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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF NOVEMBER 21, 2018 COURT ORDERED STAY OF PROCEEDINGS

Expedited Consideration Requested

Oral Argument Requested

I. ARGUMENT

The temporary stay of all proceedings issued by this Court on November 21 and the temporary stay of trial issued by the Ninth Circuit on November 8 have lifted and, thus, this Court should resume jurisdiction as described below. In light of the Ninth Circuit's orders of December 26 and this Court's November 21 Order, Plaintiffs request this Court clarify how this case will move forward in the district court pending the interlocutory appeal. It is within this Court's discretion to so decide.

As Defendants state in their opposition brief, this "Court stayed proceedings to maintain the status quo while the Ninth Circuit decides whether to accept an appeal. Nov. 21, 2018 Order 6, ECF No. 444." Opp. at 5. Specifically, this Court held: "Accordingly, this case is STAYED pending a decision by the Ninth Circuit Court of Appeals." Doc. 444. Plaintiffs believe this Court's stay of proceedings has lifted now that the two Petitions pending in the Ninth Circuit have been resolved. Thus, this Court should resume exercising its jurisdiction over issues still remaining for the district court to decide.

In a split decision yesterday, the Ninth Circuit panel issued an order, with Judge Friedland dissenting, granting Defendants' "petition for permission to appeal pursuant to 28 U.S.C. § 1292(b)." *Juliana v. U.S.*, No. 18-80176, Dkt. 8 (9th Cir. Dec. 27, 2018) (attached hereto as Attachment 1). The Ninth Circuit issued a second order that denied Defendants' Petition for Writ of Mandamus as moot, and denied Plaintiffs' motion to lift the stay of trial imposed on November 8 also as moot because, by denying the mandamus petition, the stay imposed on November 8 has been lifted. *See United States v. U.S. District Court*, No. 18-73014, Dkt. 3 (9th Cir. Nov. 8, 2018) ("Petitioners' motion for a temporary stay of district court proceedings [contained in Docket Entry No. 1] is granted in part. ***Trial is stayed pending this court's consideration of this petition for***

writ of mandamus.") (emphasis added); Dkt. 15 (attached hereto as Attachment 2) ("The petition for a writ of mandamus is denied as moot. All other pending motions are denied as moot.").

Presently, the Ninth Circuit has ordered no further stay of proceedings pending interlocutory appeal, nor is there any motion pending before them to do so. *See Juliana v. U.S.*, No. 18-80176, Dkt. 8 ("The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioners shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d). All pending motions are denied as moot."). In both Case No. 18-73014 and Case No. 18-80176, "all pending motions" have been "denied as moot," including Plaintiffs' motion to the Ninth Circuit to lift the stay of trial ordered in Case No. 18-73014.

Once the Ninth Circuit issued its decision, Plaintiffs believe this Court's temporary stay was no longer in effect. While Plaintiffs believe their motion seeking reconsideration of this Court's temporary stay is mooted by the Ninth Circuit's orders denying mandamus and granting interlocutory appeal over unspecified issues, this Court should nonetheless issue an order clarifying that proceedings may resume given Defendants' "repeated efforts to bypass normal litigation procedures" and recalcitrance to participate in discovery.[1] *See Juliana v. U.S.* No. 18-80176, Dkt. 8 ("It is also concerning that allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts.") (J. Friedland, dissenting).

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[1] If Plaintiffs' motion seeking reconsideration of this Court's temporary stay is not mooted by the Ninth Circuit orders, Plaintiffs respectfully request expedited consideration of their motion and that this Court lift the stay it put in place on November 21.

Proceedings may continue in the district court because the Ninth Circuit order does not divest this Court of jurisdiction as to matters not on appeal. This Court retains jurisdiction over the case and "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001); ECF 444. Further, "[a]n appeal from an interlocutory order does not automatically stay the proceedings, as 'it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case.'" *Finder v. Leprino Foods Co*., No. 1:13-cv-02059- AWI-BAM, 2017 WL 1355104, *1 (E.D. Cal. Jan. 20, 2017) (*quoting Plotkin v. Pacific Tel. and Tel. Co*., 688 F.2d 1291, 1293 (9th Cir. 1982)). The Ninth Circuit's Order (Attachment 1) "confers jurisdiction on the court of appeals and divests the district court of its control over *those aspects of the case involved in the appeal*." *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982) (emphasis added). Indeed, the only matters the Ninth Circuit should be reviewing on interlocutory appeal are controlling matters of law, on which this Court has already made final decisions.

The following matters remain within this Court's jurisdiction and for its resolution notwithstanding the Ninth Circuit's order:

1. Supervising the completion of the minimal outstanding discovery.
2. Resolving pretrial motions.
3. Hearing a motion for preliminary injunctive relief pending interlocutory appeal and trial, which Plaintiffs are preparing and intend to file in the district court. This Court is more familiar with the record and better suited to decide questions of fact going to irreparable harm, the public interest considerations for injunctive relief, and the factual

merits issues than the Ninth Circuit, and could hear live testimony from experts on that motion, whereas the Ninth Circuit cannot.

4. Presiding at trial to decide questions of fact related to standing, something the Ninth Circuit cannot do. This Court correctly concluded that standing raises a factual inquiry that must be addressed at trial. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 4997032, at *25 (D. Or. Oct. 15, 2018). The Ninth Circuit is not equipped to hear testimony regarding the ongoing disputes over causation and redressability specifically.
5. Presiding at trial to decide the questions of whether Plaintiffs' fundamental rights to life, liberties (personal security and family autonomy), and property have been infringed by Defendants. There is no question of controlling law regarding the existence of those express and recognized fundamental rights. The only outstanding questions are whether the evidence supports Plaintiffs' claims of Fifth Amendment violation. Defendants did not move for dismissal or summary judgment as to those claims, this Court's orders that have been certified for interlocutory appeal did not address these claims, and, thus, they are not at issue in the pending interlocutory appeal and this Court retains jurisdiction over them.
6. Presiding at trial to decide the question of whether Plaintiffs, as a class of children, have been discriminated against with respect to their recognized fundamental rights to personal security and family autonomy in violation of their rights of equal protection under the law.
7. Presiding at trial to decide the question of whether children are a quasi-suspect class entitled to a heightened level of protection from government conduct that harms them, and whether such harm has occurred here.

None of these issues is a matter before the Ninth Circuit on interlocutory appeal.[2] Further delay is unnecessary and prejudicial to Plaintiffs. As this Court said in its November 21 Order, "[t]he Court notes again that this three-year-old case has proceeded through discovery and dispositive motion practice with only trial remaining to be completed." Doc. 444. Plaintiffs' opening motion provides evidence and argument supporting the extreme urgency of this case proceeding to trial and the harm to Plaintiffs of any further delay.

Judge Friedland's dissenting opinion also makes clear why this Court should exercise its discretion in a manner consistent with its prior rulings and its views about efficient resolution of the case:

> [T]he district court's statements prevent us from permitting this appeal.
>
> Reading the certification order as a whole, however, I do not believe that the district court was actually "of the opinion" that "an immediate appeal from [these orders] [would] materially advance the ultimate termination of the litigation"—nor did it meaningfully "so state." 28 U.S.C. § 1292(b). . . .
>
> [I]t appears that the court felt compelled to make that declaration even though—as the rest of its order suggests—the court did not believe that to be true. This is very concerning, because § 1292(b) reserves for the district court the threshold determination whether its two factors are met. . . .
>
> the district court—having, among other things, direct experience with the parties, knowledge of the status of discovery, and the ability to sequence issues for trial—is far better positioned to assess how to resolve the litigation most efficiently. Neither we nor the Supreme Court had expressed a view on that second requirement, but it seems the district court interpreted our orders as mandating certification anyway.

See Juliana v. U.S., No. 18-80176, Dkt. 8 (J. Friedland, dissenting).

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[2] While Defendants assert they moved to dismiss and for summary judgment on all of Plaintiffs' claims, Opp. at 12, the text of their moving papers fails to address Plaintiffs' claims of Fifth Amendment violations as well as whether Plaintiffs, as a class or a quasi-suspect class, have been the victims of discrimination in violation of their rights of equal protection.

Defendants failed to satisfy any of the requirements warranting a stay of these proceedings. Even in opposing Plaintiffs' Motion for Reconsideration, Defendants failed to proffer a shred of evidence showing a legitimate ounce of harm that would necessitate a stay.[3] Every stay issued in this case has been based on a complete lack of evidence offered by Defendants. The Ninth Circuit has already ruled that participation in discovery and trial is not irreparable harm. *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018); *see also In re United States*, 895 F.3d 1101, 1106 (9th Cir. 2018) ("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.").

In contrast, Plaintiffs' Motion for Reconsideration sets forth some of the overwhelming evidence in the record that Plaintiffs will suffer substantial harm from any further delay in resolving their claims. Any delay in exercising the Court's jurisdiction will result in irrevocable harm to Plaintiffs and increased future litigation burdens. Plaintiffs cannot continue to wait to get to trial, while their injuries worsen and the window of opportunity to redress the injuries closes. The uncontroverted evidence shows Plaintiffs are in dire need of prompt relief. According to Defendants' Fourth National Climate Assessment ("NCA4"): "***Decisions made today*** determine risk exposure for current and future generations and will either broaden or limit options to reduce the negative consequences of climate change. NCA4 Chapter 1 (emphasis added).

For the reasons stated above, Plaintiffs respectfully request the Court immediately issue an order clarifying that pre-trial and trial proceedings may resume, and, in the alternative, reconsider and modify its November 21 Order and lift the stay in this case, if that stay has not already lifted as a result of the Ninth Circuit orders issued yesterday.

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[3] In their Opposition Brief, Defendants concede that litigation decisions "are not irreparable harms." Opp. at 12.

DATED this 27th day of December, 2018.

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