No. 18A410

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

RESPONSE BRIEF OF RESPONDENTS JULIANA, ET AL., TO PETITIONERS' APPLICATION FOR A STAY PENDING DISPOSITION 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, Respondent 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' application to stay "all further discovery and trial pending disposition of the government's petition for a writ of mandamus (or, in the alternative, certiorari)" ("Application"). Application 18.

It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 (U.S. 1 Cranch) 137, 177 (1803). In our constitutional democracy, federal courts interpret the Constitution and the laws of our nation to ensure that the political branches act within them and to safeguard individual liberty. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty."); *Marbury,* 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). A stay of trial in the district court will disrupt the integrity of the judiciary's role as a check on the political branches and will irreparably harm these children. The independence of the judiciary, free from pressure by the political branches, is instrumental in preserving our democratic institutions and the People's respect for them. At times in our history, our federal courts have faced constitutional questions with broad implications for our Nation. As Supreme Court Chief Justice Roberts recently stated in a talk at the University of Minnesota School of Law:

> Without independence, there is no *Brown v. Board of Education*. Without independence, there is no *West Virginia v. Barnette*, where the

> Court held that the government could not compel schoolchildren to salute the flag, and without independence there is no steel seizure case [*Youngstown Sheet & Tube Company v. Sawyer*], where the court held that President Truman was subject to the Constitution, even in a time of war.
>
> Now, the Court has from time to time erred, and erred greatly. But when it has, it has been because the Court yielded to political pressure, as in the *Korematsu* case, shamefully upholding the internment during World War II of Japanese American citizens.[1]

The sole harm alleged by Petitioners in their Application consists entirely of the requirement that, as in any case, they participate in the normal process of trial and await appellate consideration until after final judgment. These ordinary burdens are not "irreparable." Appellate review after trial is designed to preserve judicial economy and to assure the orderly disposition of cases in the light of full consideration of the relevant facts. This Court should not stay the trial and open the floodgates of appellate review by Circuit Courts and this Court of every denial of a motion to dismiss or a motion for summary judgment.[2] To grant the drastic and extraordinary relief Petitioners seek would disrupt these safeguards of sound judicial consideration and undermine the separation of powers underlying this Court's most vital role.

In a nearly identical application, Petitioners previously asked this Court to address the merits of and to dismiss these children's claims. In keeping with the

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[1] Chief Justice Roberts Remarks at University of Minnesota Law School, October 16, 2018; *See* SCOTUS Map: October 2018, SCOTUSBlog, http://www.scotusblog.com/2018/10/scotus-map-october-2018/ (last visited October 19, 2018).

[2] During oral argument on Petitioners' first petition for mandamus to the Ninth Circuit, Chief Judge Thomas observed: "[W]e'd be absolutely flooded with appeals from people who think that their case should have been dismissed by the District Court. I mean, if we allow – I mean, if we set the precedent in this kind of a case, there's – there's no logical boundary to it." Oral argument Tr. 15-16 (Dec.11, 2017), Appendix ("App.") 6a-10a; *see also In re United States*, 884 F.3d 830, 836 n.2 (2018).

principle of preserving considered appellate review until after final judgment, this Court ruled that "[t]he Government's request for relief is premature." *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL3615551, at *1. (July 30, 2018). This Court noted that the "breadth of [the children's] claims is striking" and "the justiciability of those claims presents substantial grounds for difference of opinion." *Id.* That opinion remains correct and applicable. This case clearly poses profoundly important constitutional questions, including questions about individual liberty and standing, the answers to which depend upon the full evaluation of evidence at trial.

This Court will have the opportunity to review these questions after trial and address the differences of opinion the Court may have. However, to stay this case now, and to reach these questions prematurely, would deprive this Court of the record necessary for considered appellate review of the claims presented, profoundly disrupt the separation of powers underlying this Court's most vital role, severely interfere with the orderly administration and resolution of cases and the reservation of appellate consideration until after final judgment, and unnecessarily undermine the confidence of the American people in our Nation's justice system.

This is not an environmental statutory case under the Administrative Procedure Act. As the district court wrote, this is "a civil rights action" under the Fifth Amendment of the U.S. Constitution. Petition Appendix ("Pet. App.") 1a. It is also not a case that hinges on a newly recognized unenumerated fundamental right, as Petitioners misstate. Regardless of the Court's views on Plaintiffs' public trust claim or the newly recognized unenumerated right to a climate system capable of

sustaining human life, the trial would still move forward on Plaintiffs' other Fifth Amendment claims. These children have claimed infringement of their fundamental rights not to be deprived of their personal security and family autonomy – rights already recognized by this Court under the liberty prong of the Due Process Clause. These children also claim specific and systemic government discrimination against them as a class in violation of their right to equal protection under the law. In its summary judgment order, the district court ruled that children are not a suspect class; nonetheless, this Court has often afforded heightened scrutiny to government conduct that harms and discriminates against children, especially over matters beyond their control. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982). A full factual record will inform the proper level of judicial scrutiny that should apply to these children's claims of governmental discrimination against them.

The legitimate questions of standing, separation of powers, as well as which enumerated and unenumerated but recognized fundamental rights may have been infringed, are all questions that must be decided on the merits. These issues cannot be responsibly determined by speculating as to what the evidence might show or conjecture regarding what remedy the district court might award. They must be decided on the facts that will be found by the district court and in light of any remedy it actually imposes should these children prevail. This Court has consistently held that its decisions on constitutional questions are better made with a full record before it and with respect for the ordinary process of judicial review under the federal rules. *See Pac. Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305,

1309 (1977) (J. Rehnquist denied applicants' stay of discovery orders pending certiorari review, stating that "this Court would be disposed to review applicants' constitutional claims, if at all, only after a full record is compiled in the course of the present litigation in the District Court . . . .").[3] To circumvent those rules requires a showing of an extraordinary circumstance where the litigation itself (discovery or the presentation of evidence) intrudes on the ability of the executive to carry out its function and causes irreparable harm. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004). That is not this case.

The occurrence of the bench trial itself, to fully explore these constitutional questions, does not intrude into the exclusive domain of the executive branch. To so find would give the federal government license to evade any trial where it is a defendant in a constitutional case. Importantly, Petitioners make no claim of intrusion into executive privilege or deliberative process privilege by either discovery or in the evidence to be presented at trial. The President has been dismissed from the case. Other than depositions, taken under no objection, the parties have only propounded contention interrogatories. Declaration of Julia A. Olson in Support of Plaintiffs' Response to Application for a Stay ("Olson Decl.") ¶ 4. Both sides will present expert and fact witnesses, but no high-level officials have been deposed or

[3] Many important fundamental rights cases were decided on appeal of merits decisions. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (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).

will be called as witnesses.[4] *Id.* at ¶ 5. The documentary evidence is largely publicly available government documents and scientific publications. *Id.* The length of the trial, which is consistent with other complex cases involving science[5] and constitutional rights,[6] is due to the need for a variety of expert witnesses with different specialties to present the scientific and historic subject matter, the number of plaintiffs who will testify as to standing, and the fact that Petitioners have been unwilling to stipulate to any facts outside of their Answer to the Complaint, necessitating additional fact witnesses. *Id.* at ¶ 6. However, the length of trial alone and the associated costs to Petitioners to defend the case do not constitute irreparable harm for purposes of a stay and are not a legitimate basis to stop a trial on the constitutional rights of children.

The strength of our Constitution and our democracy is reflected every day in the work that is conducted in the district courts, work that enables the Circuit Courts and this Court to later hear and decide the select cases that come before it on final judgment with findings of facts, and the legal analysis honed for appellate review. These children have availed themselves of a time-honored judicial process of seeking

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[4] In fact, as evidenced by their witness list, Petitioners' fact witnesses will only authenticate documents and offer testimony in relation to those documents. Application App., 28a-29a.

[5] For example, after the Deepwater Horizon oil spill there was a three-phase trial that lasted 49 court days. *United States v. BP Expl. & Prod., Inc. (In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010),* 77 F.Supp.3d 500, 503 (E.D. La. 2015); *United States v. BP Expl. & Prod., Inc. (In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010),* 148 F.Supp.3d 563, 565 (E.D. La. 2015).

[6] *See Missouri v. Jenkins by Agyei,* 491 U.S. 274 (1989) (a school desegregation case where trial lasted 7½ months and led to judgment against the State of Missouri and Kansas City Missouri school district, while dismissing suburban school districts and the federal defendants); *see also Hanrahan v. Hampton*, 446 U.S. 754 (1980) (four constitutional damages actions by legal representatives of deceased Black Panthers against 28 state and federal law enforcement officials resulted in an 18-month jury trial).

equitable redress for harms caused them by their government. For the last three years, they have overcome motions to dismiss, motions for judgment on the pleadings and summary judgment, and nearly identical prior petitions for writs of mandamus and emergency stay applications before the Ninth Circuit and this Court. The parties have nearly completed discovery and are ready to proceed to trial in exactly one week. Olson Decl. ¶ 9. Plaintiffs and all 20 of their experts have made travel arrangements to be in Eugene, Oregon over the coming months to testify. *Id*. at ¶¶ 12-13. Many of the children have arranged their school schedules to live in Eugene in order to attend their trial. *Id.* These children are fortunate to live in a country where citizens can rest assured that an independent judiciary will decide their case, and that the losing party after final judgment may seek appellate review of that decision.

This is a case about the fundamental rights of children and whether the actions of their government have deprived them of their inalienable rights. It is a case being taught in dozens of law schools across the country[7] as well as in primary, middle, and secondary schools, inspiring students of all ages to see themselves in the parchment of the U.S. Constitution. Petitioners are correct that there are bedrock principles at

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[7] United States law schools teaching *Juliana v. U.S.* include: Yale Law School; University of Michigan Law School; Cornell Law School; Boston College Law School; University of California Hastings School of Law; University of California Berkeley School of Law; University of California Davis School of Law; Temple University Law School; Tulane University School of Law; University of Utah School of Law; Denver University Sturm College of Law; American University Washington College of Law; University of Oregon School of Law; Lewis & Clark Law School; University of San Diego School of Law; Wayne State University Law School; Florida International University College of Law; Albany Law School; West Virginia University College of Law; University of Louisville Brandeis School of Law; University of Missouri Kansas City School of Law; Elisabeth Haub School of Law at Pace University; University of Wyoming College of Law; Vermont Law School; Widener Law School; Barry University School of Law; Nova Southeastern School of Law; and Delaware Law School. According to Westlaw, over 50 law review articles have already cited to opinions in *Juliana v. U.S.* Olson Decl. ¶¶2-3.

stake. They include: (1) the courts have a duty to interpret the Constitution and weigh the conduct of the political branches against it; (2) the Constitution does not protect government institutions at the expense of individual liberty; (3) it would take an extraordinary circumstance and a clear showing of irreparable harm to the operation of the federal government during trial to deprive these children of their right to have their constitutional claims determined in the light of a full factual record; and (4) the government's harm would have to outweigh the irreparable harm to these children as well as the public interest if this Court were to stay this case.

For the foregoing reasons, and as set forth below, this Application should be swiftly denied and the stay of discovery and trial lifted so that these children, who are on their way to Eugene, Oregon this week, may begin their trial on October 29, 2018.

STATEMENT

1. These young Plaintiffs commenced this action on August 12, 2015 and filed their First Amended Complaint ("FAC") on September 10, 2015. D. Ct. Doc. 7.[8] Plaintiffs allege that Petitioners' 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

[8] Plaintiffs refer to the District Court docket as "D. Ct. Doc."; the Ninth Circuit docket from Petitioners' first petition for writ of mandamus as "Ct. App. I Doc."; the Ninth Circuit docket for Petitioners' second petition for writ of mandamus as "Ct. App. II Doc."; the Ninth Circuit docket for Petitioners' third petition for writ of mandamus as "Ct. App. III Doc."; the Supreme Court docket for Petitioners' first for application for stay as "S. Ct. I Doc."; and the Supreme Court docket for Petitioners' instant petition and application for stay as "S. Ct. II. Doc."

due process rights. Specifically, Plaintiffs allege Petitioners' 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 Petitioners' conduct violates their rights as children to equal protection by discriminating against them with respect to their fundamental rights and as members of a quasi-suspect class. *Id*. ¶¶ 290-301. Finally, Plaintiffs allege Petitioners' 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 Petitioners 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 violations 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. On November 12, 2015, 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. On November 17, 2015, Petitioners moved to dismiss all of 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 Petitioners' and Intervenors' motions to dismiss be denied and Plaintiffs' claims proceed to trial. D. Ct. Doc. 68. Petitioners 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 [Petitioners] have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." *Id.* at 1241. By 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 v. Hodges*,

_U.S. _, 135 S. Ct. 2584, 2601 (2015)). 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 [Petitioners] 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, Petitioners filed their Answer, admitting many of Plaintiffs' factual allegations. Notably, Petitioners' admissions in their Answer to the FAC directly support the claim that Plaintiffs will suffer substantial harm if this Application is granted. Petitioners admit, among other significant facts:

- "for over fifty years some officials and persons employed by the federal government have been aware of a growing scientific body of research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO_2—including that increased concentrations of atmospheric CO_2 could cause measurable long-lasting changes to the global climate, resulting in an array of severe and deleterious effects to human beings, which will worsen over time";

- "global atmospheric concentrations of CO_2, methane, and nitrous oxide are at unprecedentedly high levels compared to the past 800,000 years of historical data and pose risks to human health and welfare";
- Petitioners "permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation";
- "fossil fuel extraction, development, and consumption produce CO_2 emissions and . . . past emissions of CO_2 from such activities have increased the atmospheric concentration of CO_2";
- "EPA has concluded . . . that, combined, emissions of six well-mixed [greenhouse gases] are the primary and best understood drivers of current and projected climate change";
- "the consequences of climate change are already occurring and, in general, those consequences will become more severe with more fossil fuel emissions";
- "[T]hat current and projected atmospheric concentrations of . . . [greenhouse gases], including CO_2, threaten the public health and welfare of current and future generations, and thus will mount over time as [greenhouse gases] continue to accumulate in the atmosphere and result in ever greater rates of climate change."

D. Ct. Doc. 98 ¶¶ 1; 5; 7; 10; 213; 217; *see also* D. Ct. Doc. 146 at 2-4 (District court setting forth "non-exclusive sampling" of significant admissions in Petitioners' Answer to the FAC).[9]

7. As a result of Intervenors' denial of a substantial 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 Petitioners and Intervenors).

8. Four months after the denial of their motions to dismiss, Petitioners 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 and objections. 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 [Petitioners'] 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

[9] 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.

> 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 in 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. Petitioners 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, Petitioners demanded the district court resolve their objections by June 9, 2017. D. Ct. Doc. 171. After reviewing Petitioners' 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, Petitioners filed their first petition for writ of mandamus with the Ninth Circuit. Ct. App. I Doc. 1. Just as they do here, Petitioners 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.

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, 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 Petitioner Department of Energy and director of the U.S. Global Change Research Program. App. at 30a-31a, ¶¶ 52, 54; App. at 38a-41a. Petitioners 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 ("NOAA"), a division of Petitioner Department of Commerce. App. at 30a, ¶¶ 52-53; App. at 32a-37a. Petitioners 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 stayed proceedings in the district court pending consideration of Petitioners' first Ninth Circuit 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 Petitioners' first Ninth Circuit petition. Ct. App. I 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 Petitioners' first Ninth Circuit petition. Judge Michelle Friedland joined the panel upon Judge Kozinski's retirement. *In re United States*, 884 F.3d 830, 833 n.* (2018).

18. On March 7, 2018, Chief Judge Thomas, writing for the Ninth Circuit, denied Petitioners' first petition, ruling that Petitioners had not satisfied any of the factors for mandamus. *In re United States*, 884 F.3d 830. The Ninth Circuit rejected Petitioners' contention that all discovery is categorically improper (which Petitioners repeated unaltered in their second petition to the Ninth Circuit and in their first application to this Court), stating: "If a specific discovery dispute arises, [Petitioners] can challenge that specific discovery request on the basis of privilege or relevance." *Id*. at 835 (citation omitted). Both at oral argument and in its order, the panel made clear that the primary cases on which Petitioners 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 Petitioners' 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. In finding Petitioners did not satisfy any of the factors for mandamus, the panel stated that, as in all cases, Petitioners would be able "to raise legal challenges to decisions made by the district court on a more fully developed record." *Id.* at 837. However, at that point, discovery was still underway, and the

parties had not yet had sufficient time to develop a full record upon which summary judgment would be appropriate. App. at 27a-28a, ¶¶ 12-17. The panel concluded that the issues Petitioners 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." *In re United States*, 884 F.3d at 834 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). Finally, the panel was "not persuaded" by Petitioners' 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 trial on October 29, 2018. For purposes of scheduling the length of trial, Plaintiffs initially projected 20 days for their case in chief. App. at 28a, ¶ 18. Petitioners responded that 20 days would not be enough for Petitioners' 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, Petitioners confirmed

the parties' agreement of 5 weeks per side with the district court. D. Ct. Doc. 191 at 8:3-5 (Apr. 12, 2018 Tr.) (Petitioners' 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 Petitioners' first petition, Petitioners did not seek review with this Court. Rather, Petitioners filed a series of motions with the district court, each substantively and procedurally duplicative of defenses 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 9, 2018, Petitioners filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). D. Ct. Doc. 195. In their Rule 12(c) motion, Petitioners for the first-time sought dismissal of the President as an unnecessary party, and reasserted previously rejected defenses repackaged with slightly different arguments for dismissal, whether Plaintiffs' claims must be pled under the APA and separation of powers concerns. *Id*. On July 18, 2018, Judge Aiken heard oral argument on Petitioners' 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, Petitioners moved for a protective order and stay of all discovery pending resolution of their Rule 12(c) motion, similarly arguing, 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, Petitioners 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. Petitioners did not move for summary judgment on Plaintiffs' other substantive due process and equal protection claims. Importantly, Petitioners did not dispute any material facts relevant to summary judgment despite their denials of material facts in their Answer. *Id.*; *see also* D. Ct. Doc. 98. [10]

24. On May 24, 2018, Petitioners 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, Petitioners conceded that they had presented their APA arguments in their first petition to the Ninth Circuit, which was denied. *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 Administrative Procedure Act."). Further, Petitioners made no reference to any urgency. Justice Kennedy granted Petitioners' application for an extension on May 29, 2018, Ct. App. I Doc. 70, and granted Petitioners' application for a further extension (filed on June

[10] Petitioners failed to support their motion for partial summary judgment with any evidence. For example, in denying summary judgment as to numerous claims, the district court observed: "plaintiffs have proffered uncontradicted evidence showing that the government has historically known about the dangers of greenhouse gases but has continued to take steps promoting a fossil fuel based energy system, thus increasing greenhouse gas emissions." Pet. App. 46a.

25, 2018), to and including August 4, 2018. Ct. App. I Doc. 71. Even though Petitioners' second application for an extension was brought barely three weeks before their first Application for a stay with this Court (filed on July 17, 2018), Petitioners' 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 Petitioners' 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 denied Petitioners' motion to dismiss these claims, and that Petitioners' arguments failed because they were not directed at a "specific discovery request." D. Ct. Doc. 212 at 2-3. Petitioners objected to Judge Coffin's ruling. D. Ct. Doc. 215. On June 29, 2018, Judge Aiken affirmed Judge Coffin's ruling. D. Ct. Doc. 300.

26. On June 8, 2018, Plaintiffs moved to defer consideration of Petitioners' 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 Petitioners' request that the district court hold oral argument on Petitioners' motion for summary judgment on July 18, 2018 in conjunction with argument on Petitioners' Rule 12(c) motion. D. Ct. Doc. 316.

27. There was only one issue raised in Petitioners' Rule 12(c) and summary judgment motions, their second petition before the Ninth Circuit, and the instant Application that had 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, 2018, prior to Petitioners' submission of their first Application to this Court, Plaintiffs met and conferred with Petitioners and agreed to Petitioners' requested dismissal of the President, provided that such dismissal is without prejudice. App. at 17a, 22a. On July 17, 2018, Plaintiffs informed the district court of this offer to agree during the status conference, also prior to Petitioners' filing with this Court. *Id.* Finally, at oral argument on Petitioners' motions for judgment on the pleadings and summary judgment on July 18, 2018, Plaintiffs reiterated their offer to agree with Petitioners' request to dismiss the President, provided that such dismissal is without prejudice. App. at 17a, 22a.

28. After Judge Aiken affirmed Judge Coffin's denial of Petitioners' motion for protective order and stay of all discovery, Petitioners filed their second petition in the Ninth Circuit on July 5, 2018. Ct. App. II Doc. 1. The second petition reproduced Petitioners' 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. Petitioners admitted the arguments advanced in their second petition were duplicative and raised under the same standard applicable to their first petition. *Id.* at 10. As part of their second petition, Petitioners made an emergency motion to the Ninth Circuit to stay the proceedings in the district court pending its consideration of the petition. *Id.*

Petitioners 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 Petitioners' request for a stay. Ct. App. II Doc. 9. Later the same day, the district court denied Petitioners' motion for stay pending the Ninth Circuit's disposition of their second petition. D. Ct. Doc. 307.

29. On July 17, 2018, the Solicitor General filed the first application with this Court, docketed at *United States v. U.S. District Court for the District of Oregon*, Supreme Court No. 18A65. The first application suggested that it could be construed as a petition for writ of mandamus directing the district court to dismiss the lawsuit or as a petition for a writ of certiorari to review the Ninth Circuit's first mandamus decision.

30. On July 20, 2018, the Ninth Circuit denied Petitioners' second mandamus petition as Petitioners had not met the standard to qualify for 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.

In re United States, ___ F.3d ___, 2018 WL 3484444, at *1 (9th Cir. July 20, 2018). The Ninth Circuit concluded that, because "no new circumstances justify this second petition," it "remains the case that the issues the government raises in its petition are better addressed through the ordinary course of litigation." *Id.*

30. Justice Kennedy referred the application for a stay to the entire Supreme Court. On July 30, 2018, this Court denied Petitioners' first application. *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1.

31. On October 5, 2018, Petitioners filed another stay request with the district court. Petitioners informed the district court that they planned to file a petition for a writ of mandamus (or, in the alternative, a petition for a writ of certiorari) with this Court, and asked the district court to stay discovery and trial pending this Court's resolution of that petition. D. Ct. Doc. 361. The district court denied the request on October 15, 2018. D. Ct. Doc. 374.

32. On October 12, 2018, Petitioners petitioned the Ninth Circuit to stay discovery and trial pending this Court's review of the government's petition. Ct. App. II Doc. 1-2. At the time this opposition was filed, the Ninth Circuit had not yet acted on that request.

33. On October 15, 2018, the district court issued an opinion on the Rule 12(c) and summary judgment motions and declined to certify its ruling for interlocutory appeal. Pet. App. 1a-77a (D. Ct. Doc. 369). The district court granted Petitioners' request to dismiss the President "without prejudice,"[11] *id.* at 23a, granted summary judgment in favor of Petitioners on Plaintiffs' claim under the Ninth Amendment*, id.* at 69a, and rejected Plaintiffs' arguments that children are a suspect class under the Equal

[11] The order stated that "on the current record, it appears that this is a case in which effective relief is available through a lawsuit addressed only to lower federal officials," but added that it "is not possible to know how developments to the record in the course of the litigation may change the analysis" and that the district court could "not conclude with certainty that President Trump will never become essential to affording complete relief." Pet. App. at 23a.

Protection Clause*, id.* at 70a-72a. The district court otherwise denied Petitioners' motions. The district court began her order by noting that the significant admissions in Petitioners' Answer and Petitioners' other filings

> make clear that plaintiffs and [Petitioners] agree on the following contentions: climate change is happening, is caused in significant part by humans, specifically human induced fossil fuel combustion, and poses a "monumental" danger to Americans' health and welfare. (Citation omitted). The pleadings also make clear that plaintiffs and [Petitioners] agree that [Petitioners'] policies regarding fossil fuels and greenhouse gas emissions play a role in global climate change, though [Petitioners] dispute that their actions can fairly be deemed to have caused plaintiffs' alleged injuries.

Id. at 6a. The district court rejected Petitioners' argument that Plaintiffs were required to assert their claims under the APA, which the court construed as follows: Petitioners' "APA argument succeeds only if they can demonstrate that the APA is the only available avenue to judicial review of the government's conduct that plaintiffs challenge in this lawsuit." *Id*. at 25a. The district court found the "APA contains no express language suggesting that Congress intended it to displace constitutional claims for equitable relief," *id*. at 28a, and held the "APA does not govern" claims seeking equitable relief for alleged constitutional violations, *id*. at 31a. The district court then noted that:

> the allocation of power among the branches of government is a critical consideration in this case and reiterate that, "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy." *Juliana*, 217 F. Supp. 3d at 1241. The Court recognizes that there are limits to the power of the judicial branch, as demonstrated by the Court's determination that President Trump is not a proper defendant in this case.

Id. at 32a. The district court concluded its denial of the Rule 12(c) motion with the following observation:

> Due respect for the separation of powers has informed, and will continue to inform, the Court's approach to this case at every step of the litigation. The Court remains mindful, however, that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Courts have an obligation not to overstep the bounds of their jurisdiction, but they have an equally important duty to fulfill their role as a check on any unconstitutional actions of the other branches of government.

Id. at 34a.

34. The district court then turned to Petitioners' motion for summary judgment, first considering standing. As to injury in fact, the district court found: "Plaintiffs have filed sworn declarations attesting to a broad range of personal injuries caused by human induced climate change." *Id*. at 37a. "Plaintiffs further offer expert testimony tying injuries alleged by plaintiffs to fossil fuel induced global warming." *Id*. at 38a-39a. Noting Petitioners argued this evidence merely showed a generalized grievance, the district court stated:

> Further, denying "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." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973). [Petitioners] have presented no new controlling authority or other evidence which changes the Court's previous analysis.

Id. at 41a. The district court concluded its analysis of injury in fact as follows:

> In sum, the Court is left with plaintiffs' sworn affidavits attesting to their specific injuries, as well as a swath of extensive expert declarations showing those injuries are linked to fossil fuel-induced climate change and if current conditions remain unchanged, these injuries are likely to continue or worsen. [Petitioners] offer nothing to contradict these

> submissions, and merely recycle arguments from their previous motion. Thus, for the purposes of this case, the declarations submitted by plaintiffs and their experts have provided "specific facts," of immediate and concrete injuries. (Citations omitted).

Id. at 43a. As to causation for purposes of standing, the district court found: "Plaintiffs' expert declarations also provide evidence that [Petitioners'] actions have led to plaintiffs' complained of injuries." *Id*. at 49a.

> At this stage of the proceedings, the Court finds that plaintiffs have provided sufficient evidence showing that causation for their claims is more than attenuated. Plaintiffs' "need not connect each molecule" of domestically emitted carbon to their specific injuries to meet the causation standard. *Bellon*, 732 F.3d 1142-43. The ultimate issue of causation will require perhaps the most extensive evidence to determine at trial, but at this stage of the proceedings, plaintiffs have proffered sufficient evidence to show that genuine issues of material fact remain on this issue. A final ruling on this issue will benefit from a fully developed factual record where the Court can consider and weigh evidence from both parties.

Id. at 50a-51a. As to redressability, the district court concluded:

> As mentioned elsewhere in this opinion, should the Court find a constitution violation, it would need to exercise great care in fashioning any form relief, even if it were primarily declaratory in nature. [Footnote omitted]. The Court has considered the summary judgment record regarding traceability and plaintiffs' experts' opinions that reducing domestic emissions, which plaintiffs contend are controlled by [Petitioners'] actions, could slow or reduce the harm plaintiffs are suffering. The Court concludes, for the purposes of this motion, that plaintiffs have shown an issue of material fact that must be considered at trial on full factual record.
>
> Regarding standing, [Petitioners] have offered similar legal arguments to those in their motion to dismiss. Plaintiffs, in contrast, have gone beyond the pleadings to submit sufficient evidence to show genuine issues of material facts on whether they satisfy the standing elements. The Court has considered all of the arguments and voluminous summary judgment record, and the Court finds that plaintiffs show that genuine issues of material fact exist as to each element. As the Court notes elsewhere in this opinion, the Court will revisit all of the elements

> of standing after the factual record has been fully developed at trial. For now, the Court simply holds that plaintiffs have met their burden to avoid summary judgment at this time.

Id. at 55a. Regarding summary judgment on the APA and separation of powers issues, the district court reiterated its analysis from its denial of the Rule 12(c) motion, and reaffirmed:

> As the Court noted above, the allocation of powers between the branches of government is a critical consideration in this case, but it is the clear province of the judiciary to say what the law is. *Marbury*, 5 U.S. at 177. After a fuller development of the record and weighing of evidence presented at trial, should the Court find a constitutional violation, then it would exercise great care in fashioning a remedy determined by the nature and scope of that violation. Additionally, many potential outcomes and remedies remain at issue in this case. The Court could find that there is no violation of plaintiffs' rights; that plaintiffs fail to meet one or more of the requirements of standing; or, after the full development of the factual record, that the requested remedies would indeed violate the separation of powers doctrine. As has been noted before, even should plaintiffs prevail at trial, the Court, in fashioning an appropriate remedy, need not micromanage federal agencies or make policy judgments that the Constitution leaves to other branches. The record before the Court at this stage of the proceedings, however, does not warrant summary dismissal. To grant summary judgment on these grounds at this stage—when plaintiffs have supplied ample evidence to show genuine issues of material fact—would be premature.

Id. at 57a-58a. Finally, the district court addressed the equal protection claim, holding that children are not a suspect class, but allowing the claim to proceed because it "would be aided by further development of the factual record." *Id*. at 72a-73a.

35. The district court did not certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). *Id*. at 73a-77a.

36. This case is ready to proceed to trial. There is no evidence of any discovery burden substantiating a stay. Petitioners will suffer no cognizable burden in finalizing the remaining, extremely limited discovery and proceeding through trial. As of October 19, 2018, the date this Court granted stay, the parties had completed the following discovery and pre-trial matters in preparation for trial:

a. Plaintiffs completed and served expert reports and all of their experts were deposed. Olson Decl. ¶ 9.

b. Petitioners completed and served rebuttal expert reports and each of their rebuttal experts who had submitted rebuttal reports were deposed.[12] *Id.*

c. Plaintiffs completed and served rebuttal expert reports and all but two of their rebuttal experts were deposed. *Id.*

d. Petitioners completed and served one sur-rebuttal expert report. *Id.*

e. Plaintiffs served one set of interrogatories, to which Petitioners responded. *Id.*

f. Petitioners served one set of interrogatories, to which Plaintiffs responded. *Id.*

g. 15 of the 21 Youth Plaintiffs were deposed. *Id.*

h. There is only one pending discovery motion: a motion to compel responses to interrogatories, filed by Plaintiffs. D. Ct. Doc. 388.

i. The parties have exchanged and filed exhibit lists and witness lists. D. Ct. Doc. 373, 387, 396, 402.

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[12] Petitioners were granted leave of court to serve one rebuttal report on October 26, 2018. D. Ct. Doc. 337. That rebuttal expert has yet to be deposed as to his rebuttal report.

j. The parties filed various motions *in limine*. D. Ct. Doc. 254, 340, 371, 372, 379, 380.

k. The parties filed proposed trial memoranda. D. Ct. Doc. 378, 384.

l. Plaintiffs filed a proposed Pre-Trial Order. D. Ct. Doc. 394.

37. The only remaining procedural matters for the district court to conduct are the pre-trial conference on October 26, 2018 and to commence trial on October 29, 2018.

ARGUMENT

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). This 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). Petitioners 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.").[13]

[13] 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).

"Justices have . . . weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Whalen*, 423 U.S. at 1317 (quoting *Graves v. Barnes*, 405 U. S. 1201, 1203-1204 (1972) (Powell, J., in chambers). For example, Justice Jackson noted that it was his "almost invariable practice to refuse stays which the Court of Appeals or its judges have denied" because "they are closer to the facts, have heard the merits fully argued, and because [he] ha[d] confidence that they would grant stays in worthy cases." *Breswick & Co. v. U.S.*, 75 S. Ct. 912, 915 n* (1955) (Harlan, J.) (quoting *United States ex rel. Knauff v. McGrath*, 96 Cong. Rec. A3751 (1949)); *see also id*. at 915 ("A single Justice may also be expected to give due regard to a lower court's denial of a stay.").

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). Petitioners 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. Finally, this Court 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 Petitioners' Application must be denied.

Petitioners fail to meet their "heavy burden" of justifying the "extraordinary" relief they seek. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975). Indeed, Petitioners' burden is particularly high here, where: (a) on several occasions, the district court expressly considered and rejected their requests to stay the trial; (b) three months ago, the Ninth Circuit likewise rejected Applicants' stay request; and (c) this Court recently denied Petitioners' prior application requesting stay of trial and dismissal of Plaintiffs' claims. Petitioners fail "every prong of the showing required." *Ruckelshaus*, 463 U.S. at 1317.

Petitioners do not overcome the significant deference afforded to prior decisions of the lower courts and this Court and cannot meet their heavy burden to demonstrate the likelihood of irreparable harm. Without a showing of irreparable harm, this Court need not address the other factor. Even so, Petitioners also fail to show "a fair prospect that a majority of the court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). As the district court below concluded in its thorough and well-reasoned opinion, Plaintiffs "have shown an issue of material fact that must be considered at trial on full factual record." Pet. App. 55a.

I. **Petitioners Have Not Established any Likelihood of Irreparable Harm That Cannot Be Corrected on Appeal After Trial**

Petitioners must establish a likelihood of irreparable harm in order to obtain a stay of the proceedings. *Hollingsworth*, 558 U.S. at 190. If this Court does not find a likelihood of irreparable harm to Petitioners during discovery or trial, before final appealable judgment, it cannot stay the trial. *Id.* Petitioners' asserted irreparable harm[14] is a mischaracterization of trial. Further, none of the cases Petitioners cite in support of their alleged harm is remotely analogous to the circumstances presented here. Petitioners rely solely on two types of harm they claim will be irreparable: (1) institutional harm, and (2) financial harm. Application 28-31, 32-33. This Court can eliminate the latter as insufficient justification for the requested stay. Financial harm from litigation does not constitute irreparable harm and is not a basis for this Court to stay a trial. *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). The ordinary burdens of discovery and trial of which Petitioners complain are not cognizable for purposes of the extraordinary, intrusive, and unprecedented relief they seek. *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

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[14] Petitioners characterize their harm as: "Absent relief from this court, the government imminently will be forced to participate in a 50-day trial that would violate bedrock requirements for agency decisionmaking and judicial review imposed by the APA and the separation of powers." Application at 7.

'part of the social burden of living under government.'") (citation omitted). Petitioners cite no precedent to support their incurred expenses as a basis for irreparable injury.[15] Application 32-34.

Petitioners' non-specific assertions of "institutional harm" can be readily rejected by comparing that asserted harm to the cases upon which Petitioners rely. As an initial matter, Petitioners concede "the government could raise some of the arguments asserted here after the 50-day liability phase of trial." Application 28. In arguing that appellate reversal after trial would be inadequate as to other unidentified issues, Petitioners cite cases that illuminate how far afield their claims of harm are from those in which courts have stayed cases or issued writs of mandamus. Application 28-31.

The irreparable harm which Justice Kavanaugh, then-writing for the D.C. Circuit in *In re Kellogg Brown & Root Inc.,* 756 F.3d 754 (D.C. Cir. 2014), found as justifying a writ of mandamus to overturn a discovery order, was the release of confidential documents subject to attorney-client privilege. Justice Kavanaugh wrote that appeal after final judgment would come too late to avoid irreparable harm "because the privileged communications will already have been disclosed." *Id.* at 761. In sharp contrast, the *Juliana v. U.S.* trial will not result in the release of any confidential documents or documents subject to executive or deliberative process privilege. Nor will any federal witnesses be called to discuss privileged

[15] Petitioners make no evidentiary showing that these expenditures irreparably harm the operations of the federal government when one charge of the Department of Justice is to defend cases brought against the United States.

communications. Indeed, the only federal witnesses designated to be called are those who will authenticate publicly available government documents, none of whom is a high-level political appointee. *See* Application App. 28a-29a, 7a; Olson Decl. ¶ 5.

In writing for the First Circuit in *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 20, 25 (1st Cir. 1982), Justice Breyer explained that "[i]t is elementary that mandamus requires a showing that interlocutory relief is necessary to prevent irreparable harm" and the moving party must show that an ordinary appeal is inadequate to protect their interests. There, the irreparable harm justifying mandamus was requiring the Justices of Puerto Rico's Supreme Court to unnecessarily "assume the role of advocates or partisans on [the constitutionality of a statute, which] would undermine their role as judges." *Id.* at 25. Justice Breyer emphasized the resultant risk of harm to "the court's stance of institutional neutrality—a harm that appeal would come too late to repair." *Id.* Moreover, in *In re Justices of Supreme Court of Puerto Rico*, the Justices were nominal parties, not essential to the constitutional claim moving forward. *Id.* at 20-21 ("ordinarily, no 'case or controversy' exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute"). With respect to the instant case, the executive branch agencies and officials are commonly and properly defendants in civil suits, including cases brought under the U.S. Constitution. With the President dismissed, there is now no disagreement that the remaining defendants are proper defendants in a constitutional case. The overarching interest the First Circuit sought to protect in *In re Justices* was the integrity of the Supreme Court of

Puerto Rico so that Justices would not be put in a position of defending the constitutionality of the very laws that the plaintiffs were challenging as unconstitutional. *Id.* at 25. The integrity and independence of the federal courts from the political branches here is likewise an interest that strongly favors denying Petitioners' application for a stay.

Relying upon *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004), Petitioners appear to make three institutional harm arguments. First, they appear to argue that, during the trial, agency Petitioners will be required "to take official positions on factual assessments and questions of policy concerning the climate." Application 29. They supply no supporting evidence for that assertion nor any authority supporting their argument that participating in a civil trial constitutes agency decisionmaking subject to the Administrative Procedure Act.[16] Indeed, the Ninth Circuit rejected this very

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[16] The only legal authority Petitioners cite for this proposition is *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-45 (1950), which explains that the APA was enacted to prevent certain "evils" related to the expansive functions and authority of the growing multitude of federal agencies, including their serious impacts on private rights. *Wong Yang Sung* makes clear that the APA must be construed as not limiting constitutional rights or review of constitutional claims; it acts instead as a limit on the historic evils of expansive federal agency authority to act as both legislator and judge. *Id.* at 49-50. Thus, the very purposes of the APA would be undermined if it were construed to insulate agencies from trial and judicial review of Plaintiffs' constitutional claims. Indeed "to so construe the. . . Act might. . . bring it into constitutional jeopardy." *Id.* at 50. In their Petition, Petitioners also cite *Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199 (2015). That case only stands for the proposition that courts may not impose additional procedural requirements for agency rulemaking. *Id.* at 1207. Concurring in *Perez,* Justice Thomas wrote that "a transfer of judicial power to an executive agency" such as Petitioners' arguments would effect here, raises "constitutional concerns" and "undermines [the courts'] obligation to provide a judicial check on the other branches. . . ." *Id.* at 1213, 1215-1221 (Thomas, J., concurring). Abandonment of judicial duty "permits precisely the accumulation of governmental powers that the Framers warned against." *Id.* at 1221. Even in *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444 (1930), which Petitioners cite later (Application at 30), this Court found that, while judicial review under an administrative statute could bind the court to the administrative record, it acknowledged "there may be an exception of issues presenting claims of constitutional right," a matter the Court did not address in that case. *Tagg Bros.*, 280 U.S. at 443; *see also Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) (resolved unemployment benefits claim with no constitutional claim).

argument in denying Petitioners' second petition for writ of mandamus in the Ninth Circuit. *In re United States*, 895 F.3d 1101, 1105 (9th Cir. 2018). Further, at trial, Plaintiffs will rely upon factual assessments already conducted by the federal government as to climate change, not seek new official positions. Other than for purposes of authenticating documents, there are no Petitioners on Plaintiffs' witness list. *See* Application Appendix ("App.") 7a; Olson Decl. ¶ 5. Plaintiffs are seeking constitutional review of already-implemented and ongoing conduct of the federal government, and will not ask Petitioners to wade into any deliberative process regarding new policy questions. In any constitutional case against systemic government policy and conduct, courts are routinely asked to review factual implications of actual policies and actions of the government defendant. Otherwise no constitutional case against government could ever be decided.

Second, Petitioners appear to argue that if, after the bifurcated trial,[17] the district court imposed a remedy to prepare a national remedial plan, that specific remedy would impermissibly conflict with the APA's procedures and deprive other members of the public from participating in APA procedures. Application 29. However, Petitioners' purported harm is purely speculative and not irreparable because it is fully remediable in the ordinary course of appeal after final judgment. If a constitutional remedy were to issue that overstepped the authority of the district court, such a remedy could be reversed prior to implementation as is true in any case.

[17] Ct. App. I Doc. 12 at 3.

Third, Petitioners suggest that there is a likelihood of irreparable harm to "separation-of-powers principles" by Plaintiffs seeking "to direct petitioners' decisions outside the congressionally prescribed statutory framework" for the agency Petitioners. Application 30. Again, Petitioners do not explain how *going to trial* on October 29 and the district court declaring whether the constitutional rights of Plaintiffs are violated at the conclusion of the trial on liability would amount to irreparable harm to agency Petitioners and their statutory framework. Plaintiffs challenge past government conduct and conduct that is now occurring as unconstitutional and, in one instance, Plaintiffs challenge a single statutory provision as facially unconstitutional. Any hypothetical "directing" of Petitioners' future decisions would not occur until the remedy phase of the bifurcated case should Plaintiffs prevail. Again, any improper remedy can readily be stayed and reviewed before the remedy is implemented. Moreover, Plaintiffs do not seek to have the district court direct Petitioners to engage in any conduct outside of their statutory authority, or to direct any specific conduct by any particular agency. Rather, Plaintiffs ask the court to order Petitioners to come into constitutional compliance in the manner that Petitioners deem most appropriate. As sometimes results in constitutional cases, the government defendants themselves propose an appropriate remedy to come into compliance, and often that remedy is described in a plan prepared by the government defendants. *See, e.g., Brown v. Bd. of Educ. of Topeka, Kan.,* 349 U.S. 294, 299 (1955) (*Brown II*) (school districts have the "primary responsibility" for bringing schools into constitutional compliance); *Milliken v.*

Bradley, 433 U.S. 267 (1977) (affirming district court's order requiring the Detroit School Board to submit and institute comprehensive desegregation plans).

The imagined "intrusions" of which Petitioners complain do not and will not result from the trial itself; they are purely speculative, and they are appealable if and when they occur. They are nothing like the actual intrusion into the executive's ability to carry out its function in *Cheney*, where the district court issued orders compelling production of documents within the realm of executive privilege, which prevented the executive from maintaining confidential communications. *Cheney v. U.S. Dist. Ct.,* 542 U.S. 367, 376, 379 (2004).

Petitioners rely solely on *Cheney* and Justice Kavanaugh's opinion for the D.C. Circuit in *In re Kellogg Brown & Root* to argue that mandamus relief is "appropriate under the circumstances." Application 31. But these circumstances are nothing like those two cases where courts ordered disclosure of confidential communications that could not ever have become "undisclosed" on appeal. A bench trial to hear evidence largely based upon publicly available government evidence and expert testimony to determine whether the political branches of government have violated the U.S. Constitution does not have "broad and destabilizing effects."[18] *See In re Kellogg*, 756 F.3d at 763 (recognizing the "potentially broad and destabilizing effects" created by "uncertainty" in the special context of attorney-client privilege). On the contrary, denying children their trial to present evidence on their constitutional claims when

[18] While Petitioners append the parties' respective exhibit lists to the Application (*see* Application App. 31a and 151a), they cite to no exhibits which involve disclosure of confidential government communications nor do they cite to any orders of the district court requiring production of confidential government communications at trial.

the district court and the Ninth Circuit have held that a full factual record is necessary for resolution of the claims would have broad and destabilizing effects on public faith in the judiciary and its obligation to check abuses of political power to better protect individual liberty. It would also be an abdication of Article III authority. The final judgment rule supports this Courts' institutional credibility.

In its summary judgment order, the district court found: "A final ruling on [causation] will benefit from a fully developed factual record where the Court can consider and weigh evidence from both parties." Pet. App. 51a. If the evidence at trial proves, as the children argued on summary judgment, that the political branches are acting in a manner knowingly harmful to children, and in a manner that will put large portions of Florida under the sea, including 11-year old Plaintiff Levi's barrier island, and those injuries are occurring and being irreversibly locked in today, no independent court could rely upon *Cheney* to hold that such action was unreviewable under the U.S. Constitution. *See* Ct. App. II Doc. 5-4 ¶¶ 14-15.

This Court should take equal note of the irreparable harms *not asserted* by Petitioners. Petitioners do not contend they have not been able to conduct the discovery they sought to conduct. They do not contend they will not be ready for trial on October 29, nor have they sought more time from the district court to prepare for trial. Petitioners have seen Plaintiffs' evidence and do not contend that the introduction of or scope of any of their evidence will harm Petitioners or intrude on separation of powers. Petitioners have not suggested that any evidence runs afoul of any government privilege. There is no pending motion for a protective order and

nothing out of the ordinary with any pretrial motion practice. This is run of the mill litigation in terms of pretrial preparation and evidence, notwithstanding the compressed discovery schedule, the length of the trial, or the importance of the constitutional issues presented for these children. Petitioners make no credible claim of irreparable harm justifying the intrusive and unprecedented relief they seek.

II. These Children Will Continue to Be Irreparably Harmed by Any Additional Delay

These young Plaintiffs, mere children and youth, are already suffering irreparable harm which worsens as each day passes with more carbon dioxide accumulating in the atmosphere and oceans. Petitioners' admissions in their Answer to the FAC directly contradict their claim that Plaintiffs will suffer no substantial harm from a stay. *See* D. Ct. Doc. 98 at ¶ 7 (admitting that "current and projected atmospheric concentrations of . . . GHGs . . . 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."); *id.* at ¶¶ 7, 150–51, 213 (admitting that 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.").[19] Daily contributions of fossil fuel CO_2 for which Petitioners are

[19] 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 well above

responsible are not, as Petitioners argue, "plainly de minimis." *See* Application 8, 34. Government officials and documents already concede these children are living in a "danger zone" and "emergency situation" because of climate change, and Plaintiffs' experts agree. App. at 30a-31a, ¶¶ 53-54; 37a; 39a-41a; *see also* Expert Report of James E. Hanson, D. Ct. Doc. 274-1 at 3 (Plaintiffs face "grave danger" if Petitioners "intensify, rather than solve, the climate crisis.").

Plaintiffs' scientific experts have testified that each day Petitioners' conduct in causing dangerous GHG emissions persists, it increases the risk that irreversible thresholds will be crossed and inevitable harms will be "locked in" for these children. For example, Dr. Harold Wanless, Plaintiffs' sea level rise expert, opined: "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." Ct. App. I Doc. 5-4 ¶ 30. Dr. Wanless explained that "[a]s we continue burning fossil fuels today, tomorrow, next month and into next year, a significant portion of the resulting CO_2 pollution is going to remain in the atmosphere for 4,000 years. Every ton of fossil fuels the U.S. government grants private companies permission to extract, when burned, adds more heat and energy to the oceans, and our oceans will hold that heat for hundreds to thousands of years, leading to more and more ice melt." Wanless Decl., Ct. App. I Doc. 5-4 ¶ 31. Dr. Eric Rignot, a glaciologist, testifies that the unprecedented

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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 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, 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. Wanless Decl., Ct. App. II Doc. 5-4 ¶¶ 14-15.

melting of the ice sheets, glaciers, and ice caps being witnessed today, some of which are in irreversible decline, is due to the excess heat caused by fossil fuel pollution and other human-caused greenhouse gas emissions. D. Ct. Doc. 262-1 at 18. Dr. Rignot opines that "*any* additional climate pollution and warming in the system, which will further increase temperatures from what they are today is, catastrophic." *Id.* at 17 (emphasis added); *see also* Expert Report of James E. Hansen, D. Ct. Doc. 274-1 at 3 ("Continued emissions of CO_2 and other GHGs place Plaintiffs in an unusually serious risk of harm that humanity has never previously faced. There is no time left for further delay in taking actions to address the atmospheric burden that endangers our climate system and threatens our children.").

Moreover, presently increasing CO_2 accumulations makes Plaintiffs' proposed remedy harder to achieve because "the effects of the CO_2 forcing humans have injected into the atmosphere and our climate system is far from being fully realized in terms of warming and sea level rise, *yet*." *Id.* at 32. Plaintiffs' expert Dr. James Hansen opined, "[b]ecause of the slow feedback loops of global warming, there is still a brief period of time today through century's end to reduce the concentrations of atmospheric CO_2, and slow and ultimately reverse global warming if actions are commenced immediately, thereby avoiding the catastrophic and unprecedented warming that would occur in coming centuries." *Id.* In short, the uncontradicted expert testimony is that time is running out for these children and every day matters.

Based on Petitioners' rationale, if a foster child has lived in a dangerous foster home for years, an additional week or even month of delayed review of the child's

situation by the court would be "plainly de minimis" harm when viewed against the cumulative harm to the child. Not only is that not the law, particularly with respect to children,[20] but such a rationale is antithetical to our Nation's values and the purpose of government. The same improper argument would fail under other constitutional infringement cases like children going to segregated schools for years or prisoners living in unsafe prison conditions.

Plaintiffs' exposure to dangerous climate change is *today* causing them concrete and particularized injuries that vary according to their particular locations, interests, and circumstances, as detailed extensively in Plaintiffs' opposition to Petitioners' Motion for Summary Judgment and the district court's opinion and order on summary judgment. D. Ct. Doc. 255 at 4-10; Pet App. 37a-43a. For purposes of summary judgment, Petitioners failed to introduce any evidence contradicting the evidence that Plaintiffs' catastrophic harms are imminent. As such, based on the evidence before the district court, any delay in resolving Plaintiffs' claims serves to prolong and exacerbate Plaintiffs' existing injuries; harms which are not "de minimis."

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[20] This Court has consistently recognized the need to protect children from government action that harms them. *See, e.g.*, *In re Gault*, 387 U.S. 1, 13 (1967); *Brown v. Bd. of Educ.*, 347 U.S. at 494; *Plyler*, 457 U.S. at 220 (Texas law being challenged "is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control."); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015); *Windsor v. U.S.*, 570 U.S. 744, 772 (2013) ("The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").

III. **There is Not a Fair Prospect that a Majority of this Court Will Vote to Grant Mandamus or Reverse the Judgment Below**

There are four overarching reasons why it is fairly unlikely that a majority of Justices on this Court will vote to grant mandamus or intervene at this stage to reverse the judgment below, but will instead exercise judicial restraint prior to final appealable judgment: (a) There is no intrusion into executive function akin to this Court's decision in *Cheney*; (b) the district court and the Ninth Circuit each have determined that a full factual record is necessary for the court's review of both the constitutional questions presented by these children and to assess their justiciability, and Petitioners provide no basis to disagree with that assessment by the courts most familiar with the facts of the case; (c) the district court and the Ninth Circuit each have denied similar and repetitive stay requests by Petitioners, which denials are entitled to deference; and (d) fundamental rights cases alleging infringement of liberty go to the core of judicial function and this Court takes special care to allow each level of the federal judiciary to first wrestle with and then resolve them before this Court intervenes.

Petitioners bear the heavy burden of showing: (1) they have "no 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. *Cheney*, 542 U.S. at 380-81 (quotes, citations omitted). Here, Petitioners fail to satisfy any of these requirements.

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

Petitioners' complaints about these children's constitutional claims or the justiciability of these children's case can all be addressed on appeal after final judgment. Petitioners will not be foreclosed from raising every one of their arguments at that time. Should Petitioners then prevail on appeal, any orders of the district court against them could be reversed. 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. Petitioners can avail themselves of relief from the Ninth Circuit on appeal of final judgment.

B. Petitioners Are Not Entitled to Dismissal of these Children's Constitutional Claims Before Trial

Because Petitioners fail to satisfy any of the other criteria for mandamus or a stay, the merits of Plaintiffs' claims are not properly before this Court 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. Even were this Court to reach the merits of the district court's denial of Petitioner's motion to dismiss, motion for partial summary judgment, or motion for judgment on the pleadings, the district court's conclusions are neither "clearly" nor "indisputably" erroneous as would be required to justify mandamus.

1. Plaintiffs Have Standing

As to Article III standing, the district court held on summary judgment:

> The Court has considered all of the arguments and voluminous summary judgment record, and the Court finds that plaintiffs show that

> genuine issues of material fact exist as to each element. As the Court notes elsewhere in this opinion, the Court will revisit all of the elements of standing after the factual record has been fully developed at trial. For now, the Court simply holds that plaintiffs have met their burden to avoid summary judgment at this time.

Pet. App. 55a (Petitioners on the other hand did not provide any evidence beyond the pleadings).

In their Application, Petitioners grossly misrepresent both Plaintiffs' case and their harms, ignoring all of the evidence on summary judgment. Application 20. When a child suffers climate-induced flooding where the child sleeps, increased incidence of asthma attacks from climate-induced wildfire and smoke conditions in areas where the child exercises, dead coral reefs due to overly warm oceans where the child swims, and storm surges and rising seas perpetually attacking the barrier island where the child lives so that the child now routinely evacuates and experiences flooding in the child's roads, home, and school, those injuries are hardly generalized grievances. Application 20 (misrepresenting that Plaintiffs' injuries "are the same as those felt by any other person"); *see* Pet. App. 37a-39a, *supra*, Section II (irreparable harm to Plaintiffs from delay). Moreover, Petitioners fundamentally misconstrue the basis of the generalized grievance doctrine. The district court correctly rejected this strawman argument. Pet. App. 39a-41a.

At the summary judgment phase, the district court has found for purposes of Plaintiffs' Article III injury-in-fact:

> the Court is left with plaintiffs' sworn affidavits attesting to their specific injuries, as well as a swath of extensive expert declarations showing those injuries are linked to fossil fuel-induced climate change

> and if current conditions remain unchanged, these injuries are likely to continue or worsen. [Petitioners] offer nothing to contradict these submissions, and merely recycle arguments from their previous motion. Thus, for the purposes of this case, the declarations submitted by plaintiffs and their experts have provided "specific facts," of immediate and concrete injuries. *Lujan,* 504 U.S. at 561; *See Bellon,* 732 F.3d at 1141.

Pet. App. 43a.

On causation, after reciting the systemic ways in which the evidence established that Petitioners cause Plaintiffs' injuries, the district court found:

> At this stage of the proceedings, the Court finds that plaintiffs have provided sufficient evidence showing that causation for their claims is more than attenuated. Plaintiffs' "need not connect each molecule" of domestically emitted carbon to their specific injuries to meet the causation standard. The ultimate issue of causation will require perhaps the most extensive evidence to determine at trial, but at this stage of the proceedings, plaintiffs have proffered sufficient evidence to show that genuine issues of material fact remain on this issue. A final ruling on this issue will benefit from a fully developed factual record where the Court can consider and weigh evidence from both parties.

Pet. App. 48a-51a (citation omitted). In *Brown v. Plata*, this Court similarly 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).

As to redressability, after considering expert evidence on the technical and economic feasibility of lowering U.S. carbon dioxide emissions, and expert evidence that even a reduction in U.S. emissions alone would slow global warming and ocean acidification, Pet. App. 53a-54a, the district court found:

> As mentioned elsewhere in this opinion, should the Court find a constitution violation, it would need to exercise great care in fashioning any form [of] relief, even if it were primarily declaratory in nature.

Pet. App. 55a. Redressability is a fact-intensive inquiry and does not require full relief; at the summary judgment stage, it requires a showing of a substantial likelihood that the Court could provide meaningful relief. Given that Petitioners did not support their motion for summary judgment with any evidence, the district court determined redressability based on the extensive record submitted by Plaintiffs. *Id.* at 52a. "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 v. Gautreaux*, 425 U.S. 284, 289, 293-94 (1976) (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); *Brown v. Bd. of Educ.*, 349 U.S. 294 (systemic racial injustice in school systems). Even if the district court did not grant all of the relief Plaintiffs request, it could undoubtedly order Petitioners to cease certain actions which substantially cause and sanction carbon dioxide emissions, thereby reducing, delaying, and remedying Plaintiffs' injuries.

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

The district court rejected Petitioner's motion to dismiss based on their unsupported theory that the APA is the only means of bringing a Fifth Amendment claim under the Constitution. The district court distinguished constitutional claims for damages from this case seeking equitable relief, Pet. App. 23a-31a, and held "[t]he APA does not govern plaintiffs' claims. As a result, plaintiffs' failure to state a claim under the APA is not a ground for dismissal of this action." Pet. App. 31a.

This Court's precedent supports the district court's determination that constitutional claims for equitable relief can be brought against executive agencies outside of the APA. In *Franklin v. Massachusetts*, a case "rais[ing] claims under both the APA and the Constitution," this Court reached the merits of constitutional claims against the Secretary of Commerce separately from its analysis of the APA claims, which this 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, this 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*, this 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 Petitioners' argument that all constitutional claims are subject to the strictures of the APA. *Id.* at 607 n.*. No majority of this Court has ever agreed that the APA supersedes the Constitution, including the Fifth Amendment. As discussed above, this Court has found a reason for the APA's enactment was to protect private rights of action and due process from the growing power of executive administrative agencies, not to limit rights of action under the Constitution. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-45 (1950).

Petitioners erroneously rely on inapposite cases concerning the power of Congress to limit the authority of courts to redress violations of statutorily created rights,[21] cases concerning the limitations on actions brought under the APA,[22] and cases where courts have considered extending a claim in damages for constitutional violations.[23] 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.

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[21] *Armstrong*, 135 S. Ct. 1378.

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

[23] *Wilkie v. Robbins*, 551 U.S. 537 (2007).

284 (approving remedy in non-APA direct Fifth Amendment due process challenge to systemic constitutional violations by federal agency).

Petitioners' 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.

3. Plaintiffs Claim Deprivations of Unenumerated Recognized Fundamental Rights and Rights of Equal Protection of the Law

Petitioners misrepresent Plaintiffs' constitutional claims by implying that their only claims are of infringement of their public trust doctrine rights as beneficiaries and the implied right articulated by the district court of a climate system capable of sustaining human life. Application 26. This Court need not address those rights until appeal after final judgment because, contrary to the mischaracterizations by Petitioners, Plaintiffs have claimed violations of well-recognized fundamental rights, including those to personal security, to be free of state-created danger, to family autonomy, and to equal protection under the law, even if their class is not treated as suspect. Importantly, the scope of the legal claims will

not affect the scope of the trial. The same body of evidence and expert testimony will be used to establish standing and each of the constitutional violations, regardless of whether the "previously unidentified judicially enforceable fundamental right" were dismissed or not. Application 26. The district court, however, provided a well-reasoned ruling in its decisions as to why, at this stage, it believes those unenumerated rights must be recognized and are threatened by Petitioners in this case. Pet. App. 59a-61a, 68a-69a; *Juliana*, 217 F.Supp.3d at 1248-50; 1252-61.

Of these well-recognized rights, Petitioners only moved for summary judgment as to the state-created danger claim, which the district court denied. Pet. App. 61a-68a. In denying summary judgment on Plaintiffs' state-created danger claim, the district court held:

> Additionally, based on the proffered evidence and the complex issues involved in this claim, the Court exercises its discretion to "deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson,* 477 U.S. at 256.

Pet. App. 66a-67a.

> To allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to the case, which is certainly a complex case of "public importance."

Pet. App. 68a.

Petitioners did not move for summary judgment on any of Plaintiffs' claims of infringement of the other recognized liberties or rights of equal protection and are foreclosed from seeking any form of mandamus as to those claims. Thus, the trial will

proceed regardless. The district court, in its wise discretion, underscored why a piecemeal approach to appellate review is disfavored in this case:

> Moreover, certifying a narrow piecemeal appeal on some of these legal issues would not materially advance this litigation, rather it would merely reshuffle the procedural deck and force the parties to proceed on separate tracks for separate claims, which is precisely what the final judgment rule seeks to prevent.

Pet. App. 76a.

Finally, without conducting any analysis under *Washington v. Glucksberg*, 521 U.S. 702 (1997), or pointing to any United States history, tradition, or a single fact related to liberty, Petitioners outright reject the implied fundamental rights these children assert as being essential to their bundle of liberties, to their property, and indeed to their lives and ability to survive and pursue their happiness. That historic analysis is foundational to an analysis of our Constitution and our rights, yet Petitioners ignore it. Plaintiffs did not bring this case to "wrest fundamental policy issues of energy development and environmental regulation affecting everyone . . . [and] thrust them into the supervision of the federal courts." Application 26. Plaintiffs fully expect the political branches to manage their house and their discretion, but in a manner that does not deprive these children of their fundamental rights under the Constitution. The political branches may not wield their power at the expense of our liberties. Our independent judiciary, beginning with the capable district court, must be the bulwark against abuses of power and speak for the Constitution and the children of America.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' emergency application for a stay.

DATED this 22nd day of October, 2018, at Eugene, OR.

Respectfully submitted,

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APPENDIX

Declaration of Julia Olson in Support of Plaintiffs' Response to Petitioners' Application for a Stay Pending Disposition 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 1a

December 11, 2017 Oral Argument Before the Ninth Circuit, Excerpts from Reporter's Transcript of Proceedings, *In re United States*, No. 18-81928 (9th Cir. Dec. 11, 2017) 6a

July 18, 2018 Oral Argument Before Judge Ann Aiken, Excerpts from Reporter's Transcript of Proceedings, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. July 18, 2018) 11a

July 17, 2018 Case Management Conference Before Judge Thomas M. Coffin, Excerpts from Reporter's Transcript of Proceedings, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. July 17, 2018)..........20a

Ct. App. II Doc. 5-2, Excerpts from 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, *In re United States*, No. 18-81928, (9th Cir. July 10, 2018)..........23a

Ct. App. I. Doc. 14-2, Excerpts from Declaration of Julia A. Olson in Support of Answer of Real Parties in Interest to Petition for Writ of Mandamus, *In re United States*, No. 17-71692, (9th Cir. Aug 28, 2017)..........29a

July 21, 2017, Excerpts from Deposition Transcript, C. Mark Eakin, Oceanographer with the National Oceanic and Atmospheric Administration ("NOAA") and Coordinator of NOAA's Coral Reef Watch Program..........32a

July 20, 2017, Excerpts from Deposition Transcript, Michael Kuperberg, biologist for Petitioner Department of Energy and Executive Director of the U.S. Global Change Program within the U.S. Office of Science and Technology 38a

No. 18A410

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

DECLARATION OF JULIA A. OLSON IN SUPPORT OF PLAINTIFFS' RESPONSE TO PETITIONERS' APPLICATION FOR A STAY PENDING DISPOSITION 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

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 make this Declaration in support of Plaintiffs' Response to Petitioners' Application for a Stay Pending Disposition of a Petition for a Writ of Mandamus. 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. On or about October 20, 2018, I conferred with Michael Blumm, law professor at Lewis and Clark School of Law. He surveyed his colleagues and learned that *Juliana v. United States* is being taught at law schools throughout the county, including the following law schools: Yale Law School; University of Michigan Law School; Cornell Law School; Boston College Law School; University of California Hastings School of Law; University of California Berkeley School of Law; University of California Davis School of Law; Temple University Law School; Tulane University

School of Law; University of Utah School of Law; Denver University Sturm College of Law; American University Washington College of Law; University of Oregon School of Law; Lewis & Clark Law School; University of San Diego School of Law; Wayne State University Law School; Florida International University College of Law; Albany Law School; West Virginia University College of Law; University of Louisville Brandeis School of Law; University of Missouri Kansas City School of Law; Elisabeth Haub School of Law at Pace University; University of Wyoming College of Law; Vermont Law School; Widener Law School; Barry University School of Law; Nova Southeastern School of Law; and Delaware Law School.

3. On or about October 20, 2018, under my supervision, a search of Westlaw was conducted to determine the number of law review articles citing to opinions in *Juliana v. United States*. According to the Westlaw search, over 50 law review articles have already cited to opinions in *Juliana v. United States*.

4. Discovery has been extremely limited in this case. There were depositions of only two federal government employees: Dr. Michael Kuperburg, biologist for Petitioner Department of Energy and director of the U.S. Global Change Research Program, and Dr. C. Mark Eakin, Oceanographer with the National Oceanic and Atmospheric Administration, a division of Petitioner Department of Commerce. To date, the parties each have propounded one set of contention interrogatories and both sides have responded. The parties have taken depositions of each side's experts. Petitioners have deposed most of the Plaintiffs.

5. Because the vast majority of Plaintiffs' documentary evidence consists of publicly available, government documents, there is a potential issue as to authentication. The only federal government employees Plaintiffs intend to call as witnesses at trial are those witnesses identified by Petitioners who can authenticate certain documents. Neither side has identified any politically appointed officials to testify at trial.

6. Throughout discovery, Petitioners have been unwilling to stipulate to any facts outside of those facts that were admitted in their Answer, including facts contained in federal government documents, a strategy that necessitates the introduction of a larger number of documents than otherwise would be required.

7. In order to issue a decision on Petitioners' Rule 12(c) Motion for Judgment on the Pleadings and Petitioners' Motion for Summary Judgment, the district court reviewed approximately 36,361 pages of evidentiary materials.

8. This case is ready to commence trial on October 29, 2018. The parties currently anticipate a trial lasting 8-10 weeks.

9. As of October 19, 2018, the date this Court granted the administrative stay, the parties had completed the following discovery and pre-trial matters in preparation for trial: Plaintiffs completed and served expert reports and all of their experts were deposed by Petitioners; Petitioners completed and served rebuttal expert reports and each of their rebuttal experts who had submitted rebuttal reports were deposed by Plaintiffs; Plaintiffs completed and served rebuttal expert reports and all but two of their rebuttal experts were deposed; Petitioners completed and

served one sur-rebuttal expert report; Plaintiffs served one set of interrogatories, to which Petitioners responded; Petitioners served one set of interrogatories, to which Plaintiffs responded; and 15 of the 21 Youth Plaintiffs were deposed.

10. Plaintiffs do not seek to obtain or release any confidential communications or documents of Petitioners, either through discovery or at trial.

11. Since August 1, 2018, Plaintiffs have incurred significant litigation costs to be prepared to commence trial on October 29.

12. Plaintiffs have also expended a significant amount of time and resources to ensure that the youth Plaintiffs and their experts will be in Eugene, Oregon, and prepared to testify at trial beginning October 29, 2018. Many of the youth Plaintiffs have arranged their school schedules so that they can attend trial, with some making arrangements to temporarily live in Eugene so that they can attend the entirety of the trial.

13. Plaintiffs have made and confirmed travel arrangements for the youth Plaintiffs and their experts to come to Eugene and testify, with some experts traveling from as far away as London, England, Queensland, Australia, and throughout the United States.

14. All of Plaintiffs' experts are donating their services *pro bono* and have already invested a significant number of hours in preparing expert reports and sitting for depositions. It would be extremely difficult to reschedule the trial testimony of Plaintiffs' experts to a later date given their other professional

obligations and the narrow windows of time they are available in the coming months.

15. Plaintiffs are fully prepared to go to trial on October 29, 2018 and will be harmed significantly if this trial is delayed in any way.

I declare that the foregoing is true and correct. Executed this 22nd day of October, 2018, at Eugene, Oregon.

Respectfully submitted,

/s/ Julia A. Olson

United States of America

v

United States District of Oregon

and

Juliana, et al.

December 11, 2017

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R. BROWNING U.S. COURTHOUSE

SAN FRANCISCO, CALIFORNIA

COURTROOM NO. 1

BEFORE JUSTICE SIDNEY THOMAS, JUSTICE MARSHA

BERZON, and JUSTICE ALEX KOZINSKI

In re: United States of America
UNITED STATES OF AMERICA, et al.,)
)
Petitioners,)
)
v.)No. 6:15-cv-
) 01517-TC-AA
UNITED STATES DISTRICT COURT FOR)
THE DISTRICT OF OREGON,)
)
Respondent,)
)
and)
)
KELSEY CASCADIA ROSE JULIANA, et al.,)
)
Real Parties in Interest.)

TRANSCRIPT OF PROCEEDINGS

MONDAY, DECEMBER 11 2017

(Appearances: See next page)

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Jan R. Duiven
16 CSR, FCRR, CRC

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1 where a complaint is filed, an administrative
2 record is prepared, and parties do cross-motions
3 for summary judgment.
4 JUSTICE BERZON: There's motions for
5 summary judgment all the time without having
6 administrative records in all kinds of cases.
7 MR. GRANT: Certainly, your Honor.
8 But our position -- again, the position of both
9 the previous administration and the current
10 administration is accepting all of the allegations
11 pled by plaintiffs as true, these claims lack
12 merit as a matter of law. It should not be
13 necessary to go through discovery, to go through
14 summary judgment proceedings.
15 JUSTICE BERZON: Well, but if we
16 granted the motion here, why don't we grant it to
17 the next person who comes in and says the same
18 thing?
19 JUSTICE THOMAS: I mean, we'd be
20 flooded, I think, with those -- if that were true,
21 we'd be absolutely flooded with appeals from
22 people who think that their case should have been
23 dismissed by the District Court. I mean, if we
24 allow -- I mean, if we set the precedent in this
25 kind of a case, there's -- there's no logical

1 boundary to it.
2 MR. GRANT: There is a logical
3 boundary, your Honor, and those other cases do not
4 involve, again, virtually the entire executive
5 branch.
6 JUSTICE THOMAS: Well, it may
7 surprise you, but we do get a lot of suits that
8 are filed in this circuit and other circuits
9 against everybody in the government, and lots of
10 the time they're dismissed by the District Court,
11 but sometimes they're allowed to amend, sometimes
12 they're allowed to go forward.
13 It's not -- it's not -- the subject
14 matter may be unusual and it may be more
15 substantive than those cases, but it's not unusual
16 for plaintiffs to allege all sorts of ills against
17 everybody --
18 MR. GRANT: The District Court --
19 JUSTICE THOMAS: -- and the
20 government.
21 MR. GRANT: With respect, your
22 Honor, the District Court itself on page 52 of its
23 order called this case unprecedented, and it is
24 the combination of the defendants, the combination
25 of the vastly broad remedy sought by plaintiffs

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. ANN AIKEN, JUDGE PRESIDING

4

5

6 KELSEY CASCADIA ROSE JULIANA, et)
al.,)
7)
Plaintiffs,)
8)
v.) No. 6:15-cv-01517-TC
9)
UNITED STATES OF AMERICA, et al.,)
10)
Defendants.)
11 ____________________________________)

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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 EUGENE, OREGON

16 WEDNESDAY, JULY 18, 2018

17 PAGES 1 - 77

18

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8 GENERAL INDEX

9 Argument for the defendants by Ms. Piropato Page 7

10 Argument for the defendants by Mr. Singer Page 24

11 Argument for the plaintiffs by Ms. Olson Page 37

12 Argument for the plaintiffs by Ms. Rodgers Page 55

13 Argument for the plaintiffs by Ms. Olson Page 70

14 Argument for the defendants by Ms. Piropato Page 71

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14:33:56 1 government at large. He decided to stay at his hand,
2 recognizing that the body that is most equipped to deal with
3 these issues is, by definition, the legislature. That comes
4 from a long line of historical precedent, including AAP with
5 a very similar situation as this where the court also
6 decided that separation of power concerns meant that the
7 agencies best equipped and given the power by Congress to
8 address these issues are the ones that are constitutionally
9 charged with making the decisions at issue here.
10 The court said, and I quote, the court will stay
11 its hand in favor of solutions by the legislative, executive
12 branches.
13 I would invite this court to do the same thing
14 here.
15 I will now turn the argument over to my colleague
16 Frank Singer.
17 MR. SINGER: Good afternoon, Your Honor. My name
18 is Frank Singer.
19 I will be addressing two of the issues that are
20 raised in our motion for summary judgment Ms. Piropato did
21 not address. Those issues are standing and the legal
22 sufficiency of plaintiffs' claims.
23 The Article III standing requirement, as Your
24 Honor knows, has three elements, injury in fact,
25 traceability, and redressability.

14:35:07 1 At the moment -- the standing arguments were heard
2 and litigated at the pleading stage in the Rule 12 motion,
3 and one question that might arise is what's changed since
4 then.
5 And the answer is that we now look beyond the
6 complaint. We look at the evidence. At the pleading stage
7 on the Rule 12 motion, Your Honor held that the allegations
8 of certain specific injuries, loss of homes, flooding were
9 sufficient to trigger injury in fact under Article III of
10 the Constitution. And plaintiffs have submitted
11 declarations in support of those allegations. And so
12 those -- there has been a prima facie case made for those
13 injuries.
14 There are other injuries that plaintiffs allege in
15 their declarations that are not cognizable under Article III
16 standing requirements, and those would be more subjective
17 harms like nightmares or general anxiety or frustration with
18 political bodies.
19 But be that as it may because there are specific
20 injuries, the question moves to causation. And looking at
21 those injuries, looking at things like flooding, asthma
22 symptoms, allergy symptoms, et cetera, lost skiing
23 opportunities and other aesthetic losses, the question is
24 whether plaintiffs can show a causal connection exists
25 between the injuries they assert and the conduct they

14:51:03 1 We will point out on the depraved indifference
2 claim that in the cases cited by plaintiffs, there is an
3 affirmative interaction between the government and the
4 individual plaintiffs in this case that is lacking here
5 where the government specifically has taken action with
6 regard to each individual plaintiff in those cases and put
7 them in a worse position than they were in and that that
8 kind of direct interaction between the federal government
9 and the plaintiffs is lacking in this case.
10 But unless Your Honor has any further questions, I
11 am happy to submit.
12 MS. PIROPATO: And one other thing, Your Honor.
13 As we mentioned in our opening, we just
14 respectfully request that if this court were to deny our
15 12(c) motion and our summary judgment motion that it certify
16 this --
17 THE COURT: I have heard your request.
18 MS. PIROPATO: Okay. I just want to reiterate it.
19 THE COURT: I heard it.
20 MS. PIROPATO: Thank you very much, Your Honor.
21 THE COURT: Anything else?
22 MR. SINGER: No, nothing else, Your Honor.
23 THE COURT: Ms. Olson.
24 MS. OLSON: Okay. May it please the court, I'd
25 like to begin my argument today addressing the question of

14:52:25 1 whether the president should be a defendant in this case in
2 the context of the defendants' Rule 12(c) motion to dismiss.
3 We believe the issues in the case can be narrowed
4 by the president's dismissal from the case without
5 prejudice.
6 After I discuss our reasons for asking for
7 dismissal without prejudice, I will move on to the APA and
8 separation of powers arguments.
9 I will briefly discuss their motion for summary
10 judgment on the merits of plaintiffs' claims and then turn
11 to standing, and at that time I will call counsel Andrea
12 Rodgers to assist.
13 On Monday the plaintiffs conferred with defendants
14 about their motion to dismiss the president, and we offered,
15 based upon our reading of their reply brief on their 12(c)
16 motion, that we could agree to stipulate to dismiss the
17 president without prejudice.
18 There are three reasons why we believe the court
19 should order today that the president be dismissed without
20 prejudice.
21 First, the defendants argue that the president is
22 an unnecessary party in this case because a remedy could be
23 obtained against the other defendants in the place of the
24 president.
25 And, Your Honor, that's at Pages 6 and 7 of their

15:00:59 1 be providing testimony.

2 The defendants have said they'll have potentially

3 eight witnesses, eight to ten witnesses at this point.

4 And then we anticipate, Your Honor, fewer than a

5 1,000 documents that the court will have to contend with,

6 and we are working to narrow that even more substantially.

7 And this is in stark contrast to the massive

8 discovery that the United States was involved in in the

9 *Deepwater Horizon* litigation, which was not about

10 fundamental constitutional rights but where the U.S.

11 produced over 100 million pages of documents, including

12 17 million pages in a five-month period. There were 500

13 days of depositions. The trial of the government's claims

14 took place in three phases over three years.

15 Here, the United States has not responded to a

16 single RFA. They have not produced a single document. We

17 have foregone our 30(b)(6) depositions. We do anticipate

18 documents in the hundreds, not the thousands, and the

19 depositions will probably be under 50 days for both sides.

20 We also believe, given the more limited number of

21 witnesses of defendants, we can try the case in a shorter

22 number of days.

23 So I raise those issues because they go also to

24 some of the arguments that have been made regarding

25 separation of powers and the burden on the government to

15:49:16 1 grant our Rule 12(c) motion and summary judgment in favor of
2 the United States.
3 We appreciate, again, Your Honor, for your time in
4 holding this oral argument in a compressed time frame.
5 Thank you, Your Honor.
6 THE COURT: Anything else?
7 Thank you. I am taking this under advisement.
8 We'll have something out shortly. Although every single day
9 we seem to be getting new information. We'll just attempt
10 to do our work in a timely fashion and have something out I
11 think in the relatively near future.
12 So thank you for your time. Appreciate the
13 argument. Appreciate that -- thank you to the staff for
14 accommodating the numbers of people here today, and I hope
15 the other courtroom was able to hear the argument.
16 Thank you.
17 MS. PIROPATO: Thank you, Your Honor.
18 MS. OLSON: Thank you, Your Honor.
19 THE COURT: We are in recess.
20 *(The proceedings were concluded this*
21 *18th day of July, 2018.)*
22
23
24
25

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. THOMAS M. COFFIN, JUDGE PRESIDING

4

5

6 KELSEY CASCADIA ROSE JULIANA, et al.,)
7)
Plaintiffs,)
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UNITED STATES OF AMERICA, et al.,)
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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 EUGENE, OREGON

16 TUESDAY, JULY 17, 2018

17 PAGES 1 - 34

18

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10:29:03 1 testimony, I would think the government would want to
2 cooperate as much as they could.
3 MR. SINGER: We would, Your Honor, because that
4 would abate the prejudice if we would identify a person by
5 name earlier than later.
6 So, yes, we understand that the clock is ticking,
7 and if we are going to give individual names for these two
8 subject matters, it behooves us to do it sooner than later.
9 THE COURT: Yes, I encourage everybody to work
10 together.
11 Good. Okay. Next thing.
12 MS. OLSON: The next issue, Your Honor, is
13 yesterday plaintiffs -- in light of the motion to dismiss
14 the president under the Rule 12(c) motion for judgment on
15 the pleadings that's pending before Judge Aiken --
16 THE COURT: That's going to be heard tomorrow.
17 MS. OLSON: -- and it will be argued tomorrow,
18 plaintiffs asked whether the defendants would stipulate to
19 dismissing the president without prejudice, and they were
20 going to check with their upper management on that question.
21 And I don't know if you have any further
22 information on that or if we should leave it for tomorrow.
23 MS. PIROPATO: Your Honor, we raised it with our
24 management, but that has to be vetted with the White House,
25 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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Attorneys for Real Parties in Interest

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

1 BEFORE THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF OREGON
3 - - - - - - - - - - - - - - - - - -x
4 KELSEY CASCADIA ROSE JULIANA,:
5 XIUHTEZCATL TONATIUH M., :
6 through his Guardian TAMARA :
7 ROSKE-MARTINEZ, et. al., :
8 Plaintiffs, : Civil Action Number
9 vs. : 6:15-cv-01517-TC
10 THE UNITED STATES OF AMERICA,:
11 DONALD TRUMP, in his official:
12 capacity as President of the :
13 United States, et al., :
14 Defendants. :
15 - - - - - - - - - - - - - - - - - -x
16
17 Videotaped deposition of C. MARK EAKIN, called
18 for examination pursuant to agreement of counsel, on
19 Friday, July 21, 2017, in Washington, DC, at the
offices of the United States Department of Justice,
20 601 D Street Northwest, at 10:03 a.m., before CARMEN
21 SMITH, a Notary Public within and for the District
of Columbia, when were present on behalf of the
22 respective parties.
23
24 Job No. 2659793
25 Pages 1 - 88

1 Q Sure, sure. Does NOAA consider the impact
2 of carbon dioxide and climate change on our oceans
3 to be dangerous?
4 A Yes.
5 Q So just to shift gears for a moment, 10:45:45
6 Mark -- and I'm going to grab my phone so I can
7 track time.
8 President Trump has a proposed budget for
9 2018 out, and it's my understanding that the
10 proposed budget would cut NOAA's budget by 10:46:22
11 approximately 16 percent. Is that accurate?
12 A I don't recall.
13 Q Are you aware that the proposed budget
14 would cut NOAA's budget?
15 A Yes. 10:46:40
16 Q If that were to happen, how might that
17 impact the Coral Reef Watch program and the
18 satellite programs that you help oversee?
19 A At this point, we're really not sure.
20 Q Do you believe that budget cuts would 10:47:04
21 affect NOAA's capacity to continue monitoring the
22 oceans and the impacts of climate change?
23 A It depends on the budget cuts.
24 Q Has the president proposed to eliminate
25 the Coastal Zone Management Grants Program? 10:47:32

1 Q Do you know what level of atmospheric
2 carbon dioxide corresponded with those bleaching
3 events?
4 A I don't recall.
5 Q Is it accurate that when bleaching events 10:51:37
6 occur, that it's actually based on emissions and
7 carbon dioxide levels that occurred decades earlier?
8 A Yes.
9 Q And why is that?
10 A There is a lag effect in the climate 10:52:06
11 response to CO2 increases in the atmosphere.
12 Q So is it accurate to say that carbon
13 dioxide emissions that we emit today and carbon
14 dioxide concentrations today will actually lock in
15 impacts to coral reefs 10 or 20 years from now? 10:52:37
16 A Yes.
17 Q Are current carbon dioxide levels
18 approximately 405 parts per million as a global
19 mean?
20 A Approximately. 10:52:57
21 Q I haven't checked recently, but I think
22 it's --
23 A Neither have I.
24 Q -- around that.
25 Are current atmospheric carbon dioxide 10:53:06

1 levels of approximately 405 parts per million
2 dangerous for coral?
3 A Yes.
4 Q In talking about levels of atmospheric
5 carbon dioxide or temperature increases that protect 10:53:31
6 corals, do you use the word "safe"?
7 A Not usually.
8 Q What phrase do you use to describe that
9 maximum threshold?
10 A Maximum threshold. I mean, I'm sorry, 10:53:48
11 rephrase, please.
12 Q So when I think of water quality standard
13 for lead that is safe --
14 A Right.
15 Q -- for children, I would use the word 10:54:13
16 that's a safe level in water for that amount of a
17 pollutant. And so that's a word I use when I think
18 of atmospheric carbon dioxide levels, I think of is
19 it safe.
20 But it seems that scientists may use a 10:54:28
21 different phrase, and so I'm trying to figure out
22 what that word is that NOAA may use to describe
23 thresholds.
24 A Different words may be used depending on
25 the context. 10:54:45

1 explain what you mean by "urgent and rapid action to
2 reduce global warming"?
3 A In the context of this, we're talking
4 about actions to address emissions or potentially
5 atmospheric CO2 levels on a scale of years to a few 13:39:42
6 decades.
7 Q This paper also concludes that the time
8 for recovery of corals is diminishing. Do you agree
9 with that statement?
10 A I would have to read exactly how it's 13:40:00
11 phrased, because that doesn't quite sound right.
12 Q Are you a scuba diver?
13 A Yes.
14 Q And have you been diving and seen coral
15 reefs? 13:41:46
16 A Yes.
17 Q What's your favorite reef to dive on?
18 A Ant Atoll in Micronesia.
19 Q Do you have a favorite reef in U.S.
20 waters? 13:42:03
21 A I'm trying to remember the name, it's
22 something like Coral Gardens in one of the islands
23 of the Commonwealth of the Northern Mariana Islands.
24 Q Have you seen firsthand coral bleaching on
25 these reefs? 13:42:26

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

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3 - - - - - - - - - - - - - - - - - - - x
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8 Plaintiffs, : 6:15-cv-01517-TC
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11 DONALD TRUMP, in his official :
12 capacity as President of the :
13 United States, et al., :
14 Defendants. :
15 - - - - - - - - - - - - - - - - - - - x
16
17 VIDEOTAPED DEPOSITION OF JAMES MICHAEL KUPERBERG
18
19 Washington, D.C.
20 Thursday, July 20, 2017
21 REPORTED BY:
22 SARA A. WICK, RPR, CRR

1 by "overshoot."

2 Q Well, that the CO_2 emissions are such that

3 there are consequences that are already threatening

4 and will in the short term rise to, I'll call it,

5 unbearable unless action's taken to abate fossil 16:51:07

6 fuel emissions?

7 A I'll put this in my words. There are

8 effects of increasing CO_2 concentrations in the

9 atmosphere that are currently seen and detectable

10 and that our projections for the future say they're 16:51:31

11 going to get worse.

12 Q Are you fearful as a terrestrial

13 biologist -- terrestrial ecologist and biologist

14 about what's happening to our terrestrial climate

15 system? 16:51:50

16 A Yes, I am.

17 Q As a terrestrial ecologist, do you believe

18 that 450 parts per million and 2 degrees warming are

19 dangerous level of carbon dioxide?

20 A I can't characterize a specific number as 16:52:03

21 being dangerous, which implies that another specific

22 number is not dangerous.

1 In general, I feel that increasing levels
2 of CO_2 pose risks to humans and the natural
3 environment.
4 Q Do you think that the U.S. government is
5 currently paying attention to the National Climate 16:52:28
6 Assessment and engaging in climate and energy
7 policies that will protect our climate system?
8 A You asked two questions. There are
9 certainly parts of the federal government that are
10 paying attention to the National Climate Assessment. 16:52:46
11 I don't --
12 Q What -- go ahead. I'm sorry.
13 A I don't think that the current federal
14 actions are adequate to safeguard the future against
15 climate change. 16:53:02
16 Q What agency or department do you believe
17 is paying attention to the National Climate
18 Assessment, or departments?
19 A EPA's endangerment finding is based, to a
20 substantial degree, on findings from the National 16:53:25
21 Climate Assessment. There are management activities
22 going on within the Department of Interior that take

1 into account -- that I'm aware of that take into
2 account projections from the National Climate
3 Assessment. Those are two examples that come to
4 mind.
5 Q Sir, do you believe that our country is 16:53:45
6 currently in a danger zone when it comes to our
7 climate system?
8 A Yes, I do.
9 MR. GREGORY: That's all we have.
10 MR. SINGER: Okay. I have a couple 16:54:11
11 redirect, I think, if I can go through my notes a
12 little bit.
13 EXAMINATION
14 BY MR. SINGER:
15 Q Dr. Kuperberg, I'll ask you to turn to 16:54:23
16 Exhibit 2. You recall being asked questions about
17 this 2012 "National Global Change Research Plan"?
18 A I do.
19 Q And I believe you said that this appeared
20 to be a true and accurate copy of the report; 16:54:42
21 correct?
22 A I did.