No. 24-684

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Respondent,

and

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

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

MOTION TO STRIKE PORTION OF FILING REQUESTING A STAY IN NONCOMPLIANCE WITH RULES OR, IN THE ALTERNATIVE, RESPONSE BRIEF OF REAL PARTIES IN INTEREST TO MOTION FOR A STAY OF PROCEEDINGS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Our Children's Trust states that it is a 501(c)(3) non-profit organization, does not have a parent corporation, and that no publicly-held companies hold 10% or more of its stock.

Date: February 12, 2024

s/ Julia A. Olson
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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure, Rule 27(a)(3), Real Parties in Interest ("Youth Plaintiffs") file this Motion to Strike the Portion of Petitioners' ("Defendants") Filing Requesting a Stay for Noncompliance with the Rules and in the Alternative this Response Brief in Opposition to a Motion for Stay of Proceedings. Defendants' purported motion for this extraordinary stay fails to comply with the Federal Rules of Appellate Procedure, this Circuit's Rules, and the relevant case law. Defendants do not support their stay motion with any evidence to meet their burden under the standard of review necessary for this Court to award a stay. Granting a stay on Defendants' moving papers is contrary to this Court's precedent, law of the case, and would give the Department of Justice ("DOJ") a free pass out of trial not afforded any other litigants.

The only extraordinary abuse of the rule of law here is by the DOJ and Defendants who repeatedly misstate the case, the law, and the facts during their 8-year campaign of targeting these Youth Plaintiffs with unilateral and disparate treatment not waged against any other plaintiffs in the federal courts. The only harm Defendants allege is litigation costs and time incurred by the DOJ, which should raise an immediate red flag because this Court has already rejected these very arguments, by these Defendants, in this case. *In re United States*, 895 F.3d 1101, 1105–06 (9th Cir. 2018). The law is crystal clear—the DOJ's fiscal cost and time in

preparing for trial does not warrant this Court's intervention, even if the district court erred in ruling Plaintiffs' Second Amended Complaint alleged redressability. There is nothing currently occurring in this case that will inflict irreparable harm on Defendants by having to proceed to trial and Defendants have presented no evidence of any harm, other than litigation costs. On the other hand, there is mounting daily irreparable harm to Plaintiffs' physical health and safety and the public interest with these extraordinary delay tactics of the DOJ, employed now under three Defendant administrations.

On interlocutory appeal in a 2-1 opinion, this Court found a lack of Article III standing solely because Youth Plaintiffs had not demonstrated one prong of standing—redressability. This Court affirmed the district court on the presence of injuries and causation, holding narrowly that Plaintiffs' specific request for injunctive relief (a remedial plan) was outside the power of the Court to order, and that Plaintiffs had not demonstrated how declaratory judgment would be likely to redress their significant injuries. Critically, this Court never said it was outside the authority of the district court to award declaratory relief; nor could it because that would contravene the Declaratory Judgment Act and U.S. Supreme Court precedent.

Importantly, when this Court directed dismissal of Plaintiffs' First Amended Complaint, it *did not* order dismissal *with prejudice* or foreclose amendment.[1]

Following this Court's express mandate and "the spirit of the mandate," the Youth did what every other well-represented Plaintiff does after receiving an interlocutory order of a jurisdictional deficiency: Pursuant to this Court's clear precedent and the Federal Rules of Civil Procedure, on remand, they moved the district court for leave to amend their complaint to eliminate the requests for relief that were deemed outside the district court's power to award, and to allege facts demonstrating the likelihood that declaratory relief would at least partially redress Plaintiffs' significant injuries. Throughout the pre-trial proceedings, Plaintiffs had repeatedly reserved their right to seek leave to amend if their complaint was deemed deficient. Their first loss on standing was in this Court in 2020 and, consequently, they pursued leave to amend immediately on remand.

In turn, consistent with the mandate and "the spirit of the mandate," the district court did what the federal rules and this Court's precedent requires and encourages—freely granted leave to amend, especially when the deficiency found was jurisdictional. The district court complied with the Court's mandate and did not allow Plaintiffs to proceed on the dismissed First Amended Complaint. Instead, after

[1] On remand, the district court was correct in determining that any dismissal would be without prejudice. *See Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1106–07 (9th Cir. 2006) (dismissal for lack of standing is without prejudice).

carefully considering new Supreme Court precedent, including *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021), and reviewing Plaintiffs' proposed amendments, the district court agreed Plaintiffs' factual allegations were sufficient to demonstrate that declaratory relief alone could partially redress Plaintiffs' injuries, even if no further relief were available. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334, at *8–9 (D. Or. June 1, 2023).

This Court has never reviewed, opined on, or issued a mandate with respect to Plaintiffs' Second Amended Complaint, *nor should it here*, until there is a final judgment on the merits in the district court. Doing so would be an inappropriate collateral order under this Court's and Supreme Court precedent. These Plaintiffs have a right to present their evidence at trial for declaratory judgment on whether Defendants' fossil fuel energy system is unconstitutional and causing Plaintiffs' constitutional injuries under their *Second* Amended Complaint, not the First Amended Complaint this Court reviewed four years ago.

This case was ready for trial in 2018. Since the filing of the Second Amended Complaint, there have been no discovery disputes or orders and no onerous discovery requests. Plaintiffs propounded Requests for Admissions and Defendants answered them. Plaintiffs do not seek to take depositions of high-level officials. To be ready for trial, Plaintiffs have informed the DOJ and the district court that Plaintiffs intend to provide updates from experts, produce government documents to

Defendants (documents Defendants prepared and should be familiar with), and take the depositions of the witnesses Defendants intend to call at trial. Plaintiffs and their experts are also available for a second round of depositions if Defendants wish. Any errant ruling can be reviewed and corrected after final judgment, just like every one of the 40,000 other cases on the DOJ's docket in which the United States is a defendant. A full evidentiary record will assist this Court in reviewing after final judgment the district court's findings and conclusions as to whether Plaintiffs have proven standing and the merits of their claims.[2]

These Youth Plaintiffs have been singled out by the DOJ, which has had a definite mission irrespective of the Constitution or precedent, as stated by one of its own lawyers, "to kill *Juliana v. U.S.*"[3] Such disparate treatment of these youth, who challenge government conduct this Court has said "may hasten an environmental apocalypse," *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020), must end.

[2] In 2023, the Montana Supreme Court denied a similar government effort to stay a constitutional climate trial brought by youth in state court. *State v. Mont. First Jud. Dist. Ct., Lewis & Clark Cnty.*, No. OP 23-0311, 2023 WL 3861790, at *2 (Mont. June 6, 2023) ("Although the State asserts that this Court should take supervisory control to avoid a trial, we have repeatedly held that conserving resources, without more, is insufficient grounds to justify supervisory control where a party can seek review of the lower court's ruling on appeal and there is no evidence that relief on appeal would be inadequate."). The law of the case is the same here. *See In re United States*, 895 F.3d at 1105–06.

[3] Declaration of Julia A. Olson ("Olson Decl.") ¶¶ 2–6.

After nearly nine years, it is time for these young people to have their trial and a final merits judgment. The stay should be denied.

SUMMARY OF ARGUMENT

This Court should deny Defendants' request for an administrative stay and a stay pending any consideration of their *fifth* petition for writ of mandamus to this Court because (1) this Court has already ruled conclusively against Defendants on nearly identical arguments, (2) Defendants have not complied with the basic rules of this Court, and (3) Defendants do not meet their high burden for a stay. Moreover, Defendants have not filed an emergency motion per Circuit Rule 27-3, and do not justify why, even if this Court were to take up their mandamus petition, a stay is needed. In 2018, this Court ruled:

> The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial. This distinguishes this case from others in which we have granted mandamus relief.
>
> The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836. As we stated in our prior opinion, allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal. *Id*. No new circumstances disturb that conclusion.

In re United States, 895 F.3d at 1105–06 (citations omitted). That is law of the case[4]

[4] *See Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) ("[U]nder the 'law of the case' doctrine, one panel of an appellate court will not as a general rule

and governs this present stay motion where Defendants make no new showing of discovery and trial harming them in any new way akin to *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997).

Defendants shun the rules of procedure in the district court and this Court in the following ways:

- Defendants moved for a stay in the district court on January 18, 2024 (ECF No. 571) and did not request expedited treatment of that motion in the district court. That motion is fully briefed and pending before the district court.
- Defendants sought a stay in this Court one day after Plaintiffs filed their opposition brief to the stay motion in the district court and before the district court had a chance to rule. Defendants did not comply with Rule 8(a)(2)(A) by showing that "moving first in the district court would be impracticable." Indeed, while they moved, Defendants did not await a ruling.
- Defendants cite no precedent that they can move for a stay directly under the All Writs Act, 28 U.S.C. § 1651, or Rule 21 and ignore Rule 8 or the Court's precedent setting forth the high burden of proof that falls on petitioners seeking to obtain a stay.

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reconsider questions which another panel has decided on a prior appeal in the same case.").

In short, Defendants' procedural failings and lack of evidence of harm do not satisfy their heavy burden to demonstrate this Court's "intrusion into the ordinary processes of administration and judicial review" is warranted given that a stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427, 433–34 (2009). Defendants have put forward ***zero*** sworn statements of factual evidence supporting their claim, as required by the Rule 8(a)(2)(B), that they will suffer "intrusive discovery."[5] Their single declaration by Attorney Montero that it will cost DOJ time and money to litigate the case through trial can never amount to irreparable injury. In contrast, issuance of the stay will substantially injure Plaintiffs as the national fossil fuel energy system operates in its current form, leading to more life-threatening harm to Plaintiffs, under Defendants' mistaken belief that such a system is not unconstitutional.

The public interest lies in the DOJ playing by the rules and abiding by this Court's precedent. The public interest lies in youth having access to their courts and being able to amend constitutional claims against systemic harms to their health, safety, and longevity on the planet caused by the federal government. The public interest lies in cases being decided on facts and evidence and thorough analysis by

[5] Defendants' unsupported factual assertions on page 52 is but one example of their lack of candor to the Court. Defendants misrepresent to the Court that discovery by Plaintiffs will be "intrusive," and they support it with no evidence. Olson Decl. ¶ 9; Dkt 1.1 at 516-17 (Transcript in district court on January 19 discussing discovery). Defendants' assertion is prejudicial and disingenuous.

trial judges in the first instance, rather than supposition and guess work by the appellate courts in deciding collateral orders without any evidence. Defendants cannot be taken at their un-sworn word, just because they are the government.

PROCEDURAL HISTORY

Over the course of eight years, Defendants have attempted to stay this litigation *fifteen* times, and petitioned for writs of mandamus on now *seven* separate occasions, employing these extraordinary legal tools to avoid having to stand trial on the merits. *See* Olson Decl. ¶¶ 2–3. Of the 40,000+ cases in which the United States is currently a defendant,[6] in ***no other case*** has the DOJ taken the extraordinary step of filing a motion to stay and petition for writ of mandamus to stop a trial.[7] As a result of Defendants' unprecedented deployment of extreme tactics, this case has spanned three presidential administrations, leading to unwarranted delays on an urgent and time-sensitive issue harming young people. Olson Decl. ¶¶ 2–3; *See generally* Declarations of Plaintiffs and Experts in Support of Response Brief of Real

[6] For the 12-month period concluding March 31, 2023, the United States was a defendant in 40,549 cases of the 284,220 civil cases filed in federal court. *See* U.S. Courts, *Federal Judicial Caseload Statistics 2023*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023.

[7] Since the Biden administration took office, the Solicitor General and the DOJ have only used a petition for writ of mandamus in ***one other case***, to quash a subpoena for the deposition of the Secretary of Education, which is a typical use of the extraordinary mandamus measure. Olson Decl. ¶¶ 4–7; *In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022). Even there, the Department of Justice did not seek to stop trial.

Parties in Interest to Motion for a Stay of Proceedings.

The original Complaint was filed in August 2015. ECF No. 1. Plaintiffs filed their First Amended Complaint on September 10, 2015. ECF No. 7. In 2017, the DOJ filed a similar petition for writ of mandamus as here, asking this Court to direct the district court to dismiss Plaintiffs' complaint. *In re United States*, 884 F.3d at 833–34. This Court characterized Defendants' position as arguing "that allowing the case to proceed will result in burdensome discovery obligations on the federal government that will threaten the separation of powers." *In re United States*, 884 F.3d at 833. In March 2018, this Court denied that petition, finding the DOJ did not meet "the high bar for mandamus relief," which is law of the case. *Id.* This Court held: "The issues that the defendants raise on mandamus are better addressed through the ordinary course of litigation." *Id.* at 834, 837. Furthermore:

> 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 issues by the trial courts. If appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed.

Id. at 837.

After surviving motions to dismiss and Defendants' efforts to obtain extraordinary writs, this case was set for trial beginning October 29, 2018, with a pretrial conference scheduled for October 23, 2018. On October 19, 2018, the United

States Supreme Court issued an administrative Order staying trial and all discovery in response to a petition for another writ of mandamus and application for stay filed with the Supreme Court by Defendants. *In re United States*, 139 S. Ct. 16 (2018) (mem). Pursuant to that Order, the district court vacated the trial date and all related deadlines. ECF No. 404. On November 2, 2018, the Supreme Court denied Defendants' application for stay. *In re United States*, 139 S. Ct. 452, 453 (2018) (mem). Following additional motions and petitions in this Court, the district court certified this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b); in a 2-1 opinion this Court granted Defendants' petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). *Juliana v. United States,* 949 F.3d 1125 (9th Cir. 2018). In dissenting from the decision to allow interlocutory appeal, Justice Friedland wrote that appellate review of legal issues is appropriate only "if and when they are presented [ ] after final judgment." *Juliana,* 949 F.3d at 1128 (Friedland, J., dissenting). Judge Friedland also wrote in dissent: "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." *Id.* at 1127 n.1.

On interlocutory appeal, this Court largely affirmed the district court ruling that:

1. Plaintiffs need not bring their constitutional claims under the Administrative Procedure Act ("APA"). *Juliana,* 947 F.3d at 1167–68.
2. Regarding the three-part Article III standing inquiry, this Court held: "The district court correctly found the injury requirement met," *id.* at 1168, and "[t]he district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment." *Id.* at 1169.
3. This Court assumed Plaintiffs had properly alleged constitutional infringements. *Id.* at 1169–70.
4. This Court did not award summary judgment to Defendants and there was no merits ruling. *Id.* at 1175 ("remand[ing] this case to the district court with instructions to dismiss for lack of Article III standing").

In sum, in 2020, this Court reversed the district court solely on redressability, ruling "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan." *Id*. at 1171. The jurisdictional dismissal as to standing was without prejudice.

On remand, Plaintiffs sought leave to amend to cure jurisdictional deficiencies, which was granted, in part based upon the recently-decided U.S. Supreme Court case of *Uzuegbunam*, 592 U.S. 279.[8] *Juliana*, 2023 WL 3750334.

[8] Showing a lack of exigency, Defendants waited over six months to petition for review of this decision and to move for this stay.

Thereafter, Defendants moved to dismiss the Second Amended Complaint repeating the same arguments it raised in seeking to dismiss the First Amended Complaint, which was denied. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339 (D. Or. Dec. 29, 2023). The district court, in its discretion, declined to certify its orders granting leave to amend and denying Defendants' motion to dismiss. *Id.* at *21.

From January 1, 2021 to the present there has been only one other petition for writ of mandamus filed by the United States in *any* federal civil case in *any* U.S. Court of Appeals or the U.S. Supreme Court. *See In re U.S. Dep't of Educ.*, 25 F.4th 692 (concerning the U.S. Department of Education's petition for mandamus to quash a subpoena of the former Secretary of Education). Olson Decl. ¶¶ 4–7. In no other case has the DOJ sought mandamus when the only harm alleged is ordinary litigation expenses.

STANDARD OF REVIEW

A stay represents an "intrusion into the ordinary processes of administration and judicial review" and, as a result, is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (2009) (quotations and citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. Courts consider four factors in determining whether issuance of a stay is appropriate:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (internal citations omitted). "The first two factors of the traditional standard are the most critical." *Id*.

ARGUMENT

I. Defendants Are Not Likely to Succeed on their Petition for a Writ of Mandamus

To meet their burden, Defendants must show they will prevail on the merits of their petition for writ of mandamus, which they cannot do. "The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (internal quotation marks and citations omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). In considering whether to grant a writ of mandamus, the parties agree that the Ninth Circuit is guided by the five factors in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977): "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district

court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman*, 557 F.2d at 654–55); Pet. at 17.

Defendants inappropriately rely on *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999), for the proposition that "litigants who have proceeded to judgment in higher courts should not be required to go through that entire process again to obtain execution of the judgment." Pet. at 23. *Vizcaino* does not apply here because the principle stated in *Vizcaino* was about avoiding re-litigation of *final judgments*. This Court explained: "The appeal before us in *Vizcaino I* and *II* was taken from a *judgment on the merits denying relief to plaintiffs and the members of the class* certified by the district court. . . .that judgment would be res judicata with respect to the claims not only of the plaintiffs and other workers . . . . substantial rights were at issue for all the members of the certified class." *Vizcaino*, 173 F.3d at 720 (emphasis added). Class certification cases are unique and irrelevant to the present case because there is no further remedy for the excluded class members after a decision on the merits pursuant to Rule 23(c)(1). Here on the other hand, Defendants have full rights of appeal after final judgment on the merits. *Id.* at 721–22. "Under these circumstances, the *Vizcaino* principle that mandamus is available

to assure compliance with a prior mandate has no application." *Perry v. Schwarzenegger*, 602 F.3d 976, 980 (9th Cir. 2010).

A. *Bauman* Factor 1: Defendants can directly appeal after trial and final judgment.

Defendants will have a full opportunity to appeal the district court's orders stemming from Plaintiffs' Second Amended Complaint, *after* trial, in the normal course of litigation in accordance with the final judgment rule. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 27 (2017) (stating that § 1291's firm finality principle is designed to guard against piecemeal appeals); s*ee also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (protecting independence of district court, avoiding harassment of litigants and cost of successive appeals, and obstructing judicial efficiency). Defendants do not argue otherwise.

The district court's orders on standing and failure to state a claim do not meet this Court's requirements that such rulings would be effectively unreviewable after final judgment. 28 U.S.C. § 1291; *c.f.*, *e.g.*, *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546 (1949) (holding that denial of defendants' motion for plaintiff to post security is an immediately appealable collateral order because it is unreviewable after final judgment); *DC Comics v. Pac. Pictures Corp*., 706 F.3d 1009, 1011 (9th Cir. 2013) (same, regarding an order effectively denying defendants' asserted immunity from suit). Defendants lose on *Bauman* factor one.

B. *Bauman* Factor 2: Defendants will not be damaged or prejudiced in any way not correctable on appeal.

The only prejudice or damage Defendants assert is an unfounded fear of "intrusive discovery" and the burden of trial and associated litigation costs. Both of these issues must be rejected under the law of the case. *In re United States*, 895 F.3d at 1105–06. As for claims of "intrusive discovery," this Court previously ruled: "[T]he defendants argue that mandamus is their only means of obtaining relief from potentially burdensome discovery. The defendants' argument fails because the district court has not issued a single discovery order, nor have the plaintiffs filed a single motion seeking to compel discovery." *In re United States*, 884 F.3d at 834. Today, the same is true—there is no discovery order or dispute, nor is there likely to be one given the modest discovery contemplated by the parties given that this case was previously stalled on the eve of trial. Olson Decl. ¶ 9; Dkt 1.1 at 516-17; *cf. In re U.S. Dep't of Educ.*, 25 F.4th at 697–98.

The law of the case based on long-standing Ninth Circuit precedent is also binding: litigation costs and the inconvenience of a trial can *never* suffice for mandamus, no matter how burdensome. This Court already ruled on this issue in this case:

> The second *Bauman* factor is whether the petitioner "will be damaged or prejudiced in any way ***not correctable on appeal***." *Perry*, 591 F.3d at 1156. To satisfy this factor, the defendants "must demonstrate some burden . . . other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *DeGeorge v. U.S.*

> *Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000) (alteration in original) (quoting *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 535 (9th Cir. 1998) (en banc)). Prejudice serious enough to warrant mandamus relief "includes situations in which one's 'claim will obviously be moot by the time an appeal is possible,' or in which one 'will not have the ability to appeal.'" *Id*. (quoting *Calderon*, 163 F.3d at 535). . . .
>
> To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them. The United States is a defendant in close to one-fifth of the civil cases filed in federal court. The government cannot satisfy the burden requirement for mandamus simply because it, or its officials or agencies, is a defendant.
>
> Distilled to its essence, the defendants' argument is that it is a burden to defend against the plaintiffs' claims, which they contend are too broad to be legally sustainable. That well may be. But, as noted, litigation burdens are part of our legal system, and the defendants still have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims.

In re United States, 884 F.3d at 835–36 (emphasis added).

From October 17, 2018 to today, the government has spent over 8,000 hours just on the appellate process alone, making a mockery of its argument that early appeals will save public resources.[9] Pet. Ex. 7, Montero Decl. ¶¶ 2–3; *see also*

[9] Had the case gone to trial in 2018, Defendants claim they would have expended 7,300 hours of professional time at a ten-week trial. Pet. at 48; Pet. Ex. 6, Montero Decl. ¶ 7. Defendants have spent more than that amount of time since 2018 seeking extraordinary appeals and stays. Pet. Ex. 7, Montero Decl. ¶¶ 2–3. Indeed,

Stiglitz Decl. ¶ 6.b (describing Defendants' argument as "ludicrous."). Defendants lose on *Bauman* factor two.

C. *Bauman* Factor 3: The District Court Complied with the Mandate, Which Could Only Have Been a Dismissal *Without* Prejudice.

Defendants continue to ignore that dismissals for lack of Article III standing are by their nature dismissals *without* prejudice. Defendants cite no precedent to support the proposition that this Court's jurisdictional dismissal should have been "with prejudice," even though it did not say so. *See generally* Pet. Notably, Defendants do not seek dismissal "with prejudice" in this petition either, because they cannot—it is simply not the law. *Id.* (no request for dismissal with prejudice); *Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (quoting *Fleck & Assocs.*, 471 F.3d at 1106–07) ("[D]ismissals for lack of Article III jurisdiction must be entered without prejudice because a court that lacks jurisdiction 'is powerless to reach the merits.'"); *Fleck & Assocs.*, 471 F.3d at 1102; *see also United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990) (holding that district court abused its discretion by denying union leave to amend after complaint was dismissed for lack of standing); *accord Brereton v. Bountiful*

Defendants could have had 10 people spending more than 15 hours per day for 50 days to achieve that many hours of work (10x15x50 = 7,500 hours). This case could have reached final judgment after trial in 2018 for the same amount of time Defendants have spent on its delay tactics.

City Corp., 434 F.3d 1213, 1216 (10th Cir. 2006) (collecting 2nd, 8th, and 10th Circuit cases holding that dismissal of an action for lack of jurisdiction must be without prejudice "[s]ince standing is a jurisdictional mandate, a dismissal with prejudice for lack of standing is inappropriate, and should be corrected to a dismissal without prejudice"). According to this Court,

> [o]ften a plaintiff will be able to amend its complaint to cure standing deficiencies. To deny any amending of the complaint places too high a premium on artful pleading and would be contrary to the provisions and purpose of Fed.R.Civ.P. 15. Rule 15(a) provides that amendment shall be granted "freely when justice so requires."

United Union, 919 F.2d at 1402.

The district court carefully applied this Court's interlocutory ruling and new Supreme Court precedent to Plaintiffs' motion for leave to amend to resolve whether amendment was proper under the federal rules and this Court's precedent. *Juliana*, 2023 WL 3750334; Fed. R. Civ. P. 15(a)(2); *see Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) ("This policy [to freely grant leave to amend] is 'to be applied with extreme liberality.'"); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) ("In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities."); *Hall v. City of Los Angeles*, 697 F.3d 1059, 1073 (9th Cir. 2012) ("[T]his mandate [to freely give leave to amend] is to be heeded.") (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). A motion to amend should be

resolved "with all inferences in favor of granting the motion." *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999).

This Court's mandate dismissing the First Amended Complaint "for lack of Article III standing" does not mandate dismissal of the Second Amended Complaint, which this Court has not reviewed, and should not review until final judgment. Defendants lose on *Bauman* factor three.

Even if *Bauman* permitted this Court to review the district court's order allowing for amendment, Defendants do not demonstrate clear error in granting Plaintiffs leave to amend. A plaintiff's burden to demonstrate redressability is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Defendants argue that "a declaratory judgment alone is unlikely to meaningfully address the complex phenomenon of global climate change, much less redress Plaintiffs' alleged injuries, and the district court clearly erred in holding otherwise." Pet. at 31. Whether declaratory judgment can address "the complex phenomenon of global climate change" is not the right question on redressability, and continues to mischaracterize Plaintiffs' claims against Defendants. At this stage of the case, the district court was required to take Plaintiffs' allegations as true. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). Defendants have never sought to dispute, and still do not dispute in their briefing, Plaintiffs' allegation to be taken as true that: "If the Court declares the nation's energy system unconstitutional in its present form, Defendants

will correct the unconstitutional policies and practices of the national energy system." Pet. Ex. 2, Compl. ¶ 30-A. "Even though it is now too late to prevent, or to provide a fully satisfactory remedy [for Plaintiffs' every injury] . . . a court does have power to effectuate a partial remedy." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). Resolving the constitutional controversy here, not the "complex phenomenon of global climate change," will provide immediate and at least partial redress for Plaintiffs' injuries. *See, e.g.*, Pet. Ex. 2, Compl. ¶¶ 95-A to 95-D, 276-A; *Juliana*, 2023 WL 3750334, at *6–7 (identifying Complaint paragraphs "directly linking how a declaratory judgment alone will redress of [sic] plaintiffs' individual ongoing injuries").[10] Because the district court did not "clearly" err as a matter of law, the third *Bauman* factor is not satisfied.

D. *Bauman* Factors 4 and 5: The District Court Has Not Made Oft-Repeated Errors Nor is it Addressing a Matter of First Impression.

The fourth and fifth *Bauman* factors consider whether the district court's order commits an oft-repeated error or raises novel and important issues of law. *Bauman*, 557 F.2d at 655. Here, Defendants challenge two orders by the district court: a grant

[10] Other cases cited by Defendants, like *California v. Texas*, 141 S. Ct. 2104, 2116 (2021), support Plaintiffs. There, the Court held that the government conduct could not have caused Plaintiffs' injuries, in contrast to the clear injury and causation rulings by this Court in Plaintiffs' favor. *Juliana*, 947 F.3d at 1168–69; ECF No. 505. *Creech v. Tewalt*, 84 F.4th 777 (9th Cir. 2023), also supports the discretion of the district court to resolve questions as to the futility of amendment on remand.

of leave to amend, and a denial of Defendants' motion to dismiss. Neither order can reasonably be characterized as an "oft-repeated error" because in eight years of litigation, this Court has reversed the district court only once, on a single, narrow issue—in a 2-1 decision with a powerful dissent. The district court determined that the single narrow issue was clarified by intervening Supreme Court precedent, and was adequately addressed in Plaintiffs' Second Amended Complaint. *Juliana*, 2023 WL 3750334; *Juliana*, 2023 WL 9023339. Moreover, there is no novel issue of first impression here regarding leave to amend and declaratory relief. The only "novel" issue Defendants point to relate to the merits of Plaintiffs' constitutional claims, which the district court has not yet decided on final judgment. Pet. at 51. Nor does the large magnitude of Plaintiffs' injuries render their routine motion for leave to amend "novel." Defendants lose on *Bauman* factors four and five.

II. Defendants Will Not Suffer Irreparable Injury Absent a Stay

An applicant for stay *must* "show that an irreparable injury is the more probable or likely outcome" if the stay is not granted. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). It is a "bedrock requirement that stays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors." *Id.* at 965. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough" to show

irreparable harm. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (ellipsis in original) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). It is long-standing black letter law that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Such a feeble showing of attorney and paralegal time is never a sufficient ground to stay proceedings under this Court's precedent. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005); *see also In re United States*, 884 F.3d at 835–36 ("[D]efendants must demonstrate some burden . . . other than the mere cost and delay that are regrettable, yet normal, features of our imperfect legal system.") (internal quotations omitted). Importantly, Defendants fail to cite a single case to the contrary. For these reasons alone, the motion for stay should be denied.

However, should the Court need it, Plaintiffs provide sworn expert testimony by a Nobel Laureate economist that Defendants' assertion of irreparable fiscal harm is "ludicrous." Stiglitz Decl. ¶ 6.b. Dr. Stiglitz contrasts the public resources spent on direct subsidies to the fossil fuel industry, which have been estimated at approximately $20.5 billion per year, *id.* ¶ 10, and the fact that in 2022, the U.S. provided $760 billion in implicit and explicit fossil fuel subsidies to the industry, with the paltry millions in the DOJ's legal fees it claims constitutes irreparable harm

to Defendants. *Id*. ¶ 10. Dr. Stiglitz also notes that the DOJ's budget requests are close to $40 billion dollars for Fiscal Year 2024. *Id.* ¶ 22. Defendants are not harmed.

III. A Litigation Stay Will Substantially Injure Plaintiffs

Regarding the third factor, "'if there is even a fair possibility that the stay . . . will work damage to someone else,' the stay may be inappropriate absent a showing by the moving party of 'hardship or inequity.'" *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (internal citations omitted). Here, Youth Plaintiffs' irreparable injuries compound with each delay in adjudicating their claim. As shown by the Expert and Plaintiff Declarations filed herewith, Plaintiffs, who ranged from ages 8 to 19 when this case was filed in 2015, face ever-worsening harm to their health, their future, and their constitutional due process rights while the ongoing controversy over Defendants' conduct continues unresolved. *See* Pet. Ex. 2, Compl. ¶¶ 12-14, 19-A, 22-A, 30-A, 34-A, 39-A, 43-A, 46-A, 49-A, 52-A, 56-A, 59-A, 62-A, 64-A, 67-A, 70-A, 72-A, 76-A, 80-A, 85-A, 88-A, 90-A, 95-A to -D, 276-A; *Juliana*, 947 F.3d at 1168–69. The Youth Plaintiffs' injuries have worsened since their trial was canceled in 2018:

- The U.S. became the top producer of crude oil and remains the top producer of liquified natural gas in the world. Running Decl. ¶ 9. Defendants have authorized substantial new fossil fuel infrastructure, which will be embedded into the system for decades and make it harder to achieve 100% renewable

energy by 2050. *See* Jacobson Decl. ¶ 12; "A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse." *Juliana*, 947 F.3d at 1164.

- Atmospheric CO_2 has risen 14 ppm, which is about 20% of the human-caused increase in CO_2. Running Decl. ¶ 6. The United States is responsible for 14% of that increase, emitting over 41.3 billion metric tons of additional CO_2. Running Decl. ¶ 8. Every additional ton of that CO_2 that enters the air adds to global warming and worsens the hazards for Plaintiffs' health and safety. Running Decl. ¶¶ 10–11.
- "[T]he globe is blowing past prior record temperatures every few years" from every increase in CO_2 levels, making 2023 the warmest year since global records began in 1850, and the oceans the hottest ever recorded by humans. Running Decl. ¶¶ 13, 19, 21.
- Any delay that prevents these Youth Plaintiffs from making their case at trial only serves to exacerbate their existing mental health injuries, with potentially life-long consequences. Van Susteren Decl. ¶ 19.

- Additional delay in transitioning away from a fossil fuel energy system to 100% renewable energy will make it much more difficult to reduce CO_2 pollution immediately. Jacobson Decl. ¶ 12; Running Decl. ¶ 31.
- The environmental damage alone that results from delay in obtaining a remedy in this case could be irreparable. Stiglitz Decl. ¶¶ 13–21; *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). The cost of delay to these Youth Plaintiffs and the public interest is enormously expensive because it equates to more climate damage, economic costs, and greater uncertainty. Stiglitz Decl. ¶ 6.d. The balancing of potential harms is clear: this case should be allowed to go to trial. Stiglitz Decl. ¶¶ 6, 15, 25–26.

In recent summers, as evidenced by the Declarations of Plaintiffs Avery, Miko, Jacob, and Isaac, Plaintiffs were injured when good swaths of the U.S. were shrouded under smoke from uncontrollable wildfires across North America during record temperatures. Avery Decl. ¶¶ 3, 5; Jacob Decl. ¶¶ 4–7; Isaac Decl. ¶¶ 3–5; Miko Decl. ¶¶ 3–4. Plaintiff Jacob was forced to pack up his belongings twice in anticipation of evacuation orders as wildfires approached his family ranch in Southern Oregon, and the tannery business he was beginning in Clackamas, Oregon. Jacob Decl. ¶¶ 4–7. In the past eight years, Oregon has recorded its worst urban air quality, endured three of its ten hottest years on record and witnessed one of the most severe wildfire seasons ever. *See* ECF No. 549 at 27. Plaintiffs Isaac and Sahara,

who have asthma, have been forced to remain indoors, miss school and socialization because of the harmful wildfire smoke that shrouded their communities in the West and as far as Washington D.C. Isaac Decl. ¶¶ 3–6, 9; Sahara Decl. ¶ 3.

Several Plaintiffs have been forced to evacuate from their schools and their homes because of climate change-induced hurricanes. Plaintiff Levi has been displaced from his home due to climate change, having to move inland, away from the barrier island where he grew up due to intensifying weather events and the high costs of flood insurance. Levi Decl. ¶ 3. Two weeks after she started her first year of college, Plaintiff Avery had to evacuate inland due to Hurricane Idalia, an event President Biden publicly associated with the climate crisis. Avery Decl. ¶ 6; Running Decl. ¶ 26.

The Pacific Northwest "Heat Dome" in June 2021 caused temperatures across the region to increase up to 16-20°C above normal, killing hundreds of people from excess temperatures, causing unprecedented loss of marine life[11] and exposing Plaintiffs Sahara, Miko, Isaac, and Jacob to life-threatening temperatures. Sahara Decl. ¶ 5; Miko Decl. ¶ 3; Isaac Decl. ¶ 5; Jacob Decl. ¶ 9. Plaintiffs have also been exposed to unprecedented cold and storms. Levi Decl. ¶ 4; Avery Decl. ¶¶ 6–7; Miko Decl. ¶ 5; Nathan Decl. ¶ 3; Sahara Decl. ¶ 6.

[11] Rachel H. White et al., *The Unprecedented Pacific Northwest Heatwave of June 2021*, 14 Nature Commc'ns 727 (2023).

In addition to Defendants' harmful support of the fossil fuel industry and worsening of the climate crisis and Plaintiffs' constitutional injuries, Defendants also harm Plaintiffs by further delaying this litigation. As a result of this case's repeated and extended delays caused by Defendants' barrage of motions, writs, and appeals over eight years, Plaintiffs experience trauma and continue to endure cultural, economic, physical, psychological, and mental injuries. *See* Avery Decl. ¶ 9; Miko Decl. ¶¶ 6–10; Nathan Decl. ¶ 6; Sahara Decl. ¶¶ 3, 7. If this litigation, and a resolution to the constitutional controversy is further delayed, it will necessarily and irreversibly aggravate Plaintiffs' injuries by closing the window of opportunity for Defendants to correct their unconstitutional energy system and preserve a habitable climate system for Plaintiffs and this Nation. *See* Pet. Ex. 2, Compl. ¶ 259. There is no doubt: additional delay in this case lock in additional impending catastrophes on top of those already occurring. In moving for a stay, Defendants do not dispute "that climate change poses a serious threat, nor that addressing climate change requires the active involvement of the federal government." ECF No. 571 at 8. Defendants only dispute that their current operation of the fossil fuel energy system is unconstitutional—the urgent controversy to be addressed by the district court through a declaratory judgment. Deprivation of a constitutional right "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990,

1002 (9th Cir. 2012); *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991).

Because Defendants fail to, with candor to the Court,[12] address the third grounds for a stay, and the evidence of irreparable harm to Plaintiffs is uncontroverted, this Court should deny Defendants' Motion to Stay.

IV. The Public Interest Requires a Denial of a Stay of Proceedings

The public interest strongly favors denial of Defendants' Motion to Stay. Like government leaders before him, President Biden has identified the climate crisis as an "existential threat to humanity."[13] Youth Plaintiffs will bear the brunt of the climate crisis—both because they will mature in a destabilized climate and because of their biological predisposition to climate change-related harms. Pet. Ex. 2, Compl. ¶¶ 8, 10, 285, 296; *Juliana*, 2023 WL 9023339, at *16. The public interest will benefit when Plaintiffs present their evidence at trial—as is their due process right—and the Court resolves the controversy on the merits of whether Defendants' fossil fuel energy system is unconstitutional.

[12] Defendants had Plaintiffs' Opposition to their Motion for a Stay in the district court before they filed this "motion" here. Yet despite being well aware of the irreparable harm to Plaintiffs, Defendants fail to disclose such harm here.

[13] The White House, *Remarks by President Biden on Climate Resilience | Palo Alto, CA* (June 19, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/19/remarks-by-president-biden-on-climate-resilience-palo-alto-ca/.

Each year, the localized air pollution from the fossil fuel energy system alone causes nearly 100,000 premature deaths in the U.S. Jacobson Decl. ¶ 5. Each ton of carbon pollution makes extreme weather events more likely. Running Decl. ¶¶ 10–11. According to Defendant NOAA, 2023 was also a record setting year for billion-dollar weather and climate disasters with tremendous loss of human life. *Id*. ¶¶ 24–25; *see also* Stiglitz Decl. ¶¶ 16–18. The total cost of climate disaster events from 2017 to 2023 exceeds $1.0 trillion. Stiglitz Decl. ¶ 18. Delay in measuring the fossil fuel energy system against the constitutional rights of children costs the public in lost lives and enormous amounts of money. Jacobson Decl. ¶ 14; Stiglitz Decl. ¶¶ 19–21, 25. Courts have long affirmed that the public interest is well-served by the protection of constitutional rights. "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)).

CONCLUSION

This Court has developed guidelines to guard against the "dangers of unprincipled use" of the extraordinary mandamus power, including undermining the "mutual respect" that "marks the relationship between federal trial and appellate courts." *Bauman*, 557 F.2d at 653–54. Defendants' extraordinary fifteen attempts to stay this litigation over the past eight years, combined with Defendants' seven

petitions for writ of mandamus, five to this Court, singling out this specific case, and these specific Youth Plaintiffs, without presenting any evidence of irreparable harm to the government, to roadblock their path to trial like some sort of discriminatory political vendetta, should not be tolerated by any court of law. *See* Olson Decl. ¶¶ 2–8. Defendants have now repeatedly engaged in conduct that is heavily disfavored by the Ninth Circuit, ignores law of the case and precedent, and amounts to an abuse of this Court's process.

The parties agree on one thing: the trial the district court will hold is "on issues of significant public import." Pet. at 49. The functioning of our democracy is indeed at stake in this case. Our judicial system works by uncovering the truth through rigorous presentation of facts and cross-examined testimony, a final judgment, and only then—*appeal to higher courts.* At a time when our democracy has been attacked and people are losing faith in our courts, it is vital that the judicial system be shown to work fairly for these individual children and youth, and does not favor protecting DOJ lawyers' time and expense. The power differential is enormous here between the Executive branch of the federal government with their Department of Justice compared to these individual youth who have no other recourse. The goal of separating power and the district court acting as a check on the systemic conduct of executive agencies that are harming the health of children is to better secure children's liberty, not protect governmental lawyers from constitutional claims

brought by children. *Bowsher v. Synar*, 478 U.S 714, 721 (1986). DOJ is *not* the one needing protection; these brave 21 youth do.

For the foregoing reasons, this Court should strike Petitioner's stay request and apply law of the case and its own unambiguous precedent to protect these young citizens and the rule of law and deny Defendants' Motion to Stay.

DATED this 12th day of February, 2024, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson

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FOR THE NINTH CIRCUIT

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