Some Thoughts About the Federal Government's Litigation Position and Strategy in *Juliana v. United States* (D. Or.)

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1. Overview of litigation history thus far (filings generally available at https://www.ourchildrenstrust.org/court-orders-and-pleadings/)

    a. Suit is filed in D. Or. in 2015. Plaintiffs are children and young people; a nonprofit group; and "Future Generations," represented by "their Guardian," the climate scientist James Hansen. Defendants are the President and various federal officials and agencies.

    b. Core claims:

        i. Defendants have violated plaintiffs' fundamental right to a stable climate system, protected by the Due Process Clause of the Fifth Amendment.

        ii. Defendants have violated the federal government's duties as a public trustee for the atmosphere and the oceans.

    c. Other claims: equal protection and unenumerated Ninth Amendment claims (appear to be secondary to / intertwined with due-process claim)

    d. Relief sought: declaratory and injunctive relief, including an order requiring the defendants to prepare and implement a national remedial plan to stabilize the climate system and protect vital resources by phasing out fossil-fuel emissions and drawing down excess atmospheric carbon dioxide. The court would retain jurisdiction to monitor and enforce compliance with this plan and with associated orders.

    e. Industry groups intervene in the case.

    f. In Nov. 2015, DOJ and industry intervenors move to dismiss the case for lack of jurisdiction and for failure to state a claim. In Nov. 2016, d. ct. denies the motions, holding that the plaintiffs had adequately alleged that the defendants had violated (1) the plaintiffs' unenumerated fundamental right to a climate system capable of sustaining human life and (2) the federal government's public-trust duties as to "the atmosphere, water, seas, seashores, and wildlife." *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

[1] Any opinions expressed by me herein, or in today's panel, represent solely my personal views, not the views of my law firm or of any current or former clients.

g. After the change in Administrations, DOJ requests an interlocutory appeal under 28 U.S.C. § 1292(b). The request is denied. *Juliana v. United States*, No. 15-cv-01517, 2017 WL 2483705 (D. Or. June 8, 2017). Meanwhile, intervenors successfully move to withdraw from the litigation.

h. DOJ immediately files a petition for a writ of mandamus in the court of appeals. In Mar. 2018, that petition is denied after oral argument. *In re United States*, 884 F.3d 830 (9th Cir. Mar. 7, 2018) (Thomas, C.J., joined by Berzon and Friedland, JJ.) (discussed in further detail in paragraph 2 below).

i. DOJ seeks and obtains extensions of the deadline for filing a certiorari petition in the Supreme Court through Aug. 4, 2018.

j. DOJ later files a second mandamus petition, which is denied by the same Ninth Circuit panel (without argument) in Jul. 2018. *In re United States*, 895 F.3d 1101 (9th Cir. Jul. 20, 2018) (per curiam) (discussed in further detail in paragraph 3 below).

k. DOJ seeks emergency relief from the Supreme Court, which the Court denies on Jul. 30, 2018 (discussed in further detail in paragraph 4 below).

l. Case is scheduled for trial beginning in late October 2018.

m. **UPDATE:** On Oct. 5, 2018, DOJ filed a "motion to stay discovery and trial pending Supreme Court review" in the district court.

    i. In the motion (available at https://bit.ly/2QBywPZ), DOJ indicated that a mandamus petition in the S. Ct. was "forthcoming" and that absent a stay from the district court, DOJ would seek a stay from the Ninth Circuit during the week of Oct. 8, 2018.

    ii. On Oct. 9, 2018, the district court expedited its consideration of the motion, ordering that the plaintiffs' response would be due no later than Oct. 11, 2018, and that the motion would be taken under advisement as of that date.

2. Overview of Ninth Circuit's decision denying DOJ's first mandamus petition (*In re United States*, 884 F.3d 830 (9th Cir. Mar. 7, 2018))

    a. Petition

        i. cites the burdens of the discovery process

        ii. emphasizes the unprecedented character of the suit

iii. argues that the suit poses a severe threat to the constitutional separation of powers

b. Ninth Circuit's opinion denying the petition

i. A writ of mandamus is a drastic and extraordinary remedy, reserved for exceptional cases.

ii. The panel applies the five guidelines identified in *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977), as relevant to deciding whether to grant the writ. Conclusion: The federal defendants have satisfied *none* of the five factors "at this stage of the litigation."

a. First, the government had not shown that it had no other means to obtain relief from potentially burdensome discovery. The district court had not issued any discovery orders; the plaintiffs had not moved to compel discovery; and DOJ had not sought any discovery-related relief from the district court. Thus the petition was "entirely premature."

b. Second, the government had not shown that it would be damaged or prejudiced in some way that could not be corrected on appeal later on. It is not prejudice in this sense to incur the burdens of litigation in a suit that violates separation of powers or otherwise lacks merit. And "the defendants still have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims." *Id.*

c. Third, the government had not shown that the district court's order was clearly erroneous. There is no controlling precedent, and "this case is at a very early stage." The defendants could raise challenges later "on a more fully developed record, including decisions as to whether to focus the litigation on specific governmental decisions and orders."

d. Fourth, the district court's order was not "an oft repeated error." And DOJ had not argued that the district court had violated any federal rules.

e. Fifth, the district court's order did raise "issues of first impression" – but did not present the possibility that those issues would "evade appellate review."

iii. Basic problem: Granting the writ here would open up mandamus as a vehicle for routinely seeking appellate review of a decision denying a motion to dismiss.

a. "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."

b. The issues raised in the petition "are better addressed through the ordinary course of litigation."

c. For another decision sounding the same basic theme, see *In re Bozic*, 888 F.3d 1048, 1054–55 (9th Cir. 2018) (denying mandamus petition after weighing *Bauman* factors) ("Despite the presence of a clear legal error, we hold that Bozic is not entitled to mandamus relief. … [I]f clear legal error were sufficient for mandamus relief, every erroneous interlocutory order would warrant issuance of the writ.").

iv. The panel opinion carefully abstains from deciding any ultimate merits or justiciability questions. But the opinion gives some hints:

a. Claims and remedies may need to be pruned. "[S]ome of the plaintiffs' claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress. However, the district court needs to consider those issues further in the first instance. Claims and remedies often are vastly narrowed as litigation proceeds[.]"

b. Standing remains an issue. "Nor would the defendants be precluded from reasserting a challenge to standing, particularly as to redressability, once the record is more fully developed[.]"

c. Future mandamus petitions are possible ("if circumstances justify it").

d. Future interlocutory appeals are also possible. "[T]he defendants retain the option of asking the district court to certify orders for interlocutory appeal of later rulings, pursuant to 28 U.S.C. § 1292(b)."

3. Overview of Ninth Circuit's much terser decision denying DOJ's second mandamus petition (*In re United States*, 895 F.3d 1101 (9th Cir. Jul. 20, 2018) (per curiam))

a. Bottom line: "No new circumstances justify this second petition, and we again decline to grant mandamus relief."

b. Slightly longer version: "The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the district court or in a future appeal."

c. Two highlights:

    i. The lack of "a specific discovery order" "distinguishes this case from *In re United States*, __ U.S. __, 138 S.Ct. 443 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an order compelling discovery" in litigation challenging the Department of Homeland Security's decision to take immediate steps to rescind the Deferred Action for Childhood Arrivals (DACA) program.

        i. In the DACA case, "the district court had issued an order compelling the government to complete the administrative record over the government's objection that it had filed a complete record properly limited to unprivileged documents. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss."

        ii. By contrast, "[i]n this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests." (Citations omitted.)

    ii. "The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute 'agency decisionmaking,' which the government contends could not occur without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA."

4. Supreme Court's short opinion accompanying its denial of relief (Jul. 30, 2018)

    a. DOJ goes to S Ct on Jul. 17, 2018, before Ninth Cir. has acted on DOJ's second mandamus petition.

    b. DOJ asks for a stay of the district court case pending disposition of the mandamus petition. DOJ argues in the alternative "that the Court may wish to construe this application as a petition for a writ of mandamus or as a petition for a writ of certiorari from the Ninth Circuit's prior mandamus decision and directly order dismissal of this suit or a stay of discovery and trial" pending resolution of the government's pending dispositive motions.[2]

    c. Supreme Court issues a very short decision denying relief, which reads in its entirety as follows:

> "The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions."

5. Overview of the government's main arguments for dismissal

    a. Justiciability

        i. Article III standing

        ii. Political question doctrine (not explicitly argued by government)

    b. Threshold issues other than justiciability

        i. APA

    c. Merits

        i. The Due Process Clause of the Fifth Amendment does not afford private individuals a fundamental right to be protected against climate change.

            i. The interest in a stable climate system is different from the various personal, individual interests that the Supreme

[2] This and other filings are available at https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\18a65.html.

Court has held are fundamental rights protected by substantive due process. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (holding that couples of the same sex may exercise the fundamental right to marry) (due-process rights protect "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"); *id.* at 2599 ("[C]hoices concerning contraception, family relationships, procreation, and childrearing … are protected by the Constitution.").

ii. Various prudential and policy considerations weigh against creating a new constitutional right to be free from greenhouse gas pollution. Federal judges are not as well placed as expert regulators to ascertain how best to set optimal emissions levels. *Cf. American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants"); *id.* at 426-29. EPA is better at making an "informed assessment of competing interests," including "our Nation's energy needs and the possibility of economic disruption," in this area of national and international policy. *Id.* at 427.

iii. The state-created-danger doctrine (another strand of due process doctrine) does not apply here either. Under that doctrine, a governmental entity takes on a constitutional duty to an individual whom it places in peril in deliberate indifference to his or her safety.

a. The problem with applying the doctrine to climate change is that the doctrine applies to dangers attributable to government actions, not to government omissions (e.g., failures to regulate). *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195, 197-203 (1989).

b. Also, courts have applied the doctrine to government actions that cause *direct* physical harm to individuals (e.g., actions by law enforcement officers). Climate change is far more complex than such incidents.

ii. The public-trust doctrine cannot be used to force the federal government to take specific actions to fight climate change.

i. The doctrine does not apply to the federal government. *Alec L. v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir. 2014) (per curiam) (affirming dismissal of similar suit, raising solitary public-trust claim, for lack of federal-question jurisdiction; concluding that public trust doctrine is a matter only of state law, not federal law).

ii. Other limits?

6. Federal government's appeal authorization process

   a. 28 C.F.R. § 0.20 (cited in Justice Manual (formerly United States Attorneys' Manual) § 2-1000)

      i. Describes general functions of Solicitor General, including "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs)."

   b. Delays in this process are not uncommon, given the need for interagency consultation.

      i. Hence "protective" notices of appeal.

      ii. Note government's delay in seeking appeal from Judge Aiken's decision in Nov. 2016 denying motions to dismiss.

   c. Mandamus is an extraordinary remedy and thus is not routinely sought.

      i. Example of situation in which DOJ would seriously consider seeking mandamus relief: Cabinet secretaries and other high officials are forced to give testimony.

         i. *See, e.g., In re McCarthy*, 636 F. App'x 142, 143 (4th Cir. 2015) (granting government's petition for writ of mandamus precluding deposition of EPA Administrator in federal district court case) ("It is well established that high-ranking government officials may not be deposed or called to testify about their reasons for taking official actions absent 'extraordinary circumstances.' When such circumstances are not present, mandamus is appropriate to prevent a district court from compelling an official's appearance.") (citations omitted).

ii. See also pending S.D.N.Y. litigation challenging Commerce Department's decision to add a citizenship question to the 2020 Census. DOJ is seeking relief from orders that would allow depositions of Secretary of Commerce (Wilbur Ross) and Acting Assistant Attorney General of DOJ Civil Rights Division (John Gore). *In Re: U.S. Dep't of Commerce*, Nos. 18-2652, 18-2659, 18-2856, 18-2857 (2d Cir.). For filings, see https://www.brennancenter.org/legal-work/new-york-v-united-states-dept-commerce. A Second Circuit panel denied mandamus petitions concerning Mr. Gore on Sept. 25, 2018, and denied a stay pending Supreme Court review on Oct. 2, 2018. The federal defendants sought a stay from the Supreme Court on Oct. 3, 2018. The Second Circuit denied mandamus petitions concerning Mr. Ross on Oct. 9, 2018. ***Stay tuned.***

ii. Other example: *In re United States*, 791 F.3d 945, 949, 960 (9th Cir. 2015) (denying United States' petition for writ of mandamus challenging district judge's policy restricting pro hac vice admission of federal government attorneys) ("We agree that the controversy remains live, conclude that the district court erred, and find that guidance to the district court is appropriate. We decline to issue a formal writ of mandamus because it would not be an effective remedy in this case, and accordingly deny the petition without prejudice. … We are confident that the district court will conform its decisions to the principles we announce here.").

d. Supreme Court extraordinary writ practice / requests for emergency relief

i. Becoming more common in the Trump era?

ii. *Trump v. Hawaii*, 138 S.Ct. 2392 (Jun. 26, 2018), recounts multiple stays entered by the Court in the course of the travel-ban litigation that culminated in that decision.

7. A few ideas about how the U.S. government may view the *Juliana* case

a. Standard doctrinal arguments (constitutional law, public trust doctrine, etc. – see above), plus…

b. Separation of powers

c. An attack on Executive Branch officials' discretion in formulating and implementing policies pursuant to their statutory authorities

d. Threatens prerogatives of expert agencies

e. A programmatic suit – government typically doesn't like programmatic suits

    i. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62, 64 (2004) (*SUWA*) (note: no constitutional claims)

    ii. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (note: no constitutional claims)

f. A non-APA suit

    i. Discovery (atypical)

    ii. No specific agency decision, with an accompanying agency record, being challenged

g. Trump Administration policy/jurisprudential priorities

    i. Fostering conventional energy development and use

    ii. Limiting/rejecting expansion of substantive due process doctrine and constitutional-law innovation

8. Some thoughts re: possible government tactics / strategies

    a. Between now and trial

        i. Pending dispositive motions (motion for judgment on the pleadings and motion for summary judgment)

        ii. Discovery wrapping up

        iii. Possible third effort at mandamus?

            i. *October 2018 update: Yes.*

    b. At trial

        i. Narrowing scope through concessions?

        ii. Rearguing standing?

            i. Several statements in the district court's opinion denying DOJ's motion to dismiss suggest that the court was open to considering anew whether standing might be defeated, esp. on redressability grounds, at a later stage of the case,

including at trial. *See Juliana*, 217 F. Supp. 3d at 1245; *id.* at 1246-47, 1267; *id.* at 1268; *id.* at 1269.

ii. See also district judge's and magistrate judge's letter to Ninth Circuit in response to first mandamus petition (filed Aug. 25, 2017), https://bit.ly/2CxW857. The letter indicates that trial would be bifurcated; the first phase would pertain to liability, including standing, and if the defendants are held liable, then a second, remedial phase would be held.

c. After trial

i. If the government loses the first phase, the government might seek an interlocutory appeal during the pendency of the second phase. Presumably such an interlocutory appeal would be subject to the discretion of the district court, absent an immediately effective injunction.

ii. One might imagine another mandamus petition at this point.

iii. If appeal is taken or a mandamus petition is filed, government would likely seek stay pending appeal.

9. Other cases to watch / cases that may have some indirect impact on *Juliana* (or vice versa)

a. *Clean Air Council v. United States*, No. 17-cv-04977 (E.D. Pa. filed Nov. 11, 2017)

i. Asserts due process and public trust claims, but seeks only declaratory relief re: Trump Admin. regulatory rollbacks based on inadequate science that increase the frequency or intensity of climate change impacts. A motion to dismiss is pending.

ii. Third Circuit precedent may be less favorable to plaintiffs than Ninth Circuit precedent. *See Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980) (Constitution protects no "right to a pollution-free environment"), *vacated in part on other grounds sub nom. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

b. Similar suits filed in state courts against state governments

i. *Aji P. v. State of Washington*, No. 18-2-0448-1 SEA (King County (Wash.) Super. Ct. Aug. 14, 2018) (granting defendants' motion for judgment on the pleadings)

1. The kind of opinion that the federal defendants would like to see in *Juliana*?

ii. For information on other cases (e.g., against Florida), see https://www.ourchildrenstrust.org/pending-state-actions.

c. Tort (e.g., public nuisance) suits filed by municipalities vs. energy companies

i. Order dismissing N.D. Cal. cases (*City of Oakland v. BP PLC*, No. 3:17-cv-06011-WHA (Jun. 25, 2018)) – on appeal to Ninth Circuit.

ii. Remand order in other N.D. Cal. cases (*County of San Mateo v. Chevron Corp.*, No. 3:17-cv-04929-VC, Dkt. No. 223 (Mar. 16, 2018) – on appeal to Ninth Circuit.

iii. Order dismissing S.D.N.Y. case (*City of New York v. BP P.L.C.*, No. 1:18-cv-00182-JFK (Jul. 19, 2018)) – on appeal to Second Circuit.

iv. Several other cases are pending in various federal courts.

v. On Sept. 5, 2018, DOJ filed a notice of supplemental authority in *Juliana* that cited the *City of New York* decision and the *Aji P.* decision as supporting the government's separation-of-powers argument (and also cited *Aji P.* as supporting the government's argument that there is no fundamental right to a stable climate).

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DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*, Case No. 6:15-CV-01517-TC

Plaintiffs,

v.

Expedited Hearing Requested

UNITED STATES OF AMERICA, *et al.*,

Defendants.

DEFENDANTS' MOTION TO STAY DISCOVERY AND TRIAL PENDING SUPREME COURT REVIEW

Defendants hereby move this Court to stay any further discovery and the trial pending consideration of the government's forthcoming petition for a writ of mandamus, or in the

alternative for a writ of certiorari, to be filed in the United States Supreme Court.[1] As set forth fully in the accompanying memorandum of law, a stay is warranted because Defendants are likely to succeed on their petition to the Supreme Court, Defendants will be irreparably harmed absent a stay, Plaintiffs will not be harmed by a stay, and the public interest would be well-served by a stay. To ensure that the Ninth Circuit and Supreme Court have adequate time to consider, if necessary, the government's requests for relief before trial is set to begin on October 29, 2018, the United States seeks expedited consideration of this motion. Absent a stay from this Court, the government plans to seek a stay from the Ninth Circuit next week.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY

Procedural History

This Court is familiar with the background and procedural history of this case. As relevant here, Plaintiffs brought this action in August 2015 against President Obama (for whom President Trump was later substituted), the Executive Office of the President, three sub-components within that office, and eight departments and federal agencies, for allegedly violating their rights under the Constitution and a purported federal public trust. Am. Compl., ECF No. 7. Plaintiffs ask this Court to, *inter alia*, order Defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." *Id.*, Prayer for Relief ¶ 7. Defendants moved to dismiss Plaintiffs' claims on several grounds, including lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim on a public trust theory. ECF No. 27. In November 2016, this Court

[1] Pursuant to Local Rule 7-1(a), the parties conferred on this motion and the request for expedition. Plaintiffs oppose this motion and the request for expedited consideration.

denied that motion, and later declined to certify its order for interlocutory appeal. Nov. 10, 2016 Opinion and Order, ECF No. 83; June 8, 2017 Order, ECF No. 172.

Defendants petitioned the Ninth Circuit for a writ of mandamus. Petition for Writ of Mandamus, ECF No. 177. The court of appeals stayed the litigation for seven-and-a-half months, but ultimately denied the petition without prejudice. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018). Specifically, that court "decline[d] to exercise [its] discretion to grant mandamus relief at [that] stage of the litigation," in part because no discovery orders had yet been filed. *Id.* at 835. That court explained, however, that "[c]laims and remedies often are vastly narrowed as litigation proceeds," and that it had "no reason to assume this case will be any different." *Id.* at 838. The Ninth Circuit also reiterated that Defendants could continue to "raise and litigate any legal objections they have," including by "seek[ing] protective orders," moving to "dismiss the President as a party," and seeking "summary judgment on the claims." *Id.* at 835-38. That court added that Defendants remain free to "seek[] mandamus in the future." *Id.* at 838.

Following the Ninth Circuit's decision on the petition for a writ of mandamus, the United States filed a Motion for Judgment on the Pleadings with this Court, ECF No. 195, wherein it asserted that Plaintiffs' claims should be dismissed in their entirety, both for the reasons set forth in that motion and for the reasons previously set forth in the Motion to Dismiss. *Id.* at 1. The United States also filed a Motion for Summary Judgment, ECF No. 207, wherein it asserted that the Court should enter judgment in favor of the United States on all of Plaintiffs' claims. *Id.* at 30. The United States also moved for a protective order precluding all discovery. Defs.' Mot. for a Protective Order and for a Stay of All Discovery, ECF No. 196. In June 2018, the Court denied the United States' motion for a protective

order. June 29, 2018 Order, ECF No. 300.

In July 2018, following the denial of the motion for a protective order, and while the two dispositive motions were pending, the United States sought relief from both the court of appeals and the Supreme Court. Petition for a Writ of Mandamus and Emergency Mot. for a Stay, ECF No. 308-1; Application for a Stay Pending Disposition by the U.S. Ct. of Appeals for the Ninth Cir., ECF No. 321-1. Both courts denied the requested relief without prejudice. The Ninth Circuit determined that "[a]bsent a specific discovery order, mandamus relief remains premature." July 20, 2018 Op. at 9, ECF No. 326-1. The Supreme Court denied the United States' application "without prejudice" because it was "premature." July 30, 2018 Order in Pending Case, ECF 330-1. The Supreme Court also stated that "[t]he breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.* It instructed this Court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Id.*

The Supreme Court clearly referenced the standard for certification in 28 U.S.C. § 1292(b), which provides: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is *substantial ground for difference of opinion* and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." (emphasis added).

It has been 79 days since the hearing on the government's dispositive motions and 67 days since the Supreme Court noted the need for a "prompt ruling" on those motions. *See* July 18, 2018 Min. of Proceedings, ECF No. 323; July 30, 2018 Order in Pending Case, ECF 330-1.

Trial is scheduled to begin on October 29, 2018, and given the number of witnesses and claims, is expected to last approximately 50 days. April 24, 2018 Minute Order, ECF No. 192; April 2, 2018 Hrg. Tr. 7:22-8:7, ECF No. 191. Nevertheless, the Court has not yet resolved the government's dispositive motions, and has suggested that it has no intention of delaying trial absent an order from a higher court. May 10, 2018 Hrg. Tr. 27:22-25, ECF No. 244 ("Here's – here's the big picture. October 29, 2018, trial starts unless some higher court says no. So from this perspective, October 29, 2018, the trial starts."). Absent reconsideration by this Court, the government cannot wait any longer to seek such relief.

Because the United States will ask the Supreme Court to issue a stay pending its resolution of the government's forthcoming petition, we are asking this Court for a stay as well. *See* Supreme Court Rule 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.").

Argument

Whether to issue a stay turns on four factors: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The first two factors are "the most critical." *Id.* at 434. The balance of equities and consideration of the public interest merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, all factors counsel strongly in favor of a stay of further discovery and trial pending the Supreme Court's consideration of the government's forthcoming petition.

I. The United States is likely to succeed on its petition to the Supreme Court.

The Supreme Court is likely to direct this Court to dismiss this case. Plaintiffs' claims are fundamentally flawed for three independent reasons. First, this litigation is not remotely a "Case" or "Controversy" within the meaning of Article III because: (1) Plaintiffs do not have standing to assert generalized grievances against the diffuse effects of climate change not tied to any specific action by Defendants and not redressable by any authority of a federal court; and in any event, (2) Plaintiffs may not redirect federal environmental and energy policies through the courts rather than the political process by asserting a manifestly wrong fundamental substantive due process right to certain climate conditions.

Second, even if Plaintiffs could bring justiciable claims, they would be required to do so under the Administrative Procedure Act (APA), which requires that Plaintiffs identify and target specific actions or failures to act by the federal agency defendants. The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law" or "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. § 706(2)(A)-(B), and to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The APA thus provides a "comprehensive remedial scheme" for a "person 'adversely affected . . . by agency action" or alleged failure to act with respect to regulatory requirements and standards, permitting, and other administrative measures. *Western Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) (citation omitted), *cert. denied*, 559 U.S. 1106 (2010); *see Wilkie v. Robbins*, 551 U.S. 537, 552-554 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions"); *Webster v. Doe*, 486 U.S. 592, 607 n* (1988) (Scalia, J., dissenting) (explaining that the APA "is an umbrella statute governing

judicial review of all federal agency action" and that "if review is not available under the APA it is not available at all"). As currently formulated, Plaintiffs' claims cannot proceed because the APA allows only for challenges to "circumscribed, discrete" final agency action, and not the sort of "broad programmatic attack" on agency policies that Plaintiffs assert here. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 64 (2004) ("*SUWA*"); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). And a suit challenging an agency action must seek review based on the administrative record of that particular agency action, not a record developed in the court and a trial *de novo* in court. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

Third, Plaintiffs' claims of a fundamental right to a particular climate system and a never-before-recognized public trust obligation on the federal government plainly fail. The Supreme Court has instructed courts considering novel due process claims to "exercise the utmost care whenever . . . asked to break new ground in this field lest the liberty protected by the Due Process Clause be subtly transformed" into judicial policy preferences, and important issues placed "outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quotation marks and citation omitted).

Plaintiffs ask this Court to do precisely what the Supreme Court instructed courts not to do, *i.e.* to transfer a subject from the arena of public debate and legislative action into the arena of judicial policy preferences via the Due Process Clause. The Due Process Clause protects fundamental individual rights and liberties, which are "deeply rooted in this Nation's history and tradition." *Id.* at 720-21 (citation omitted). This Court's recognition of an "unenumerated fundamental right" to a "climate system capable of sustaining human life"—an asserted right not personal or distinct to the handful of plaintiffs in this case but seemingly running to every person in the United States—lacks any pedigree in the nation's history or tradition. *cf. Obergefell v.*

Hodges, 135 S. Ct. 2584, 2602 (2015) (recognizing a fundamental right to same-sex marriage as "fundamental as a matter of history and tradition").

Plaintiffs' public trust claim is similarly unfounded. The roots of a public trust concept "trace to Roman civil law" and "can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws. . ." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). In has been relied upon under state law in holding that the sovereign "owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 718 (Cal.) *cert. denied*, 464 U.S. 977 (1983) (citation and internal quotation marks omitted). Because the proposition of a public trust is purely a matter of *state* law that pertains only to *state* functions, *PPL Montana*, 565 U.S. at 603, Plaintiffs' efforts to invoke such a common-law concept to support a cause of action against the federal government's regulation of the fossil fuel industry and its alleged effects on the atmosphere, where no other court has done so, clearly fails.

Permitting these fatally defective claims to proceed to a 50-day trial in a case brought by a handful of individuals would impermissibly intrude on the Executive branch's authority to consider and formulate federal policy through agency procedures such as notice and comment that allow all interested parties to participate. And such a trial would violate statutory limitations on judicial review of agency decisionmaking imposed by the APA. For all of these reasons, the Supreme Court is likely to direct this Court to dismiss the case.

II. The balance of equities counsels in favor of a stay.

The remaining stay factors also weigh strongly in favor of staying discovery and trial pending the government's forthcoming petition.

A. Without a stay, the United States will be irreparably harmed.

The United States' harm is ongoing. Absent a stay, the government will be forced to proceed with a 50-day trial that is fundamentally inconsistent with Article III and the separation of powers under the Constitution, as well as the procedures Congress has prescribed in agencies' organic statutes and the APA for agencies to consider factual and legal issues concerning major policies and for the courts to review their determinations. Trial would force the government to address climate policy not through APA procedures and other agency actions authorized by statutes such as the Clean Air Act, but instead through a judicially-supervised and as-yet unknown process imposed by this Court.

That is improper. Plaintiffs' efforts to require the defendant agencies to develop and implement a comprehensive, government-wide energy policy outside of the congressionally-prescribed statutory framework runs roughshod over fundamental separation of powers principles. It violates the vesting of "legislative Power" in the Congress, U.S. CONST. art. I, § 1, and to the extent it seeks to require the President and Executive agencies to develop and implement such policies, it violates the Constitution's vesting of "executive Power . . . in a President of the United States of America." *Id.*, art. II, § 1, cl. 1. The APA limits judicial review to the administrative record of action taken within the scope of an agency's authority. 5 U.S.C. § 706. And as the Supreme Court recognized, even before enactment of the APA, permitting an agency's "finding to be attacked or supported in court by new evidence" as Plaintiffs seek to do here, improperly "substitute[s] the court for an administrative tribunal." *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444 (1930). That would allow this Court to "usurp[] the agency's function." *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946). Yet no part of Plaintiffs' claims purports to challenge governmental action under the APA.

Absent a stay, the United States will be forced to proceed with a 50-day trial concerning Plaintiffs' efforts to obtain a decree that a court has no authority to enter—all the while violating its obligations under the APA and transgressing the separation of powers under the Constitution.

B. Plaintiffs will not be harmed by a stay.

Plaintiffs can make no credible claim that a relatively brief stay to allow the Supreme Court to consider the United States' petition will cause them irreparable harm. Plaintiffs' alleged injuries stem from the cumulative effects of CO_2 emissions, hundreds of years in the making. *See* Expert Report of James E. Hansen at 8, ECF No. 274-1. As one of Plaintiffs' own experts recognizes, climate change "is not something that can be stopped in the near term." Decl. of Harold R. Wanless ¶ 18, ECF No. 275; *see also* Expert Report of Eric Rignot, ECF No. 262-1 at 2 ("It is not clear how much of this sea level rise can be avoided by slowing down climate warming or even cooling the planet again."). A brief stay to allow the Supreme Court to consider whether a lawsuit is the appropriate means to address climate change will not appreciably harm Plaintiffs.

Conclusion

For the foregoing reasons, this Court should stay proceedings pending the resolution of the United States' forthcoming petition for a writ of mandamus, or in the alternative for a writ of certiorari, to be filed in the United States Supreme Court.

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Respectfully submitted,

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