel production by undervaluing royalties for public leasing, *id.* ¶ 172; funding coal power plants, liquefied natural gas facilities, and other fossil fuel projects overseas, *id.* ¶ 177; and failing to regulate the power and transportation sectors, *id.* ¶¶ 115, 125—correlate to 25% of worldwide emissions. Dkt. 83 at 24. This is *larger* than the contribution (6% of worldwide emissions) that the Supreme Court in *Massachusetts v. EPA* ruled sufficient to support standing. 549 U.S. at 525.

The Government contends, without any supporting cases, that multiple actions by defendants across various sectors that collectively contribute to plaintiffs' injuries cannot be examined together in aggregate for purposes of Article III standing. Pet. at 17. Indeed, there is no Article III prohibition on challenging multiple actions that collectively cause an actionable harm and courts have considered such actions in the aggregate when finding they caused plaintiffs' injuries. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011) (system-wide deficiencies in the provision of medical care, "taken as a whole," subject California

prisoners to the "substantial risk of serious harm") (citations omitted); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-11, 114-15 (1979) (residents and potential homebuyers have standing to sue real estate firms for practice of steering African Americans into particular towns, which, in aggregate, manipulated the housing market and caused increased racial segregation); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (plaintiffs have standing based on climate harms caused by aggregate actions of six electric power corporations that operated multiple power plants in twenty states), *rev'd on other grounds*, 564 U.S. 410 (2011) .

The Government's aggregation argument seems to conflate the appropriate scope of harm with the requirement to plead "*with particularity* a government failure that is a meaningful cause of the plaintiff's injury." Pet. at 17. *See id.* ("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."). However, the categories of government actions the plaintiffs identify in their complaint are amply specific to establish the elements of standing at the motion to dismiss stage when "general allegations" suffice. *Lujan*, 504 U.S. at 561. Mandamus is not the place to consider the Government's creative arguments against plaintiffs' standing.

Washington Environmental Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013), on which the Government relies, actually undercuts its argument. The plaintiffs in *Bellon* challenged Washington State's failure to regulate greenhouse gas emissions from five refineries with emissions constituting 5.9% of Washington's total emissions and a smaller percentage of U.S. and global emissions. *Id.* at 1143-44. The court explained that the challenged actions need not be the sole source of the plaintiffs' injuries and assumed that manmade sources of greenhouse gases are causally linked to detrimental climate change. *Id*. at 1141-42. The court also said nothing that would preclude challenging multiple actions and having their combined effect considered for standing purposes.

Ironically, the case might be read to mean the plaintiffs in *Bellon* failed to aggregate enough harmful actions to avoid being deemed "scientifically indiscernible" because, compared to the emissions from new motor vehicles at issue in *Massachusetts v. EPA*, the contribution of the five refineries to global warming was too small to be linked to the plaintiffs' injuries. *Id.* at 1143-44. Here, by contrast, the challenged actions and inactions implicate a substantial contribution—more than 25% of global emissions. Dkt. 83 at 24. Under *Bellon* and *Massachusetts v. EPA*, such a contribution is sufficient to show causation. The Government cannot demonstrate clear legal error when the district court merely

applied the principles laid out in binding precedent to the facts pled in the complaint.

3. The district court's ruling that the complaint met the redressability requirement of standing does not warrant mandamus relief.

The district court identified a host of questions that would need to be addressed at subsequent stages of the suit before it could issue relief. Dkt. 83 at 28. Nonetheless, it found that "[i]f 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 CO_2, and slow climate change," then an order requiring the Government "to prepare and implement an enforceable remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2" would redress their injuries. *Id.* at 26-27.

Urging the Court to take issue with this ruling, the petition first reiterates its unsupported contention that multiple actions cannot be considered together for standing purposes, Pet. at 19-20, which is addressed above.

The petition next argues that the complaint is deficient because it fails to identify specific statutory authority for the relief requested. *Id.* at 20. This argument ignores plaintiffs' claim that public trust obligations and the protections of the Due Process Clause constrain how federal agencies exercise the discretion given to them by Congress through the delegation of statutory authority. In

gauging plaintiffs' standing, a court "must not confuse weakness on the merits with absence of Article III standing." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015), *see also Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1984 (2017) (a nonfrivolous allegation of jurisdiction generally suffices to establish jurisdiction upon initiation of a case). Should plaintiffs succeed in their claims, the Constitution and public trust obligations would provide the necessary authority to shape the agencies' actions under existing statutory mandates.

Finally, the petition contends that the Court lacks the authority to grant injunctive relief against the President. Pet. at 20-21. Of course, no such relief has been granted or is necessary to redress plaintiffs' injuries, and the Government will have ample opportunity to present its separation-of-powers objections should the plaintiffs seek such relief. As with the other standing rulings, the petition falls far short of demonstrating an error on redressability of such magnitude as to warrant an unprecedented intervention via mandamus.

C. The Government Cannot Demonstrate Clear Legal Error in the District Court's Refusal to Dismiss the Due Process and Public Trust Claims.

Under the third *Bauman* factor, absence of "clear error as a matter of law will always defeat a petition for mandamus." *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015). *See also Perry v. Schwarzenegger*, 602 F.3d 976, 981-82 (9th

Cir. 2010) (holding "mandamus jurisdiction is not appropriate" even though "the district court may have erred," since "it is not clear that the district court's ultimate conclusions were clearly erroneous as a matter of law").

This Court has held that there can be no clear error on a substantive issue as to which there is no controlling precedent. *See In re Van Dusen*, 654 F.3d 838, 845 (9th Cir. 2011) ("The absence of controlling precedent weighs strongly against a finding of clear error."); *In re Swift Transp. Co.*, 830 F.3d 913, 917 (9th Cir. 2016) ("[A] question of first impression not yet addressed by any circuit court in a published opinion cannot satisfy the third *Bauman* factor . . . .") (citation omitted).[3] Because the plaintiffs' complaint presents constitutional and public trust issues of first impression, the Government cannot demonstrate clear error warranting mandamus.

Exercising restraint is particularly warranted here. The petition asks the Court to decide the reach of the Due Process Clause and the public trust doctrine.

[3] When acting in its supervisory capacity, the courts have on occasion granted mandamus to review procedural and discovery issues of first impression that would not be correctable on appeal. *See, e.g.*, *Schlagenhauf*, 379 U.S. at 108-09 (1964) (reviewing discovery order compelling defendant to submit to medical examinations); *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1491-92 (9th Cir. 1989) (assessing scope of attorney-client privilege raised in response to discovery order); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984) (exploring whether legislators can be deposed to determine their subjective motives for enacting ordinances). This supervisory role is not relevant to the Government's request that this Court weigh in on the underlying merits claims.

The Supreme Court has admonished courts to avoid ruling on constitutional issues unless required to do so. *See Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080 (U.S. June 26, 2017) (Nos. 16-1436, 16-1540). It would be especially inappropriate to do so before the relevant facts have been developed and before the lower court has issued a definitive ruling on the question. Because mandamus is an extraordinary remedy, this Court should deny the Government's petition and avoid deciding core constitutional issues on an expedited and premature basis.

CONCLUSION

The Government has failed to demonstrate why its threshold challenges to plaintiffs' standing and right to relief—the sort of motions it files in countless cases every year—are so extraordinary that they merit a novel use of mandamus, and justify the construction of a brand-new appellate avenue that would annul the centuries-old final judgment rule. *Amici* urge the Court to adhere to the constraints that this Court and the Supreme Court have imposed on mandamus relief and

request that the Court deny the Government's Petition for Writ of Mandamus.

Dated: September 5, 2017

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *Amici Curiae* EarthRights International, *et al*. state that they are unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing opening brief is proportionately spaced, has a typeface of 14 points, and contains 3,799 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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 September 5, 2017. 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.

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