Case No. 18-80176

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, *et al*.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, *et al*.,
Defendants-Appellants.

On Petition For Permission to Appeal from the United States District Court for the District of Oregon (No. 6:15-cv-01517-AA)

ANSWER IN OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL (28 U.S.C. § 1292(b))

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Granting this Petition and endorsing Defendants' delay tactics on the eve of trial in this constitutional case will contribute to a miscarriage of justice. The uncontradicted evidence is that every passing day is crucial for the ability of these young Plaintiffs to protect their fundamental rights to life, liberty, and property from the "direct existential threat"[1] of climate change.[2] Defendants' ongoing systemic conduct in controlling and perpetuating a fossil fuel energy system has led to the accumulation of carbon dioxide and heat in an already dangerous climate system. Granting interlocutory appeal will continue the present path of burdensome, layered, inefficient, and lengthy appellate review before the facts have been presented to the court charged with reviewing the evidence in the first instance. Interlocutory appeal will not serve the interests of justice and has the undisputed likelihood of denying a remedy for these youth Plaintiffs if trial remains stayed.[3] This Court's decision will

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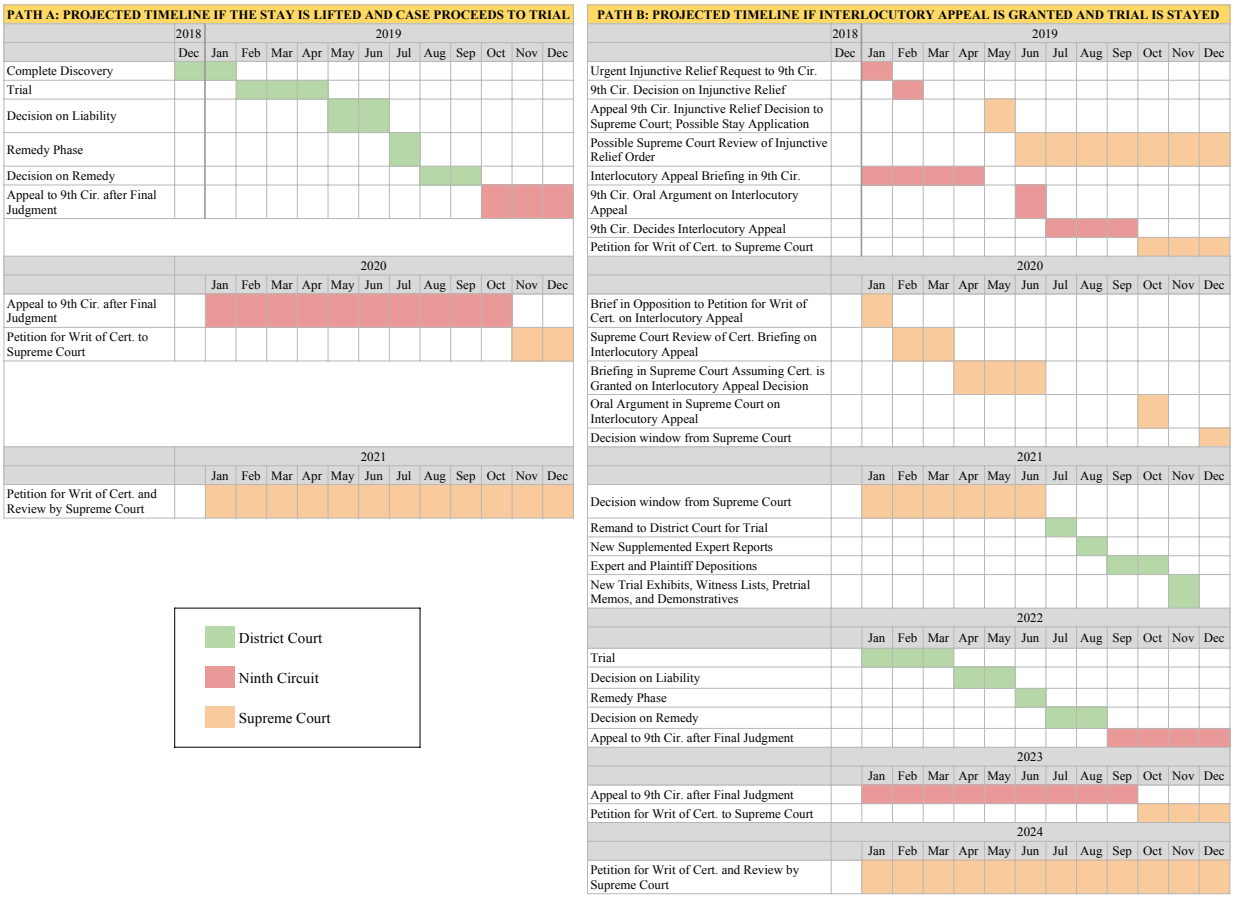
[1] Plaintiffs-Appendix 96 (UN Secretary General's September 2018 statement on climate change).

[2] Plaintiffs reference the instant Petition as "Pet."; Defendants' Appendix as "Appendix"; Plaintiffs' Appendix as "Plaintiffs-Appendix"; the District Court docket, *Juliana v. United States*, No. 6:15-cv-0157-AA (D. Or.), as "ECF"; the docket for Defendants' First Petition, *In re United States*, No. 17-71692 (9th Cir.), as "Ct. App. I Doc."; and the docket for Defendants' Fourth Petition, *In re United States*, No. 18-73014 (9th Cir.), as "Ct. App. IV Doc."

[3] *See, e.g.*, Plaintiffs-Appendix 6 (Expert Report of James E. Hansen, Ph.D.) ("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."); Plaintiffs-Appendix 85 (Expert Report of Harold R. Wanless, Ph.D.) ("[A]ny delay in a judicial remedy for Plaintiff Levi poses clear and irreversible harm to his interests and his future").

affect whether "we risk missing the point where we can avoid runaway climate change." Plaintiffs-Appendix 96. If this Court grants interlocutory appeal and maintains the stay, these children will have no choice but to seek injunctive relief pending appeal to prevent the worsening of their status quo.

The clearest presentation of how interlocutory appellate review in this case thwarts efficiency and justice is by illustration:



Plaintiffs-Appendix 90-91.

Path A illustrates the "rule that a party is entitled to a single appeal, to be deferred until final judgment." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106

(2009). Path B demonstrates the three levels of appellate review in both this Court and the Supreme Court that would ensue with interlocutory appeal, adding further premature review onto the four prior instances of review by this Court and two instances by the Supreme Court. Interlocutory review will likely delay trial and final judgment by at least two years, whereas review after final judgment without interlocutory review would likely occur in 2019, "materially advanc[ing] the ***ultimate*** termination of the litigation." 28 U.S.C. § 1292(b) (emphasis added). To preserve the integrity and the reputation of the judicial process, there is only one path to efficient judicial resolution of Plaintiffs' claims and the material advancement of the termination of this litigation. As this Court previously held: "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." *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018). That wisdom holds true here. This Petition should be denied.

STATEMENT OF THE CASE

As Plaintiffs have recently set forth a procedural history of this case in their response to Defendants' Fourth Petition, Plaintiffs streamline their response to this

Fifth Petition by correcting Defendants' misstatements of the case and highlighting the most pertinent matters.

In August 2015, Plaintiffs filed this action to stop their federal government from infringing their substantive due process rights to life, liberty, and property and their right to equal protection of the law. ECF 7. Contrary to Defendants' characterization, Plaintiffs did not assert that the Constitution "conferred on them a substantive right to *particular* climate conditions." *Cf.* Pet. 3 (emphasis added). Rather, Plaintiffs claim the state of climate conditions, substantially created by Defendants' systemic conduct, is dangerous, injurious to these Plaintiffs, and must be redressed. *See, e.g.*, ECF 7, ¶¶ 5, 7-8, 10-12, 19, 28, 66-67, 70, 83-85, 214-215, 220-221, 231-232, 237, 241, 279-289.

On November 10, 2016, Judge Aiken denied Defendants' motion to dismiss Plaintiffs' claims. Appendix 74-127. Contrary to Defendants' characterization, the district court did not rule "Plaintiffs had established Article III standing," Pet. 4, but Plaintiffs "adequately alleged they have standing to sue." Appendix 101. The district court detailed the allegations of Plaintiff Jayden, whose home was destroyed by climate flooding, as one of Plaintiffs' particularized, actual injuries-in-fact, Appendix 92-93, and that Plaintiffs adequately alleged a causal chain to Defendants' conduct. Appendix 99. The district court found "[r]edressability in this case is scientifically complex, particularly in light of the specter of 'irreversible climate

change,' wherein greenhouse gas emissions above a certain level push the planet past 'points of no return, beyond which irreversible consequences become inevitable, out of humanity's control.'" Appendix 100-101.

The district court's order denying the motion to dismiss did not address all of Plaintiffs' due process or equal protection claims because Defendants did not move to specifically dismiss each claim. However, the district court expressly recognized a new liberty right, Appendix 105, recognized the federal public trust doctrine claim as "cognizable in federal court," Appendix 121, and held that the danger creation claim was adequately pled. Appendix 109; *cf.* Pet. 4-5.

On November 28, 2016, Plaintiffs notified the district court that any delay in starting trial would necessitate a motion for preliminary injunction in light of the ongoing and irreparable harms Plaintiffs are suffering. ECF 100, 10:22-13:17. The district court advised Plaintiffs to wait: "The goal would be to set the discovery deadline and the motion practice, dispositive motions, *et cetera*, within a time period where a trial can be held by the middle or toward the fall of [2017]." *Id.* 12:2-5. Plaintiffs heeded the district court's advice.

In response to Defendants' First Petition for mandamus, filed six months after the district court denied Defendants' motion to dismiss, the district court wrote this Court 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, 2. After a seven-and-a-half month delay of pretrial proceedings, this Court denied the First Petition on March 7, 2018, holding that denial of the motion to dismiss did not present the possibility that the issues raised would evade appellate review and 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. This Court also was "not persuaded" that "holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten separation of powers." *Id*. at 836.

Thereafter, Defendants moved for partial summary judgment, again arguing standing, the two newly recognized fundamental rights fail on the merits, Plaintiffs' claims must be pled under the Administrative Procedure Act ("APA"), and separation of powers concerns bar Plaintiffs' claims and requested relief. ECF 207, i, 1-2. Defendants did not move for summary judgment on Plaintiffs' other constitutional claims.[4] They also moved for judgment on the pleadings. ECF 195. As to all issues other than standing, Defendants asserted entitlement to judgment purely as a matter of law and engaged in no factual, scientific, or historical analysis.

[4] Defendants claim they moved for summary judgment on all of Plaintiffs' claims, Pet., 13-14, n.3, but the motion made no reference to Plaintiffs' claims respecting their substantive due process rights to life and property, their recognized liberty rights to personal security and family autonomy, or rights of equal protection even where no suspect class exists. *See* ECF 207, i (III.B.1-2 in table of contents). Defendants' motion to dismiss similarly did not address all of Plaintiffs' substantive due process claims. ECF 27-1.

In opposing summary judgment, Plaintiffs submitted 18 expert declarations, 21 plaintiff declarations, and hundreds of government documents into the record, totaling over 36,000 pages. ECF 255-299; Plaintiffs-Appendix 91-92. Much of this evidence was offered to contest denials Defendants made in their Answer. ECF 98. Defendants submitted no evidence. ECF 207; ECF 315. At oral argument, ***Defendants conceded that Plaintiffs have established injury-in-fact***:

> [W]e now look beyond the complaint. We look at the evidence. At the pleading stage on the Rule 12 motion, Your Honor held that the allegations of certain specific injuries, loss of homes, flooding were sufficient to trigger injury in fact under Article III of the Constitution. And plaintiffs have submitted declarations in support of those allegations. And so those -- ***there has been a prima facie case made for those injuries. . . . But be that as it may because there are specific injuries, the question moves to causation.***

ECF 329, 25:5-13, 19-20 (emphasis added).

In denying Defendants' intervening Second Petition for mandamus on July 20, 2018, this Court again ruled it "remains the case that the issues the government raises . . . are better addressed through the ordinary course of litigation." *In re United States*, 895 F.3d 1101, 1106 (9th Cir. 2018). This Court reiterated that "allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." *Id.*

In its October 15 order on summary judgment and judgment on the pleadings, the district court narrowed Plaintiffs' case. The district court determined "[d]ue respect for separation of powers . . . requires dismissal of President Trump as a

defendant." Appendix 25. Although Defendants did not so move, the district court, *sua sponte*, granted summary judgment on Plaintiffs' claim under the Ninth Amendment, Appendix 65, and, rejected Plaintiffs' claim that children are a suspect class under the Equal Protection Clause. Appendix 65-67.

The district court otherwise denied Defendants' motions. Regarding separation of powers, the district court noted Defendants "offer[ed] no new evidence or controlling authority on this issue . . . [n]or do they offer a rationale as to why the outcome should be different under the summary judgment standard." Appendix 55. The district court noted it is entirely speculative at this stage, in a bifurcated trial, as to whether any remedy would transgress separation of powers when a full factual record is needed, when no decision has been made on liability, and when the court will take great care not to tread on the policy-making authority of the other branches. Appendix 53, 55-56, 56 n.16, 63, 64. The district court also rejected Defendants' APA argument, citing precedent of this Court and the Supreme Court. Appendix 29-34. As to the newly recognized liberty interest, the district court found Plaintiffs had submitted significant evidence, Defendants had submitted none, and held "further factual development of the record will help this Court and other reviewing courts better reach a final conclusion as to plaintiffs' claims under this theory." Appendix 58. The district court concluded genuine issues of material fact existed with respect to all issues raised at summary judgment, including standing, and found "[t]o allow

a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to this case, which is certainly a complex case of 'public importance.'" Appendix 63. The district court declined to certify its order for interlocutory appeal. Appendix 68-70.

On November 5, Defendants moved the district court to reconsider its denials of Defendants' requests to certify the case for interlocutory appeal under 28 U.S.C. § 1292(b) and stay the litigation. ECF 418; ECF 419.

On November 8, this Court issued a partial stay pending consideration of Defendants' Fourth Petition for mandamus, staying only trial. Ct. App. IV. Doc. 3. Therein, this Court "invited [the district court] to revisit its decision to deny interlocutory review." Appendix 3.

On November 21, in response to this Court's request, the district court certified four orders for interlocutory appeal and stayed proceedings, but set forth the many reasons why it believed interlocutory appeal was ***not*** appropriate. Appendix 1-6. The district court reiterated "[t]he function of trial courts in our judicial system is to initially consider the myriad evidence and legal issues offered by the parties and then refine them to their most essential form, rendering judgment and relief as the law allows." Appendix 4-5.

> The Court notes again that this three-year-old case has proceeded through discovery and dispositive motion practice with only trial remaining to be completed.

> This Court stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial.

Appendix 5. Contrary to Defendants' misrepresentation, Pet. 10, the district court did not grant Defendants' motion for reconsideration, but denied their motion as moot in a minute order. Plaintiffs-Appendix 88 (ECF 445).

On November 30, Defendants petitioned this Court for interlocutory review of the order on motions to dismiss, Appendix 74-127, and the order on motions for judgment on the pleadings and summary judgment, Appendix 10-71.

On December 5, due to the dire urgency of their claims and in light of two new climate change reports issued by Defendants[5] confirming Plaintiffs' allegations of harm, and the short window left to stop climate change, Plaintiffs moved the district court for reconsideration of its November 21 stay order so that they may complete the limited discovery and pre-trial proceedings remaining and be prepared to commence trial when this Court lifts the stay of trial. ECF 446, 447; *see also* Ct. App. IV Doc. 12 (demonstrating that Defendants have suffered, and will suffer, no cognizable harm in finalizing discovery and the remaining pre-trial matters). That motion is pending before the district court.

[5] Plaintiffs-Appendix 94.

STANDARD OF REVIEW

The issue before this Court is whether Defendants should be permitted to appeal *now*, on the eve of trial. Interlocutory appeal is a narrow exception to the final judgment rule set forth in 28 U.S.C. § 1291, which preserves judicial resources by preventing piecemeal appeals without adequate development of the record. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Interlocutory appeal is only allowed when an order involves: (1) "a controlling question of law"; (2) for which "there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "Because the requirements of § 1292(b) are jurisdictional, if this appeal does not present circumstances satisfying the statutory prerequisites for granting certification, this court cannot allow the appeal." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quotations omitted). "Even where the district court makes such a certification, the court of appeals nevertheless has discretion to reject the interlocutory appeal[] and does so quite frequently." *James v. Price Stern Sloan. Inc.*, 283 F.3d 1064, 1068 (9th Cir. 2002) (citing 16 Wright, Miller & Cooper § 3929, at 363).

This Court's Appellate Practice Guide states:

> Interlocutory or 'piecemeal' appeals run very much against the grain of modern federal appellate jurisprudence. Therefore, possibly the most critical aspect of your petition is your demonstration that (a) the matter you want reviewed is not appealable right now; and (b) ***some***

> ***significant loss will be suffered before a post-judgment appeal that cannot be remedied on post-judgment appeal. You may safely assume that the expense, delay, and annoyance of enduring the litigation through final judgment will not qualify as such a loss***, unless petitioner has an immunity or similar right to avoid the litigation altogether.[6]

To carry the heavy burden of avoiding the general rule against interlocutory appeal, Defendants must show all three elements of section 1292(b) have been met and show evidence of irremediable harm without interlocutory appeal. Defendants fail these criteria.

REASONS FOR DENYING DEFENDANTS' PETITION

This Court can, and should, summarily deny Defendants' Fifth Petition. *First*, interlocutory appeal will extend the ultimate termination of the litigation, not hasten it, with delay resulting in extreme prejudice to Plaintiffs. Only a merits decision that Plaintiffs lack standing can stop their case from proceeding to trial, and standing is not a proper question for this Court to determine in the first instance on interlocutory appeal given its fact-intensive nature. *Second*, the two constitutional questions posed – whether Plaintiffs have liberty rights to a climate system that sustains life or public trust resources – are not controlling questions of law because Plaintiffs also pled other due process violations of express and already-recognized rights that do not turn

[6] The Appellate Lawyer Representatives' Guide To Practice in the United States Court of Appeals for The Ninth Circuit (June 2017 ed.), *available at* https://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf (emphasis added).

on the answers to those new constitutional questions. There is no rush to validate or eliminate those two claims, and no efficiency gained, because the same body of evidence will be presented to establish Article III standing as will be introduced to prove Plaintiffs' claims. Plaintiffs-Appendix 92. *Third*, there is no substantial ground for difference of opinion as to Defendants' APA argument. Nor is there substantial ground for difference of opinion that our federal government cannot affirmatively act to deprive citizens of their fundamental rights without due process of law. These questions of standing and whether rights have been infringed are unequivocally mixed questions of law and fact yet to be decided by the district court on the merits. For this Court to take those issues up on interlocutory appeal after a denial of summary judgment would improperly place this Court in the shoes of the trier of fact.

Requiring the appealing party to bring all claims of error in a single appeal following a final judgment prevents "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). This debilitating effect is already occurring here, where this Fifth Petition, like Defendants' four prior attempts for early appeals, seeks to upset the judgment of Congress and the independence of the three levels of the federal judiciary in exercising jurisdiction and rendering decisions in an orderly manner.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). This Court should reject these tactics once and for all.

I. INTERLOCUTORY APPEAL WILL EXTEND, NOT ADVANCE, THE ULTIMATE TERMINATION OF THE LITIGATION.

None of the issues raised by this Fifth Petition will evade appellate review after final judgment, which could occur as early as mid-2019 if the stay is lifted. *See* Appendix 2; *supra*, 2. This case is over three years old. Discovery and pre-trial proceedings can be completed in a matter of days, and the case is ready for trial. An appeal now can hardly "advance the ultimate termination of this case." *Caldwell v. Seaboard Coastline R.*, 435 F. Supp. 310, 312 (W.D. N.C. 1977).

On standing, Defendants fail to comply with Federal Rule of Appellate Procedure 5(b) to state "the facts necessary to understand the question presented." Their petition lacks any reference to "facts" or the extensive evidence in the record below. *See Clark-Dietz & Assocs.-Eng'rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 68 (5th Cir. 1983) (court of appeals must rely upon would-be appellant to supply in the petition an adequate presentation of facts). Defendants are obliged to contend with the extensive body of evidence in the record supporting Plaintiffs' standing in their Petition, but instead they ignore it. While Defendants disputed the causation and redressability of Plaintiffs' standing on summary judgment, they have not yet presented their counter evidence to the district court, including their eight expert witnesses who contest causation and redressability. *See* Ct. App. IV. Doc. 12, 2-3;

Appendix 37, n.6. Thus, only their denials of those facts in their Answer were before the district court. ECF 98. The only judicial review that will materially advance the ultimate termination of the litigation is a final decision on Plaintiffs' standing after both sides present evidence at trial. Indeed, Plaintiffs' standing arguments run parallel to their merits claims. This is precisely why appellate courts do not review decisions on standing involving mixed questions of law and fact until there is a final judgment. Defendants cite no case, and Plaintiffs can find none, where a court of appeals addressed standing on interlocutory appeal when there was a dispute as to the facts between the parties.[7]

Far from materially advancing the litigation, interlocutory appeal will actually extend this litigation with unnecessary premature, piecemeal appellate review and additional motion practice, and lead to additional discovery and a much-delayed trial, potentially extending this litigation well into 2024. *Supra*, 2. The absence of conclusive findings of fact and of rigorous presentation of evidence at trial, evidence

[7] Standing only presents a controlling question of law for purposes of interlocutory appeal, if ever, where it involves a pure question of law, as opposed to the mixed questions of law and fact presented here. *See, e.g.*, *Edwards v. First Am. Corp.,* 610 F.3d 514 (9th Cir. 2010) (controlling question of statutory interpretation as to standing), *cert. dismissed*, 567 U.S. 756 (2012); *see also In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 641 (9th Cir. 1992) ("The issue of standing is a mixed question of fact and law."); *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 n.3 (2d Cir. 2013).

that is prepared and ready for trial to commence, would hamstring this Court's review. Appendix 5.

At this late date, should this Court keep the current stay in place on interlocutory appeal, Plaintiffs would be forced to seek relief under Federal Rule of Appellate Procedure 8(a)(2) because, as the uncontested evidence below establishes, absent a prompt trial or injunctive relief, irreversible climate harms will become locked-in. Plaintiffs would be entitled to an injunction pending appeal because serious questions are raised and the balance of hardships tips sharply in favor of Plaintiffs due to the grave and imminent possibility of irreparable harm. *See, e.g., Lopez v. Heckler*, 713 F.2d 1432, 1436, 1437 (9th Cir. 1983); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234-35 (9th Cir. 1999); *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). This Court would face a motion for injunctive relief pending appeal at the same time interlocutory appeal was unfolding – something the district court has tried to avoid since late 2016 (ECF 100, 10-13) – leading to another evidentiary proceeding in the absence of trial.

Ultimately, interlocutory appeal will lead to potentially three levels of appellate review by this Court and the Supreme Court. *Supra*, 2. Once the case is finally cleared for trial after interlocutory appeal, the parties would have to reopen

discovery, particularly as to experts, given the passage of time and the new evidence that is constantly developing. Plaintiffs-Appendix 92-93.

Trial will proceed on Plaintiffs' Fifth Amendment claims even if the newly recognized climate right or public trust rights, on which Defendants moved for summary judgment and now seek interlocutory appeal, were found not to fall within the liberty prong of the substantive due process clause.[8] "When litigation will be conducted in substantially the same manner regardless of [the court's] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002) (quoting *White v. Nix*, 43 F.3d 374, 378-79 (8th Cir. 1994) (alteration in original)).[9] The clear choice is to allow trial to commence in early 2019 and reserve appeal after final judgment. Defendants have submitted no evidence of harm other than the time and money it takes to participate in trial, which is a fraction of the resources already spent over the past three years on the multiple motions and petitions to stay litigation and for

[8] Those constitutional questions are mixed questions of law and fact and would benefit from factual findings at trial. However, if this Court accepted interlocutory appeal on those questions, trial should still proceed because the same body of evidence pertains to all claims and would not be altered by this Court's decision as to those two asserted rights.

[9] *See, e.g., McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1262 (11th Cir. 2004) ("Resolution of one claim out of seven would do too little, if anything, to 'materially advance the ultimate termination of the litigation'"); *Isra Fruit Ltd. v. Agrexco Agric. Exp. Co.*, 804 F.2d 24, 25-26 (2d Cir. 1986); *Syufy Enters. v. American Multi-Cinema, Inc.*, 694 F. Supp. 725, 729 (N.D. Cal. 1988).

mandamus, in nearly completing discovery, added to what will be spent in the next five years if this Court chooses Path B. *Supra*, 2.

II. DEFENDANTS HAVE NOT SHOWN THE SUMMARY JUDGMENT ORDER INVOLVES A "CONTROLLING QUESTION OF LAW" ON WHICH THERE IS "SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION."

A. The Only "Controlling Question of Law" Presented Is Whether Constitutional Claims Can Be Pled Apart from the APA.

A "question of law" is "controlling" under section 1292(b) if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). A "question of law" means a "pure" question of law, not a mixed question of law and fact or an application of law to a particular set of facts. *See Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 676-77 (7th Cir. 2000). A controlling question of law is one the appellate court can decide "quickly and cleanly without having to study the record" and "without having to wait till the end of the case." *Id*. at 677; *see McFarlin*, 381 F.3d at 1259. A "controlling question of law" is a legal consideration, not one that necessitates factual development. *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 WL 952273, at *3 (D. Or. Mar. 10, 2010) (collecting cases).

The standing question cannot be deemed a "controlling question of law" because it is not a pure legal question, but a mixed question of law and fact, which

the district court has not yet decided, and which would require this Court to make a merits decision in the first instance before trial. *See Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993) ("a mixed question of law and fact" is not appropriate for permissive interlocutory review). That is the purpose of trial, not interlocutory appeal.

Further, a question of law is not controlling if additional claims would remain with the trial court after appeal, particularly if those claims involve similar evidence. *See, e.g.*, *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Despite portending to seek review of all of Plaintiffs' due process claims,[10] Defendants did not move for dismissal, summary judgment, or judgment on the pleadings on Plaintiffs' substantive due process rights to life, property, or their recognized liberty rights to personal security and family autonomy. There is no order yet of the district court as to those specific rights for this Court to review. *See, e.g.*, *Burke v. Warner & Swasey Co.*, 868 F.2d 1008, 1010 (8th Cir. 1989) (remanding claims not addressed on summary judgment). The questions of the existence of a climate right or the public trust right do not qualify as controlling questions, simply because Plaintiffs have other substantive due process claims, and because in the absence of controlling precedent, those questions will involve an empirical analysis under *Washington v.*

[10] Defendants mention three of Plaintiffs' due process claims as controlling issues of law, Pet. 13, but only argue two claims (climate right and public trust) meet the section 1292(b) test. Pet. 17-18.

Glucksberg, 521 U.S. 702 (1997), which is best informed by expert testimony at trial on the history and traditions of our nation. *See* Appendix 58, 63.

B. For the Single Controlling Issue of Law Presented Regarding the APA, There is No Substantial Ground for Difference of Opinion.

Whether the APA overrides the Constitution is a controlling issue of law, but one that is soundly resolved. Under section 1292(b), this Court "must examine to what extent the controlling law is unclear." *Couch*, 611 F.3d at 633.

This Court definitively addressed the APA question as recently as November when it held that judicial review foreclosed under the APA "does not affect a plaintiff's ability to bring freestanding constitutional claims." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 494 n.8 (9th Cir. 2018); *see also* Appendix 28-34. Defendants irresponsibly ignore *Regents*, as well as decisions such as *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017); *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 n. 9 (9th Cir. 1989); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); and *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). There is no difference of opinion on this question of law except as between Defendants and the courts.

While the Supreme Court opined that "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion," Appendix 73, 8, none of the

three courts reviewing this case has found the other two requirements satisfied. Thus, interlocutory review is still inappropriate. Moreover, as discussed above, the justiciability of this case lies in Plaintiffs' Article III standing and, in particular, whether on the merits Plaintiffs can establish causation and redressability within the bounds of the separation of powers.[11] Standing, including the formulation of a remedy that would redress the injuries, is quintessentially a fact-laden question. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Here, causation (not raised in Defendants' Fifth Petition) and redressability will involve complex expert testimony. Appendix 50, 52-54. Defendants submitted no evidence to support their argument that Plaintiffs' claims cannot be redressed without the district court taking over the energy policy of the Nation. *See* Pet. 20. That notion is fundamentally at odds with what Plaintiffs seek, the availability of declaratory relief, and with the evidence to be presented at trial. This Court should not pre-judge the merits of Plaintiffs' case, nor a hypothetical remedy concocted by Defendants. *See* Plaintiffs-Appendix 93-94.

[11] While Defendants bluster about generalized grievances, Pet. 15, they conceded Plaintiffs made a prima facie case of injury-in-fact. ECF 329, 25. A single dissenting opinion by Chief Justice Roberts does not provide substantial ground for difference of opinion as to Plaintiffs' injuries. Pet. 15 (citing only *Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting)).

Defendants contend "[n]o federal court has ever purported to use the 'judicial Power' to perform such a sweeping policy review,"[12] Pet. 16, but no federal defendants have ever before knowingly and systematically destroyed Plaintiffs' lives, liberties, and property so profoundly. Defendants conflate policy-*review* under the Constitution with policy-*making* by the political branches. Courts are free to engage in the former and order the political branches to bring the latter into constitutional compliance. *See, e.g.*, *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 34 (2010) ("Our precedents . . . make clear that national security and foreign relations do not warrant abdication of the judicial role."); *East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 6428204, at *3 (9th Cir. Dec. 7, 2018). To accept Defendants' arguments on interlocutory appeal, *without a shred of evidence*, that when our government engages in systemic deprivation of life, liberty, and property, discriminates against young American citizens, and destroys the foundation of our Nation, there is no remedy under the Constitution, and no right for our youth to be heard at trial, would signal the demise of our constitutional democracy and the demise of our third branch of government as a bulwark against abuses of power by the majoritarian political branches. Any appellate review on Plaintiffs' standing must await a full factual record and a final decision by the district court.

[12] Plaintiffs do not seek judicial review of any treaties or seek the enactment of treaties as relief, as implied by Defendants. Pet. 16.

CONCLUSION

In 2019, this Court can comprehensively review this case after final judgment, on a thorough factual record with findings of fact and conclusions of law honed for judicial review, and avoid a motion for injunctive relief. Defendants suffer no cognizable harm in "simply allowing the usual legal process to go forward." *In re United States*, 884 F.3d at 836. Interlocutory appeal will achieve only delay and extend this litigation into piecemeal reviews of fact-intensive questions and questions of law that will not dispose of the case. The projected timeline, *supra*, 2, clearly shows that interlocutory appeal will likely double the time it takes to resolve this case and triple the number of appellate reviews by this Court and the Supreme Court leading to gross judicial inefficiencies. The lengthy delay of trial court proceedings pending interlocutory appeal and the probability that interlocutory appeal will require lengthy appellate consideration on an incomplete record counsel against interlocutory review at this stage.

As the district court has oft and sagely recommended, Defendants' Petition should be denied so the parties can make their best case at trial and, if Plaintiffs prevail, our government can move on to saving our Nation for our children, rather than continue wasting resources fighting them. Plaintiffs do not state lightly that this decision will be a lasting legacy of this panel and this Court.

DATED this 10th day of December, 2018, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson
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STATEMENT OF RELATED CASES

This case was previously before this Court and is a related case within the meaning of Circuit Rule 28-2.6: Defendants' four prior petitions for writs of mandamus: *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692); *In re United States*, 895 F.3d 1102 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776 (denied as moot Nov. 2, 2018); and *In re United States*, No. 18-73014 (9th Cir. Nov. 5, 2018) (pending).

CERTIFICATE OF COMPLIANCE

I certify that this Answer to Petition contains 5,600 words, excluding the portions exempted by Federal Rules of Appellate Procedure 5(c) and 32(f) and Circuit Rule 5-2(b), which is equal to the limit of 5,600 words established by Circuit Rules 5-2(b) and 32-3(2). The petition's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

s/ Julia A. Olson
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