No. 18-505

IN THE

Supreme Court of the United States

IN RE UNITED STATES, ET AL.,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

1. Whether, in this Fifth Amendment substantive due process case involving the rights of young U.S. citizens, the Government has satisfied the requirements for the drastic and extraordinary remedy of a writ of mandamus to the Ninth Circuit Court of Appeals or the district court requesting dismissal of this case prior to final judgment where: (i) the Government has repeatedly presented the same arguments in successive, unsuccessful attempts at early appeal contrary to the final judgment rule; (ii) the Government will suffer no cognizable harm in proceeding to trial; (iii) any interlocutory and final orders of the district court will be subject to review after final judgment; (iv) the interlocutory orders of the district court and Ninth Circuit are well-supported in law; (v) interlocutory determinations on the merits and justiciability are neither clearly nor indisputably erroneous where this Court has found they present "substantial grounds for difference of opinion"; and (vi) the circumstances here differ from those in which this Court has ever issued mandamus relief?

COUNTER STATEMENT OF PARTIES TO THE PROCEEDINGS

The Government correctly identifies the parties to the proceedings, with one exception. The district court dismissed President Trump from these proceedings without prejudice. *See* Pet. App. 77a.[1] Accordingly, President Trump is not a party to the proceedings.

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[1] Plaintiffs refer to the Government's Appendix as "Pet. App."; the district court docket, *Juliana v. United States*, No. 6:15-cv-0157-AA (D. Or.), as "D. Ct. Doc."; the docket for the Government's First Ninth Circuit Petition for writ of mandamus, *In re United States*, No. 17-71692 (9th Cir.), as "Ct. App. I Doc."; the docket for the Government's Second Ninth Circuit Petition for writ of mandamus, *In re United States*, No. 18-71928 (9th Cir.), as "Ct. App. II Doc."; the docket for the Government's Third Ninth Circuit Petition, *In re United States*, No. 18-72776 (9th Cir.), as "Ct. App. III Doc."; the Supreme Court docket for the Government's First Application for stay, *United States v. U.S. Dist. Court for Dist. of Oregon*, No. 18A65, as "S. Ct. I Doc."; the Supreme Court docket for the Government's Instant Petition for writ of mandamus, *In re United States*, No. 18-505, as "S. Ct. II Pet. Doc."; the Supreme Court docket for the Government's Second Application for stay, *In re United States*, No. 18A410, as "S. Ct. II App. Doc."; the docket for the Government's Fourth Ninth Circuit Petition for writ of mandamus, *In re United States*, No. 18-7304 (9th Cir.), as "Ct. App. IV Doc."; the Government's Instant Petition for writ of mandamus as "Pet."; and the Appendix to this brief as "App."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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STATEMENT

1. Twenty-one Youth Plaintiffs, a youth organization known as Earth Guardians, and Dr. James Hansen, on behalf of future generations, commenced this action on August 12, 2015 and filed the First Amended Complaint ("FAC") on September 10, 2015. D. Ct. Doc. 7. Plaintiffs allege the Government's systemic, affirmative ongoing conduct, persisting over decades, in creating, controlling, and perpetuating a national fossil fuel-based energy system, despite long-standing knowledge of the resulting destruction to our Nation and profound harm to these young citizens, violates Plaintiffs' constitutional due process rights. Specifically, Plaintiffs allege the Government's conduct violates their substantive due process rights to life, liberty, and property, including recognized unenumerated rights to personal security and family autonomy, and has placed Plaintiffs in a position of danger with deliberate indifference to their safety under the state-created danger theory. *Id.* ¶¶ 277-89, 302-06. Further, Plaintiffs allege the Government's conduct violates their rights as children to equal protection by discriminating against them with respect to their fundamental rights and as members of a quasi-suspect class. *Id.* ¶¶ 290-301. Finally, apart from claims of deprivation of rights already recognized by this Court as fundamental, Plaintiffs allege infringement of two fundamental rights this Court has not addressed under *Washington v. Glucksberg*, 521 U.S. 702 (1997): the Government's conduct violates their rights as beneficiaries to public trust resources under federal control, and deprives them of a climate

system capable of sustaining human life. *Id.* ¶¶ 277-89, 302-10. With respect to all claims, the FAC seeks a declaration of Plaintiffs' rights and the violation thereof, and an order directing the Government to cease its violations, prepare an accounting of the Nation's greenhouse gas emissions, and prepare and implement an enforceable national remedial plan to cease and rectify the constitutional violations by phasing out fossil fuel emissions and drawing down excess atmospheric CO_2, as well as such other and further relief as may be just and proper. *Id.* at Prayer.

2. On November 17, 2015, the Government moved to dismiss Plaintiffs' claims, arguing lack of standing, failure to state constitutional claims, and nonexistence of a federal public trust doctrine. D. Ct. Doc. 27-1.

3. On November 10, 2016, Judge Ann Aiken, then Chief Judge for the District of Oregon, refused to dismiss the FAC. Pet. App. 104a-170a. Judge Aiken recognized that, "[a]t its heart, this lawsuit asks this Court to determine whether [the Government] ha[s] violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." *Id.* at 122a. Regarding redressability and remedy, the district court acknowledged that it "would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct [the Government] to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so." *Id.* at 123a. Ultimately, Judge Aiken concluded that "speculation about the difficulty of crafting a

remedy could not support dismissal at this early stage." *Id.* at 124a (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

4. On January 13, 2017, the Government filed its Answer, admitting the following:

- the Government "permits, authorizes, and subsidizes fossil fuel extraction, development, consumption, and exportation";
- "fossil fuel extraction, development, and consumption produce CO_2 emissions and . . . past emissions of CO_2 from such activities have increased the atmospheric concentration of CO_2";
- "the consequences of climate change are already occurring and, in general, those consequences will become more severe with more fossil fuel emissions";
- "'business as usual' CO_2 emissions will imperil future generations with dangerous and unacceptable economic, social, and environmental risks . . . . [T]he use of fossil fuels is a major source of these emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path";
- United States' emissions comprise "more than 25 percent of cumulative global CO_2 emissions"; and
- "climate change is damaging human and natural systems, increasing the risk of loss of life . . . current and projected atmospheric concentrations of GHGs . . . threaten the public health and welfare of current and

> future generations, and this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change."

D. Ct. Doc. 98 at ¶¶ 7, 10, 150, 151, 213; *see also* D. Ct. Doc. 146 at 2-4.

5. On June 9, 2017, the Government filed its first petition for writ of mandamus with the Ninth Circuit. Ct. App. I Doc. 1 ("First Ninth Circuit Petition"). As it does here, the Government claimed separation of powers harms from general participation in this litigation and sought dismissal on the basis of standing, the merits of Plaintiffs' constitutional and public trust claims, and failure to identify a cause of action, such as a claim under the Administrative Procedure Act ("APA"). *Id.*

6. On July 25, 2017, a panel of the Ninth Circuit stayed proceedings in the district court pending consideration of the Government's First Ninth Circuit Petition. Ct. App. I Doc. 7.

7. On August 25, 2017, Judges Aiken and Coffin submitted a letter brief to the Ninth Circuit, explaining that "permitting this case to proceed to trial will produce better results on appeal by distilling the legal and factual questions that can only emerge from a fully developed record." Ct. App. I Doc. 12 at 3.

8. On August 28, 2017, Plaintiffs answered the First Ninth Circuit Petition. Ct. App. I Doc. 14-1. On September 5, 2017, over 90 *amici* filed eight *amicus* briefs in support of Plaintiffs in the Ninth Circuit. Ct. App. I Doc. 17, 19-24, 30 (available at 2017 WL 4157181-86, 4157188). The *amici*

included over 60 legal scholars and law professors, many of whom are teaching about this case in their classes due to its constitutional import. App. 15a-16a.

9. On March 7, 2018, Chief Judge Thomas authored the order denying the First Ninth Circuit Petition, ruling the Government had not satisfied any of the factors for mandamus. Pet. App. 91a-103a. The panel held that "the absence of controlling precedent in this case weighs strongly against a finding of clear error"; that any potential merits errors were correctable through the ordinary course of litigation; and that the district court's denial of the motion to dismiss did not present the possibility that the issues raised would evade appellate review. *Id.* at 100a-101a. The panel emphasized that mandamus is not to be "'used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial.'" *Id.* at 96a (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). Finally, the panel was "not persuaded" by the Government's argument, repeated here, that "holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten the separation of powers," concluding "simply allowing the usual legal processes to go forward will [not] have that effect in a way not correctable on appellate review." *Id.* at 99a. The Ninth Circuit panel noted: "There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of issues by the trial courts." *Id.* at 102a. The Ninth Circuit panel stated that

challenging objectionable discovery orders and a motion to dismiss the President were among the tools available to the Government going forward. *Id.* at 98-99a.

10. On April 12, 2018, the district court set this matter for trial to commence October 29, 2018. As a result of meet and confer efforts, the parties agreed jointly to request 50 trial days. App. 25a; D. Ct. Doc. 191 at 8:3-5 (Apr. 12, 2018 Tr.).

11. Following denial of the First Ninth Circuit Petition, the Government did not seek immediate review with this Court. Rather, the Government filed a series of motions in the district court, each presenting duplicative legal arguments previously rejected by the district court on the motion to dismiss and by the Ninth Circuit on mandamus, except regarding dismissal of the President. The Government purported to argue for the first time that the APA presents the exclusive means for bringing constitutional challenges to agency conduct.[2]

12. First, on May 9, 2018, the Government moved for judgment on the pleadings under

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[2] The Government made materially identical arguments addressing the APA and Plaintiffs' alleged failure to identify a cause of action in previous motions in the district court and in its First Ninth Circuit Petition. *See* D. Ct. Doc. 211-1 at ¶ 3 (Government's application for extension of time to petition for certiorari of denial of First Ninth Circuit Petition, conceding that "[t]he government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal, contending that the district court's order contravened fundamental limitations on judicial review imposed by . . . the Administrative Procedure Act."); *see also* D. Ct. Doc. 208 at 7-14 (setting forth excerpts from previous briefing).

Federal Rule of Civil Procedure 12(c), "reassert[ing] [its] earlier arguments" and slightly repackaged, previously rejected defenses. D. Ct. Doc. 195 at 1, 6. Simultaneously, the Government sought a protective order and stay of all discovery pending resolution of its Rule 12(c) motion. D. Ct. Doc. 196.

13. On May 22, 2018, with discovery ongoing, the Government filed a motion for partial summary judgment, again arguing that Plaintiffs lack standing, that the two newly recognized rights of public trust and a climate system that sustains human life fail on the merits, that Plaintiffs' claims must be pled under the APA, and that separation of powers concerns bar Plaintiffs' claims and requested relief. D. Ct. Doc. 207. The Government did not move for summary judgment on Plaintiffs' other constitutional claims, including due process rights recognized as fundamental by this Court under the Bill of Rights. Importantly, the Government did not support its motion for partial summary judgment with *any* evidence, contending there were no genuine disputes of material fact despite its denials of material facts in its Answer. *Id.*; *see also* D. Ct. Doc. 98. As to all issues other than standing, the Government asserted entitlement to judgment purely as a matter of law, rendering such arguments both substantively and procedurally duplicative of arguments rejected in its motion to dismiss and First Ninth Circuit Petition. *See* Pet. 8. In response, Plaintiffs submitted over 36,000 pages of evidence supporting standing and their claims, consisting of publicly available documents, Plaintiff declarations, and expert declarations from Nobel

laureate economists and scientists, award-winning historians, a former head of the Council on Environmental Quality, and the top climate scientists in the world, including the former head of NASA's Goddard Institute for Space Studies, which showed specific injuries to Plaintiffs linked to fossil fuel-induced climate change that the Government is substantially responsible for causing, and scientific evidence of the ability to redress these injuries. D. Ct. Doc. 255; D. Ct. Doc. 369 at 34; App. 18a.

14. On May 24, the Government applied to this Court for an extension to file a petition for certiorari review of the denial of its First Ninth Circuit Petition. D. Ct. Doc. 211-1. Justice Kennedy granted the application on May 29, 2018, Ct. App. I Doc. 70, and granted the Government's application for a further extension (filed on June 25), up to and including August 4, 2018. Ct. App. I Doc. 71.

15. On June 29, 2018, Judge Aiken denied the Government's motion for protective order and stay of all discovery. D. Ct. Doc. 300. On July 5, 2018, the Government filed its second petition for mandamus in the Ninth Circuit challenging that order. Ct. App. II Doc. 1-2 ("Second Ninth Circuit Petition"). As here, the Government *again* sought review of the denial of the motion to dismiss, reproducing the same arguments, *id.*, and *again* claimed unsubstantiated separation of powers harms stemming from general participation in litigation. *Id.* at 41-45. On July 16, 2018, the Ninth Circuit denied the Government's request to stay discovery and trial pending the district court's consideration of the Rule 12(c) and summary judgment motions. Ct. App. II Doc. 9.

16. On July 17, 2018, the Solicitor General filed the Government's first application with this Court. S. Ct. I Doc. 1 ("First Application"). The Government requested this Court stay proceedings in the district court pending the Ninth Circuit's consideration of the Second Ninth Circuit Petition and any further proceedings in this Court. *Id.* The Government requested that "[a]lternatively, the Court should construe this application as a petition for a writ of certiorari to the district court, or as a petition for writ of certiorari seeking review" of the denial of the First Ninth Circuit Petition "and it should order that the district court dismiss this suit . . . ." *Id.* at 38. As here, the Government again contended that the APA presents the exclusive means to challenge unconstitutional agency conduct, that only two of Plaintiffs' claims fail on the merits, and that separation of powers principles prohibit discovery and trial. *Id.*

17. On July 20, 2018, the Court of Appeals denied the Government's Second Ninth Circuit Petition, concluding the Government again failed to satisfy any of the requirements justifying mandamus. Pet. App. 78a-85a. The Ninth Circuit found "[n]o new circumstances justify this second petition," and "[i]t remains the case that the issues the government raises . . . are better addressed through the ordinary course of litigation." *Id.* at 80a-81a. The Ninth Circuit reiterated that "allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." *Id.* at 84a.

18. The same day, the Solicitor General informed this Court of the denial of the Second

Ninth Circuit Petition. App. 1a-14a. The Government reiterated its request that this Court construe the First Application as a petition for writ of certiorari to review denial of the First Ninth Circuit Petition or as a petition for writ of mandamus to the district court. *Id.* at 3a. The Solicitor General additionally requested that the Court "now also construe the application as a petition for a writ of certiorari to review" the denial of the Second Ninth Circuit Petition. *Id.* Thus, with the exception of the district court's decision on the motions for judgment on the pleadings and summary judgment, the Government has previously sought this Court's review of each of the decisions on dispositive motions and petitions in the lower courts.

19. On July 30, 2018, this Court denied the First Application, concluding the "Government's request for relief is premature . . . ." *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018). This Court did not construe the First Application as a petition for writ of certiorari or mandamus as the Government requested and did not grant the writ. The time has lapsed for the Government to properly petition this Court for review of the denial of the First Ninth Circuit Petition. *See* Ct. App. I Doc. 71.

20. On October 15, 2018, the district court granted in part the motions under Rule 12(c) and for summary judgment, thereby narrowing Plaintiffs' case. Pet. App. 1a-77a. The district court determined "[d]ue respect for separation of powers . . . requires dismissal of President Trump as a defendant," "without prejudice." *Id.* at 20a, 23a. The district court also granted the Government summary judgment on Plaintiffs'

Ninth Amendment claim, *id.* at 69a, and rejected Plaintiffs' claim that future generations and children are a suspect class under the Equal Protection Clause. *Id.* at 70a-72a. The district court otherwise denied the Government's motions. Regarding separation of powers, the district court noted the Government "offer[ed] no new evidence or controlling authority on this issue . . . . Nor do they offer a rationale as to why the outcome should be different under the summary judgment standard." *Id.* at 56a-57a. Nonetheless, the district court acknowledged:

> the allocation of power among the branches of government is a critical consideration in this case and [the court] reiterate[s] that, "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy."

Id. at 32a (citation omitted). The district court noted it is entirely speculative at this stage, in a bifurcated trial, as to whether any remedy would transgress separation of powers when a full factual record is needed, when no decision has been made on liability, and when the court will take care not to tread on the policy judgments of the other branches. *Id.* at 34a, 55a, 57a-58a. Addressing Plaintiffs' due process claim regarding a previously unrecognized unenumerated liberty interest, the district court found Plaintiffs had submitted significant evidence on the matter and concluded "further factual development of the record will help this Court and other reviewing courts better reach a final conclusion as to plaintiffs' claims under this theory." *Id.* at 61a.

With respect to all issues raised at summary judgment, the district court concluded genuine issues of material fact existed as to each and that "[t]o allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to the case, which is certainly a complex case of 'public importance.'" *Id.* at 68a. For these reasons, the district court declined to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at 73a-77a.

21. On October 18, 2018, the Government filed the Instant Petition with this Court, repeating arguments presented in the district court, in three petitions for mandamus to the Ninth Circuit, and its First Application to this Court regarding standing, separation of powers, failure to plead claims under the APA, and the merits of two of Plaintiffs' constitutional claims, ignoring Plaintiffs' claims of deprivation of well-recognized fundamental rights and rights of equal protection under the law. The Government also applied to stay district court proceedings pending review of the Instant Petition. S. Ct. II App. Doc. 1 ("Second Application"). On October 19, 2018, Chief Justice Roberts ordered a temporary stay of discovery and trial. *In re United States*, No. 18A410, 2018 WL 5115388 (Oct. 19, 2018). On October 22, 2018, Plaintiffs responded to the Second Application, S. Ct. II App. Doc. 3, and on November 2, 2018, this Court denied the Second Application and lifted the temporary stay. *In re United States*, No. 18A410, 2018 WL 5778259 (Nov. 2, 2018). The Court ruled the Instant Petition "does not have a 'fair prospect' of success because adequate relief may be available" in the Ninth Circuit. *Id.* at *2.

22. On November 5, the Government filed a fourth petition for writ of mandamus in the Ninth Circuit, once again claiming separation of powers harms from general participation in discovery and trial, seeking dismissal and review of each of the district court's orders on its dispositive motions. Ct. App. IV Doc. 1-2. ("Fourth Ninth Circuit Petition").[3] In response, the Ninth Circuit stayed trial in the district court pending consideration of the Fourth Ninth Circuit Petition and ordered further briefing, including a joint report of the parties on the status of all discovery and pretrial proceedings. Ct. App. IV Doc. 3.

23. This case is ready to proceed to trial. App. 26a. The Government will suffer no cognizable burden in the remaining, extremely limited discovery and proceeding through trial. *Id.* at 16a-17a. As of the date of this filing, the parties have completed the following discovery and pre-trial matters:

a. Plaintiffs served expert reports and all of their experts were deposed. *Id.* at 18a. Plaintiffs served rebuttal expert reports and all rebuttal experts were deposed. *Id.* at 19a.

b. The Government served rebuttal expert reports and all but two of its rebuttal experts were deposed.[4] The Government served one sur-

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[3] The Government filed its Third Ninth Circuit Petition on October 5, seeking a stay and making identical arguments as here. Ct. App. III Doc. 1-2. It was denied November 2. Ct. App. III Doc. 5.

[4] The remaining two rebuttal experts are noticed for depositions on November 26 and 27. App. 22a.

rebuttal expert report whose author is scheduled for deposition on November 28. *Id.* at 19a

c. Plaintiffs served one set of interrogatories, to which the Government responded. *Id.* The Government served one set of interrogatories, to which Plaintiffs responded. *Id.*

d. Fifteen of the 21 Youth Plaintiffs were deposed. *Id.* The parties are conferring to schedule prompt depositions of the remaining testifying Plaintiffs. *Id.*

e. There is only one pending discovery motion: Plaintiffs' motion to compel responses to interrogatories regarding which witnesses and exhibits the Government will use at trial. D. Ct. Doc. 388.

f. The parties have filed exhibit lists, witness lists, motions *in limine*, and trial memoranda. D. Ct. Doc. 254, 340, 371, 372, 373, 378-80, 384, 387, 396, 402.

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

24. The only procedural matters prior to commencing trial are the pre-trial conference and rulings on pending pre-trial motions. App. 26a.

25. The Government will suffer no harm cognizable for purposes of mandamus in proceeding through trial. No high-level officials have been deposed or will be called as witnesses. App. 17a. As evidenced by its witness list, the Government's fact witnesses will only authenticate documents and offer testimony in relation to those documents. *Id.*; D. Ct. Doc. 373.

No confidential government documents have been, or will be, disclosed in discovery or trial. App. 17a.

26. Due to the stay of trial, Plaintiffs' pre-arranged plans to attend their trial were cancelled and the travel and lodging for all of Plaintiffs' experts had to be cancelled at great expense and inconvenience. *Id.* at 25a-26a.

REASONS FOR DENYING THE PETITION

Over 135 years ago, this Court explained: "The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary writ, may not be done with it. It only lies when there is practically no other remedy." *Ex parte Rowland*, 104 U.S. 604, 617 (1882); *Kerr v. U. S. Dist. Ct. for N. Dist. of California*, 426 U.S. 394, 404-06 (1976).

The Government seeks review of district court orders denying motions to dismiss, for partial summary judgment, and for judgment on the pleadings. Those orders can be reviewed in the ordinary course of appeal after final judgment, as Congress directed. The Government concedes it "may be able to raise some of the arguments asserted here" after trial. Pet. 28. There are no objectionable discovery or preliminary injunctive relief orders at issue. Only the upcoming trial itself cannot be undone. Yet the mere cost and time of a party defending itself at trial has never been and should never be a basis for mandamus. That is especially so in this case regarding the constitutional rights of young Americans, many without rights of suffrage, where uncontradicted evidence shows the harms they are suffering

caused by the systemic actions of the Government can be remedied by an order of the district court. Any appeals should be heard only after final judgment, when a full factual record has been developed at trial. Denial of this Petition respects the will of Congress and the orderly administration of the courts.

A "drastic and extraordinary remedy" and one of "the most potent weapons of the judicial arsenal," a writ of mandamus may only issue where the petitioner establishes that: (1) she has "no other adequate means to attain the relief" sought, "a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process," (2) the "right to issuance of the writ is 'clear and indisputable,'" and (3) "the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 379-81 (2004) (citations omitted). "The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power.'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

If a party can seek review of an order on direct appeal after entry of final judgment, "it cannot be said that the litigant 'has no other adequate means to seek the relief he desires.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978)). *See Cheney*, 542 U.S. at 379 (mandamus "may not issue so long as alternative avenues of relief remain available"). The Government's Petition, like its prior successive

attempts for early appeals,[5] seeks to upset the judgment of Congress and the independence of the three levels of the federal judiciary in exercising jurisdiction and rendering decisions in an orderly manner. *See Allied Chemical*, 449 U.S. at 35. The final judgment rule:

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge . . . .

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). Here, *none* of the issues determined in the district court's orders will evade review after final judgment: whether there is standing; whether two of several rights asserted are fundamental; and whether the Fifth Amendment provides a right of action against the federal government.

While the Government's Petition seeks mandamus relief, it cites three unpersuasive cases in support of its alternative argument that this Court should grant certiorari to review any or all of the decisions below. Pet. 14-15; *Cheney*, 542 U.S. at 391 (granting certiorari to review court of appeals decision not to grant mandamus on a discovery order requiring disclosure of confidential

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[5] The Government has repeatedly presented materially identical legal arguments in successive, duplicative motions and petitions for early appeal in contravention of the final judgment rule in all three tiers of the federal judiciary, App. 23a, and has moved for a stay in this case a total of twelve times between the three tiers of the judiciary. *Id.* at 24a.

information subject to executive privilege); *De Beers Consol. Mines v. United States*, 325 U.S. 212, 217, 219-20, 222 (1945) (granting certiorari to review a preliminary injunction that indefinitely froze a foreign company's assets, where "no decision of the suit on the merits [could] redress any injury done by the order" because freezing the assets was outside the scope of any final injunction that the district court could have entered in the case); *U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 203-04, 208, 212 (1945) (deciding a jurisdictional conflict between the district court and the Federal Trade Commission to ensure that the initial adjudication of rights before the Commission had not been foreclosed).

A. The Government Has Other Adequate Means To Obtain The Relief It Seeks

To ensure that mandamus remains an extraordinary remedy, and not a substitute for ordinary appeal, the Government must show it lacks adequate alternative means to obtain relief. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 31 (1943). Hardship from delay and an unnecessary and lengthy trial are neither exceptions to the final judgment rule nor a basis for mandamus. *Bankers Life & Cas. Co.*, 346 U.S. at 383; *Roche,* 319 U.S. at 30 (the inconvenience of a trial of "several months' duration" that is "correspondingly costly" is not a basis for mandamus); *see Allied Chemical*, 449 U.S. at 34-36 (mandamus denied where trial court granted new trial after finding error in first 4-week trial). "In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial

decision some interlocutory orders might be erroneous." *Bankers Life & Cas. Co.*, 346 U.S. at 383.

Seeking to use the writ as a substitute for the ordinary appeals process, the Government's Petition fails on the first condition alone. *Cheney*, 542 U.S. at 380-81 (citing *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). The Government seeks dismissal, challenging interlocutory determinations on: (1) justiciability, which has not been conclusively decided by the district court on a full factual record; (2) the viability of Fifth Amendment substantive due process claims to "a climate system capable of sustaining human life" and to public trust resources; and (3) the viability of pleading a constitutional claim outside of the APA. In its November 2 Order, this Court found "adequate relief may be available" in the Ninth Circuit. *In re United States*, 2018 WL 5778259 at *2. Indeed, each issue can be appealed after final judgment and full reversal could be obtained if the district court erred. The Government does not argue otherwise. As this Court observed in *Johnson v. Jones*:

> [28 U.S.C. § 1291] recognizes that rules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence.

515 U.S. 304, 309 (1995) (citations omitted).

Additionally, this Court's November 2 Order stated: "When mandamus relief is available in the court of appeals, pursuit of that option is

ordinarily required." *In re United States*, 2018 WL 5778259 at *2. Since that Order, the Government filed its pending Fourth Ninth Circuit Petition, seeking review of each of the district court's interlocutory orders in contravention of the final judgment rule, including orders already addressed by the Ninth Circuit in its first two mandamus orders. Ct. App. IV Doc. 1-2.

It is a misuse of judicial resources to permit the Government to continuously revisit, in all three levels of the federal judiciary simultaneously, its entire defense of the case, which it can raise on appeal of final judgment. The Government concedes it "may be able to raise some of the arguments asserted here" after trial, without identifying *a single cognizable issue* it would be precluded from raising after final judgment. Pet. 28-29. Adequate means to obtain relief will not be precluded by this Court's denial of the Government's Petition. *Catlin v. United States*, 324 U.S. 229, 236 (1945) ("denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable"); *cf. In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 20-21, 25 (1st Cir. 1982) (no adequate post-trial relief for Supreme Court Justices forced to assume roles of partisan advocates, undermining their role as judges and institutional neutrality of the judiciary). As the Court held in *Roche*, 319 U.S. at 27, here, "any error which [the district court] may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment and by this Court by writ of certiorari."

Asserting it will suffer irreversible harm not redressable on final judgment, the Government argues, without citing any supporting evidence or applicable authority, that participating in trial will "require agencies to take official positions on factual assessments and questions of policy concerning the climate through the civil litigation process . . . ." Pet. 30. Nothing in the record supports this statement. Plaintiffs have not requested the Government to "take official positions" at trial. Rather, Plaintiffs seek review of the Government's *existing* fossil fuel energy system and the effect of already formulated and executed policies and actions comprising it. The evidence at trial will be nothing more than what is already publicly available regarding the Government's pre-existing policy positions in numerous publicly available government documents. App. 18a. Plaintiffs have not deposed any high level government officials and will not be calling any federal employees to "take official positions" of the Government. *Id.* at 17a; *cf. In re Dep't of Commerce, et al.*, 586 U.S. ___, 2018 WL 5259090 (2018) (staying deposition of Commerce Secretary Wilbur Ross). The Government will suffer no substantive, cognizable harm whatsoever in proceeding to trial.

No authority supports the argument that mere participation in trial constitutes rulemaking under the APA. The Government misconstrues *Wong Yang Sung v. McGrath*, which held *agency adjudications* must conform to APA provisions governing the same. 339 U.S. 33 (1950). The Court explained the APA was enacted to prevent certain "evils" related to the expansive functions and authority of the growing multitude of federal

agencies, including their serious impacts on private rights. *Id.* at 37-45. *Wong Yang Sung* makes clear the APA does *not* limit constitutional rights or review of constitutional claims; it acts instead as a limit on expansive federal agency authority to act as both legislator and judge. *Id.* at 49-50. Thus, the very purposes of the APA would be undermined if it were construed to insulate agencies from trial and judicial review of constitutional claims. Indeed "to so construe the . . . Act might . . . bring it into constitutional jeopardy." *Id.* at 50. *Perez v. Mortgage Bankers Association* held only that courts may not impose additional procedural requirements for agency rulemaking, which Plaintiffs do not seek. 135 S. Ct. 1199, 1207 (2015); *see also id.* at 1213, 1215-21 (Thomas, J., concurring) (explaining "constitutional concerns" of transferring judicial power to executive agency, "permit[ting] precisely the accumulation of governmental powers that the Framers warned against.").

The Government's novel claim that participating in trial alone violates separation of powers would upend our system of checks and balances and finds no support in law. *See* Pet. 30-31; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 443-44 (1930) (acknowledging "claims of constitutional right" are different); *cf. Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) (no constitutional claim) and *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 710 (1963) (same).

Conjecture about future remedies, contrary to express statements in the district court's orders, is not a basis for mandamus. As the district court noted: "Plaintiffs point to various statutory

authorities by which they claim federal defendants could affect the relief they request." Pet. App. 53a (citations omitted). For instance, Congress has already authorized the Government to create a "coordinated national policy on global climate change" and directed that "[n]ecessary actions must be identified and implemented in time to protect the climate." *Massachusetts v. EPA*, 549 U.S. 497, 508 (2007) (citing 15 U.S.C. §§ 1103(b), 1102(4)). The Government also has authority to coordinate national energy planning. 42 U.S.C. §§ 7112, 7321. The Government seeks preemptive review of a decision not yet even made. Even if the district court ordered a remedy that exceeded its jurisdiction, that order would be immediately reviewable, with no chance of unavoidable irreparable harm.

On this factor alone, the Petition should be denied.

B. The Government Has No Clear and Indisputable Right to Relief

This Court has found a clear and indisputable right to relief before final judgment in extremely rare circumstances involving protecting confidential information of the executive, *Cheney*, 542 U.S. 367, protecting the executive's ability to conduct foreign relations with a friendly sovereign state, *Ex parte Republic of Peru*, 318 U.S. 578 (1943), persistent disregard by a district court of the Rules of Civil Procedure necessitating supervisory mandamus, *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), and failure by a district court to issue a warrant for a person properly indicted for a criminal offense, *Ex parte U.S.*, 287 U.S. 241, 249 (1932). To Plaintiffs' knowledge,

this Court has never found a clear and indisputable right to relief prior to final judgment regarding Article III standing, interpretation of the liberty prong of the Due Process Clause, or on the issue of whether there is an independent right of action under the Fifth Amendment. The Government cites no cases to the contrary. This Court routinely addresses those types of issues after final judgment as provided by Congress. 28 U.S.C. § 1291. "[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin*, 324 U.S. at 236; *Johnson*, 515 U.S. at 315-18 (denial of summary judgment due to an issue of material fact is ordinarily not a final judgment and not a basis for an interlocutory appeal).

This Court has already found that both the "striking" breadth of Plaintiffs' claims and their justiciability presents "substantial grounds for difference of opinion." *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018); *In re United States*, 2018 WL 5778259 at *1. That there are "substantial grounds for difference of opinion" on these issues indicates the Government's right to issuance of the writ is clearly not "indisputable." Mere doubt as to the district court's subject matter jurisdiction is not enough to invoke this Court's writ power. *Ex parte Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 275-76 (1921). The Government has not argued that Plaintiffs' Fifth Amendment claims of infringement of well-established fundamental rights or of discrimination cannot proceed. Thus, any piecemeal review of the district court's interlocutory orders regarding newly recognized rights, even if found to be clearly and indisputably

erroneous, would not result in the dismissal the Government seeks. Finally, the district court and the Ninth Circuit relied upon clear precedent of the Ninth Circuit and this Court in holding that Plaintiffs' Fifth Amendment claims need not be brought via the APA. The Government's APA arguments are the novel ones, lacking supporting precedent. Pet. App. 23a-31a.

1. Justiciability

This is not a case challenging government conduct under a single statutory provision, but the systemic deprivation of unalienable rights of American children.[6] The Article III analysis cannot be divorced from the rights at stake, or the deep body of evidence under review in the district court, which the Government entirely ignores. Constitutional deprivations, by their nature, can be experienced by many people, particularly when injuries to fundamental rights result from systemic government action. In *Brown v. Board of Education,* it was not just Linda Brown (age 9) and her co-plaintiffs who were harmed, but all African American children in segregated schools subjected to government-sanctioned racial discrimination. 349 U.S. 294 (1954). In *West Virginia State Board of Education v. Barnette*, it was not just Marie and Gathie Barnette (ages 9 and 10) whose harms were redressed, but all students the state compelled to salute the flag and speak against their will. 319 U.S. 624, 634-35

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[6] *Cf. Massachusetts v. EPA*, 549 U.S. 497, 535-36, 538-39 (2007) (Roberts, C.J., dissenting) (disputing causation and redressability of one agency's single failure to "promulgate new motor vehicle greenhouse gas emissions standards.").

(1943). Article III standing is not meant to prohibit cases where many people are harmed, which would eliminate all actions affecting a class of people. Rather it ensures the party seeking redress "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker*, 369 U.S. at 204. The uncontroverted evidence in the district court shows Plaintiffs are *already harmed* by the challenged government system and have stakes of life, liberty, and property in the outcome. *See e.g.* Pet. App. 5a-6a, 37a-43a. That redress of their constitutional deprivations might also redress harm to those similarly situated, as was true for other African American children after *Brown* or any child forced to speak the Pledge of Allegiance after *Barnette*, cannot be a bar to justiciability of Plaintiffs' claims.

Whether adequate injuries, causal nexus, and redressability exist is not a determination this Court can make without reference to the evidence at trial in the district court, nor one it should make before final judgment. In denying summary judgment, the district court, entrusted with reviewing the facts of this case, concluded Plaintiffs' sworn affidavits, extensive expert declarations, and government documents provided sufficient evidence of "genuine issues of material fact," precluding summary judgment. Pet. App. 43a, 49a-51a, 55a. Without considering the over 36,000 pages of evidence Plaintiffs filed in this case, this Court cannot reasonably find clear and indisputable error in the district court's

conclusion that Plaintiffs proffered evidence of a genuine issue of material fact regarding standing. *See Massachusetts v. EPA*, 549 U.S. at 521-26 (majority), 541-45 (Roberts, C.J., dissenting) (showing even as to injuries from climate change, deciding Article III standing is a deeply factual analysis; reviewing scientific evidence now 11 years old); S. Ct. I Doc. 4 at 32-34 (setting forth additional arguments supporting standing).

Notwithstanding Defendants' argument regarding the "courts at Westminster," Pet. 20-22, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The canon of this Court's most celebrated cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g.*, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (systemic racial injustice in school systems); *Hills v. Gautreaux*, 425 U.S. 284 (1976) (systemically segregated public housing system created by state and federal agencies); *Brown v. Plata*, 563 U.S. 493 (2011) (systemic conditions across state prison system).

2. Constitutional Claims

The Government conspicuously ignores Plaintiffs' other Fifth Amendment claims, focusing only on these young American's implied liberty rights not to be deprived of a climate system that will sustain their lives, and to use public trust resources. Interlocutory review would

not dispose of the case because Plaintiffs' claims of infringement of well-established due process and equal protection rights would still remain and the same body of evidence bears on all claims at trial. Pet. App. 61a, 69a-73a; App. 25a.

This Court's decision in *Barnette*, reversing adverse precedent adopted only three years prior, reflects the careful examination due in cases involving fundamental rights. 319 U.S. at 636. Here, a question for trial is whether the Government can continue to impose a perilous energy system knowingly harming life, liberties, and property of America's youth without abating the irreversible dangers. *Barnette* recognized that the First Amendment provides "a more definite test" on judicial review than the "vagueness" of the due process clause of the Fifth and Fourteenth Amendments. *Id.* at 639-40. That "vagueness" only underlines the lack of "clear and indisputable" error as to the district court's preliminary conclusions regarding newly recognized liberty interests – a matter the district court is still wrestling with, which will be informed upon a full empirical and historical record at trial. Pet. App. 59a-61a, 68a-69a ("To allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to the case, which is certainly a complex case of 'public importance.'"); *Id.* at 138a-143a, 147a-167a.

Without conducting any analysis under *Washington v. Glucksberg*, 521 U.S. 702 (1997), or pointing to any history, tradition, or evidence related to liberty, the Government rejects the implied fundamental rights these children assert as essential to their bundle of liberties, to their

property, and indeed to their lives and ability to survive. Pet. 25-27. Instead, the Government invokes *Obergefell v. Hodges*, incorrectly asserting that decision turned on a right to "same-sex marriage," rather than the "right to marry," which this Court found was fundamental and extended to *everyone*. 135 S. Ct. 2584, 2602 (2015); Pet. 26. Fundamental rights are fundamental because they do "run indiscriminately to every individual in the United States." *Contra* Pet. 26 (stating opposite). The evidence at trial will show that a stable climate system is a fundamental attribute of American life and liberty.

Even under an originalist analysis, history and tradition shows the Nation's founders believed the inalienable rights claimed by these children were implicit in ordered liberty and essential to the health and longevity of the new Nation. As James Madison said in a celebrated speech: "Animals, including man, and plants may be regarded as the most important part of the terrestrial creation . . . . To all of them, *the atmosphere is the breath of life. Deprived of it, they all equally perish*."[7] At the core of the Constitution is a system of intergenerational ethics focused on preservation of the human species. D. Ct. Doc. 60 at 10 (citing John Locke, *Two Treatises of Government* ¶¶ 7, 16, 134, 135, 149, 159, 171, 183 (1689) (Peter Laslett ed., 2d ed. 1967)).

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[7] "Address to the Agricultural Society of Albemarle, 12 May 1818," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Madison/04-01-02-0244; *see also* D. Ct. Doc. 269-1 (Wulf Expert Report), at 11-15.

The district court committed no clear and indisputable error in allowing Plaintiffs' public trust claim to proceed to trial. An inherent obligation incumbent on every government, including the federal government, "by virtue of its sovereignty" and as such, the public trust doctrine and its concomitant powers and duties "cannot be relinquished." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453, 455 (1892). Numerous decisions, and government documents that will be presented at trial, recognize the public trust doctrine's application to the federal government. Pet. App. 155a-162a; *see PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012) (citing D. Slade, Putting the Public Trust Doctrine to Work 3-8, 15-24 (1990), which states at 4: "there are over fifty different applications of the doctrine, one for each State, Territory of Commonwealth, *as well as the federal government*." (emphasis added)); *see also* S. Ct. I Doc. at 38-42 (setting forth additional arguments regarding the newly recognized liberty interests at issue).

3. The APA Is Not the Sole Means of Review for Constitutional Challenges to Agency Conduct[8]

In arguing the APA is the sole means of reviewing unconstitutional executive agency conduct (Pet. 22-25), the Government fails to cite this Court's precedent, which makes clear that constitutional claims against executive agencies

[8] The Government argues for the first time, in a footnote, that challenges to regulatory measures under the Clean Air Act must be brought in a court of appeals. This Court should not entertain arguments the Government failed to raise in the lower courts.

and officials can be brought directly under the Fifth Amendment, independent of the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796-801, 803-06 (1992); *Hills*, 425 U.S. 284; *Webster v. Doe*, 486 U.S. 592, 601, 603-05 (1988); *Davis v. Passman*, 442 U.S. 228, 243-44 (1979); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *see also* Pet. App. 78a-85a, 23a-31a. No majority of this Court has ever agreed that the APA supersedes the Constitution. *See* S. Ct. I. Doc. 4 at 35-37. The Fifth Amendment provides a right of action for equitable relief from systemic infringements of fundamental rights.

C. Mandamus Relief Is Inappropriate Under These Circumstances

The totality of the circumstances renders mandamus inappropriate. The Government makes no showing that it will suffer any irreparable harm not correctable on appeal. *See* Section A, *supra*. The Government relies on *Cheney* and four circuit court opinions in support of its argument that mandamus relief is appropriate; each case is inapposite. Pet. 31-32.

In *Cheney,* the district court compelled production, from the Vice President and other high-level executive officials, of documents subject to executive privilege – the same documents sought as final relief in the case. 542 U.S. at 381, 388. This Court remanded for further consideration on mandamus because disclosure implicated separation of powers by preventing the executive from maintaining confidential communications. *Id.* at 385, 391. No such confidentiality or order is at issue here.

In re Kellogg Brown & Root, Inc., which overturned a discovery order on mandamus, counsels that mandamus is not "'appropriate under the circumstances'" here, where there has not been a single court order requiring disclosure of confidential communications that could never become undisclosed after final judgment. 756 F.3d 754, 760-61 (D.C. Cir. 2014) (quoting *Cheney*, 542 U.S. at 381). A bench trial in the present action to consider publicly available government evidence, expert testimony, and fact witness testimony does not have "broad and destabilizing effects." *Id.* at 763; *See* S. Ct. II App. Doc. 1 at 31a-259a (no exhibits involving confidential communications). On the contrary, denying Plaintiffs the ability to present evidence on their standing and their constitutional claims, when the district court and the Ninth Circuit have found that a full factual record is necessary for resolution of the claims, would have broad and destabilizing effects on public faith in the judiciary and the responsibility of the district court to first decide cases that come before it. Pet. App. 68a, 102a.

Likewise, in *In re Roman Catholic Diocese of Albany, New York, Inc.,* the Second Circuit issued mandamus to prevent harm to employees and victims from "'the disclosure of highly sensitive personal information'" in documents the district court ordered a defendant (over which it clearly lacked personal jurisdiction) to produce. 745 F.3d 30, 33, 35-36 (2d Cir. 2014).

In *Abelesz v. OTP Bank*, the Seventh Circuit granted mandamus where there was a "complete absence of any arguable basis for exercising general personal jurisdiction" over foreign banks, who faced "intense pressure" to settle when faced

with potential liability amounting to $75 billion in protracted litigation over events occurring 65 years prior *on another continent*. 692 F.3d 638, 645, 651-53 (7th Cir. 2012). The circuit court did not, however, foreclose the important Holocaust claims in a proper forum outside U.S. federal courts. *Id.* at 660. Here, the challenged conduct of the Government is still ongoing within the United States, and there are no damages at issue to press settlement. As this Court previously found, there is reason for differences of opinion regarding the scope and justiciability of Plaintiffs' claims. *United States*, 2018 WL 3615551, at *1; *In re United States*, 2018 WL 5778259 at *1. That would not be the case were there unequivocal Supreme Court precedent that under no circumstances could the district court exercise jurisdiction.

In *In re Justices of Supreme Court of Puerto Rico*, the First Circuit took special care to articulate the specific irreparable harm justifying mandamus. 695 F.2d at 20, 25 (finding relief after final judgment inadequate for Justices forced to "assume the role of advocates or partisans on [the constitutionality of a statute, which] would undermine their role as judges."). The harm to the Court's institutional neutrality, combined with the fact the Justices were nominal unessential parties, supported mandamus. *Id.* at 17, 20-21, 25. Here, executive branch agencies and officials are commonly and properly defendants in civil suits brought under the U.S. Constitution. With the President dismissed, there is now no disagreement among the parties that the remaining defendants are proper defendants in a constitutional case. *See Cheney*, 542 U.S. at 381 ("Were the Vice President not a party in the case

[the mandamus argument] . . . might present different considerations.").

The Government has not made a case for irreparable harm necessitating mandamus that is important and "distinct from the resolution of the merits of the case," *In re Roman Catholic Diocese*, 745 F.3d at 36, such as the improper disclosure of confidential information that cannot be undone, a discovery order's intrusion into executive privileged communications, compromising the nonpartisan nature of the judiciary, or a district court improperly asserting jurisdiction over a foreign company and compromising foreign relations.

The Government's three complaints of alleged harm fall flat. First, the feared future order on injunctive relief, should Plaintiffs prevail, can be immediately appealed upon final judgment and prior to implementation. Second, the expense and time of trial is conclusively not a basis for mandamus. Third, the vague notion that Plaintiffs will somehow force the Government to take new official positions during trial is entirely unsupported by the record, particularly when Plaintiffs do not intend to call any Government witnesses to the stand, other than the fact witnesses identified by the Government itself, for purposes of document authentication. If the Government is going to cry wolf, it should at least be required to have a shred of evidence to support its call for such a "drastic and extraordinary remedy" that would derail these young citizens from securing their freedom and safety under the Constitution. The Government's evasion of the final judgment rule would become limitless and enfeeble judicial administration if it could obtain

mandamus on such paltry arguments. *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) ("Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.").

As the Second Circuit said in *In re Roman Catholic Diocese*, the individual aspects that contributed to their conclusion to issue mandamus would not have been enough in isolation. 745 F.3d at 41. It was the irreparable exposure of highly confidential and sensitive information, combined with the indisputable error, and the opportunity to clarify the general personal jurisdiction law of the Supreme Court that, taken together, led to the extraordinary remedy. *Id.* Here, the justiciability of Plaintiffs' claims is at least open to dispute and "differences of opinion" and requires further factual development in the district court. *See In re Kensington Int'l Ltd.,* 353 F.3d 211, 223 (3d Cir. 2003) (remanding where the court was "[r]eluctant to act in a complex situation such as this one, where so many vital interests are at stake, without a developed evidentiary record"). Here, there is no colorable claim of irreparable harm prior to, and ample opportunity for adequate relief after, final judgment as to each of Plaintiffs' claims, some of which are not even included in the Petition. Here, the district court and the Ninth Circuit have taken care to consider the Government's defenses on multiple occasions and have nonetheless allowed the case to proceed to trial. After three years, the case is ready to be tried and 21 American children and youth should have the opportunity to be heard, to prove their

standing, and to prove their Fifth Amendment claims against government defendants. Given all of these considerations, mandamus would be highly inappropriate in this case, which is of immense importance to these children's individual lives and the future of our country.

CONCLUSION

For the foregoing reasons, the Court should deny this Petition.

DATED this 19th day of November, 2018, at Eugene, OR.

Respectfully submitted,

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APPENDIX

APPENDIX A

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
[LETTERHEAD]

Washington, D.C. 20530

July 20, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: United States of America, et al. v. United States District Court for the District Court of Oregon, No. 18A65

Dear Mr. Harris:

On July 17, the government filed an application for a stay of discovery and trial in the above-captioned case pending the Ninth Circuit's disposition of a petition for a writ of mandamus to the United States District Court for the District of Oregon and any further proceedings in this Court. In the underlying suit, plaintiffs seek recognition of a new fundamental right to certain climate conditions and an order requiring the Executive Branch to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2," Am. Compl. 94, to be monitored and enforced by the district court. The government's petition for mandamus asked the court of appeals to order the district court to dismiss this suit or, at a minimum,

to order the district court to stay all discovery and trial pending resolution of the government's pending motion for a judgment on the pleadings and motion for summary judgment. On July 18, Justice Kennedy requested a response to the government's stay application to be filed by noon on Monday, July 23. The government wishes to inform the Court of a recent development relevant to the government's application.

Earlier today, the Ninth Circuit denied the government's petition for mandamus without prejudice. See *In re United States*, No. 18-71928, slip op (per curiam). A copy of the court of appeals' opinion is enclosed. In its decision, the court again declined to engage with the merits of this suit or the government's arguments for dismissal, insisting that "[t]he merits of th[is] case can be resolved by the district court or in a future appeal." *Id.* at 9-10. The court observed that the government "retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers." *Id.* at 6. The court dismissed the government's concerns about compelling agency officials to articulate official positions through discovery on factual assessments and questions of policy concerning climate change, describing such requests as "routine." *Id.* at 8. It characterized the impending 50-day trial for imposing on the government an "enforceable national remedial plan," Am. Compl. 94, to phase out fossil-fuel emissions and decrease atmosphere carbon dioxide as the "usual legal processes," reasoning that it would impose no prejudice on the government that is not correctable on appeal. Slip op. 9. And it distinguished this

Court's decision in *In re United States*, 138 S. Ct. 443 (2017) (per curiam), on the ground that the district court there had entered a specific discovery order before resolving the government's justiciability arguments in a motion to dismiss, whereas here the district court rejected the government's objection to any discovery before resolving the government's justiciability arguments in motions for judgment on the pleadings and for summary judgment. Slip op. 6-7.

In its stay application, the government suggested that the Court consider construing the application as a petition for a writ of mandamus to the district court or as a petition for a writ of certiorari to review the Ninth Circuit's decision on the government's prior mandamus petition. Stay Appl. 6. That course of action is now even more warranted in light of the court of appeals' decision, because nothing relevant remains to be done in the lower courts. The Ninth Circuit's denial of mandamus—and its reasoning that the discovery and trial contemplated in this case are simply part of the usual legal processes—make clear that the court of appeals will not prevent this case from moving forward absent direction from this Court. Today's decision, however, does present the Court with an additional way to provide such relief. The Court could now also construe the application as a petition for a writ of certiorari to review the Ninth Circuit's new mandamus decision. Whatever procedural course the Court deems appropriate, the government respectfully submits that it is entitled to relief from the mounting burdens of this litigation for the reasons stated in its stay application.

I would appreciate it if you would circulate this letter and copies of the enclosed opinion to the Members of the Court.

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

18A65
UNITED STATES OF AMERICA, ET AL.

UNITED STATES DISTRICT COURT
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

[STAMP]

No. 18-71928

D.C. No. 6:15-cv-01517-AA

In re: UNITED STATES OF AMERICA; CHRISTY GOLDFUSS; MICK MULVANEY; JOHN HOLDREN; RICK PERRY; U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO; U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS; U.S. DEPARTMENT OF DEFENSE; JAMES N. MATTIS; U.S. DEPARTMENT OF STATE; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP; MICHAEL R. POMPEO; ANDREW WHEELER,

UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her official capacity as Director of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget; JOHN HOLDREN, Dr., in his official capacity as Director of the Office of Science and Technology Policy; RICK PERRY, in his official capacity as Secretary of Energy; UNITED STATES DEPARTMENT OF INTERIOR; RYAN ZINKE, in his official capacity as Secretary of Interior; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; JAMES N. MATTIS, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; ANDREW WHEELER, in his official capacity as Acting Administrator of the EPA; MICHAEL R. POMPEO, in his official capacity as Secretary of State; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Petitioners,

—v.—

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

Respondent,

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamela Vergun; HAZEL V., through her Guardian Margo Van Ummersen; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Real Parties in Interest.

OPINION

Petition For Writ Of Mandamus

Submitted July 19, 2018*

Before: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges. PER CURIAM.

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

In this petition for a writ of mandamus, the government asks us for the second time to direct the district court to dismiss a case seeking various environmental remedies, or, in the alternative, to stay all discovery and trial. We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief. The factual and procedural history of this case was detailed in our prior opinion, and we need not recount it here. *In re United States*, 884 F.3d at 833-34.

I

We have jurisdiction over this mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651. In considering whether to grant a writ of mandamus, we are guided by the five factors identified 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).

"Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

II

The government does not satisfy the *Bauman* factors at this stage of the litigation. It remains the case that the issues that the government raises in its petition are better addressed through the ordinary course of litigation. We thus decline to exercise our discretion to grant mandamus relief.

A

The government does not satisfy the first *Bauman* factor. The government argues that mandamus is its only means of obtaining relief from potentially burdensome or improper discovery. However, the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers.

In our opinion denying the first mandamus petition, we stated:

> The defendants will have ample remedies if they believe *a specific discovery request*

> from the plaintiffs is too broad or burdensome. Absent any discovery order from the district court, or even any attempt to seek one, however, the defendants have not shown that they have no other means of obtaining relief from burdensome or otherwise improper discovery.

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

Since that opinion, the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

This fact distinguishes this case from *In re United States*, 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 that 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. *See id*. at 444. 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. *Id.* at 444-45. In 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. It does not satisfy the first *Bauman* factor.

B

Nor does the government satisfy the second *Bauman* factor. The government makes two arguments for why it will be prejudiced in a way not correctable on appeal. Neither is persuasive.

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.

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. *See Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d

1342, 1346 (9th Cir. 1997) (granting mandamus relief when a discovery order would force defendants "to choose between being in contempt of court for failing to comply with the district court's order, or violating Swiss banking secrecy and penal laws by complying with the order").

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.[1] *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

C

As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors. *In re United States*, 884 F.3d at 836-37. No new circumstances give us cause to reevaluate these conclusions.

III

Because petitioners have not satisfied the *Bauman* factors, we deny the mandamus petition without prejudice. The government's fear of burden-

[1] Following our previous opinion, the government moved for the first time in the district court for judgment on the pleadings with respect to the inclusion of the President as a named party, and a decision is pending on that motion.

some 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. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

PETITION DENIED WITHOUT PREJUDICE.

APPENDIX B

IN THE SUPREME COURT
OF THE UNITED STATES

No. 18-505

IN RE UNITED STATES OF AMERICA, ET AL.

DECLARATION OF JULIA A. OLSON
IN SUPPORT OF BRIEF FOR RESPONDENTS
IN OPPOSITION TO PETITION
FOR WRIT OF MANDAMUS

I, Julia A. Olson, hereby declare and if called upon would testify as follows:

1. I am an attorney of record in the above-entitled action. I make this Declaration in support of Plaintiffs' Response to the Government's Petition for a Writ of Mandamus. I have personal knowledge of the facts stated herein, except as to those stated on information and belief, and if called to testify, I would and could testify competently thereto.

2. On or about October 20, 2018, I conferred with Michael Blumm, law professor at Lewis and Clark School of Law. He surveyed his colleagues

at law schools and learned that *Juliana v. United States* is being taught at law schools throughout the Nation, including, but not limited to the following law schools: Yale Law School; University of Michigan Law School; Cornell Law School; Boston College Law School; University of California Hastings School of Law; University of California Berkeley School of Law; University of California Davis School of Law; Temple University Law School; Tulane University School of Law; University of Utah School of Law; Denver University Sturm College of Law; American University Washington College of Law; University of Oregon School of Law; Lewis & Clark Law School; University of San Diego School of Law; Wayne State University Law School; Florida International University College of Law; Albany Law School; West Virginia University College of Law; University of Louisville Brandeis School of Law; University of Missouri Kansas City School of Law; Elisabeth Haub School of Law at Pace University; University of Wyoming College of Law; Vermont Law School; Widener Law School; Barry University School of Law; Nova Southeastern School of Law; and Delaware Law School.

3. Discovery has been extremely limited in this case. There were depositions of only two federal government employees, in summer 2017: Dr. Michael Kuperburg, biologist for Petitioner Department of Energy and director of the U.S. Global Change Research Program; and Dr. C. Mark Eakin, Oceanographer with the National Oceanic and Atmospheric Administration, a division of Petitioner Department of Commerce. The Government did not object to either deposition.

To date, the parties each have propounded one set of contention interrogatories and both sides have responded to those interrogatories. The parties have taken depositions of each side's experts, with three remaining expert depositions, one of which has been scheduled and the remaining two of which are in process of being scheduled. The Government has deposed most of the Plaintiffs, and the parties are meeting and conferring as to prompt depositions of the remaining testifying Plaintiffs.

4. The only current federal government employees who Plaintiffs intend to call as witnesses at trial are those witnesses the Government has identified as fact witnesses. *See* D. Ct. Doc. 373 at 5-6 (identifying Government fact witnesses for authentication of documents). During a meet and confer with Plaintiffs' counsel on November 8, 2018, counsel for the Government stated that the Government will call these witnesses for the sole purpose of authenticating documents. Neither side has identified any high-level officials to testify at trial. Both sides will present expert and fact witnesses at trial, but no high-level officials have been deposed or will be called as witnesses.

5. Plaintiffs do not seek to obtain or release any confidential or privileged communications or documents of the Government, either through discovery or at trial. To date, the only information that has been designated as confidential and subject to the protective order entered in the case has been personal and health information concerning Plaintiffs.

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

7. In support of their response to the Government's Motion for Summary Judgment, Plaintiffs submitted approximately 36,361 pages of evidentiary materials, largely consisting of publicly available government documents, declarations of each Plaintiff, and Plaintiffs' expert declarations from Nobel laureate economists and scientists, award-winning historians, a former head of the Council on Environmental Quality, and the top climate scientists in the world, including former head of NASA's Goddard Institute for Space studies. D. Ct. Doc. 255, 257, 257-1, 258, 258-1, 259, 259-1, 260, 260-1, 261, 261-1 – 4, 262, 262-1, 263, 263-1, 264, 264-1, 265, 265-1, 266, 266-1, 267, 267-1, 268, 268-1, 269, 269-1, 270, 270-1 – 158, 271, 271-1, 272, 272-1, 273, 274, 274-1 – 25, 275, 275-1 – 4, 276, 277-97, 298, 298-1, 299, 299-1 – 227.

8. As of November 19, 2018, the date of this filing, the parties have completed the following discovery and pre-trial matters in preparation for trial:

- Plaintiffs completed and served expert reports and all of their experts were deposed by the Government;

- the Government completed and served rebuttal expert reports and all of its original rebuttal experts were deposed by Plaintiffs;
- the Government completed its final two rebuttal expert reports after this Court's stay was lifted and depositions of those two experts are noticed and in process of scheduling;
- Plaintiffs completed and served rebuttal expert reports and all of their rebuttal experts were deposed by the Government;
- the Government completed and served one sur-rebuttal expert report and the deposition of that sur-rebuttal expert is now scheduled to occur November 28, 2018;
- Plaintiffs served one set of interrogatories, to which the Government responded;
- the Government served one set of interrogatories, to which Plaintiffs responded; and
- 15 of the 21 Youth Plaintiffs were deposed by the Government. The parties are meeting and conferring as to prompt depositions of the remaing testifying Plaintiffs.

In total, the parties have conducted 45 depositions over the course of 35 days since August 1, 2018, and have scheduled or are in process of scheduling all remaining depositions as indicated in the chart below:

2018 DEPOSITION SCHEDULE FOR
JULIANA V. UNITED STATES

	Date (2018)	**Deponent Name**
1	Aug. 2	H. Frumkin (Plaintiffs' Expert)
2	Aug. 10	O. Hoegh-Guldberg (Plaintiffs' Expert)
3	Aug. 15	S. Running (Plaintiffs' Expert)
4	Aug. 20	Alex L. (Plaintiff)
5	Aug. 20	Kelsey J. (Plaintiff)
6	Aug. 20	Aji P. (Plaintiff)
7	Aug. 20	Avery M. (Plaintiff)
8	Aug. 21	Jacob L. (Plaintiff)
9	Aug. 21	Zealand B. (Plaintiff)
10	Aug. 21	Hazel V. (Plaintiff)
11	Aug. 22	Tia H. (Plaintiff)
12	Aug. 22	Isaac V. (Plaintiff)
13	Aug. 22	Miko V. (Plaintiff)
14	Aug. 23	H. Herzog (Government Expert)
15	Aug. 24	F. Ackerman (Plaintiffs' Expert)
16	Aug. 28	D. Victor (Government Expert)
17	Aug. 30	A. Partikian (Government Expert)
18	Aug. 31	J. Sugar (Government Expert)
19	Sept. 5	P. Erickson (Plaintiffs' Expert)
20	Sept. 6	D. Sumner (Government Expert)

	Date (2018)	Deponent Name
21	Sept. 10	J. Sweeney (Government Expert)
22	Sept. 12	H. Wanless (Plaintiffs' Expert)
23	Sept. 13	J. Weyant (Government Expert)
24	Sept. 13	Jayden F. (Plaintiff)
25	Sept. 14	S. Pacheco (Plaintiffs' Expert)
26	Sept. 18	K. Trenberth (Plaintiffs' Expert)
27	Sept. 18	Xiuhtezcatl M. (Plaintiff)
28	Sept. 19	C. Smith (Plaintiffs' Expert)
29	Sept. 19	Nick V. (Plaintiff)
30	Sept. 21	G.P. Robertson (Plaintiffs' Expert)
31	Sept. 22	Victoria B. (Plaintiff)
32	Sept. 25	J. Stiglitz (Plaintiffs' Expert)
33	Sept. 27	N. Klein (Government Expert)
34	Sept. 28	E. Rignot (Plaintiffs' Expert)
35	Sept. 29	Sophie K. (Plaintiff)
36	Oct. 1	J. Hansen (Plaintiffs' Expert)
37	Oct. 1	L. Van Susteren (Plaintiffs' Expert)
38	Oct. 2	J. Paulson (Plaintiffs' Expert)
39	Oct. 9	J. Williams (Plaintiffs' Expert)
40	Oct. 11	M. Jacobson (Plaintiffs' Expert)
41	Oct. 12	A. Wulf (Plaintiffs' Expert)

	Date (2018)	**Deponent Name**
42	Oct. 16-17	G. Speth (Plaintiffs' Expert)
43	Oct. 19	G.P. Robertson (Plaintiffs' Expert)
44	Nov. 15	A. Jefferson (Plaintiffs' Expert)
45	Nov. 16	K. Walters (Plaintiffs' Expert)
46	Nov. 26 Noticed, Scheduling in Process	J. Sweeney (Government Expert)
47	Nov. 27 Noticed, Scheduling in Process	D. Victor (Government Expert)
48	Nov. 26/27 Proposed, Scheduling in Process	Sahara V. (Plaintiff)
49	Nov. 26/27 Proposed, Scheduling in Process	Kiran O. (Plaintiff)
50	Nov. 26/27 Proposed, Scheduling in Process	Journey Z. (Plaintiff)
51	Nov. 26/27 Proposed, Scheduling in Process	Levi D. (Plaintiff)
52	Nov. 26/27 Proposed, Scheduling in Process	Nathan B. (Plaintiff)
53	Nov. 28	J. Sugar (Government Expert)

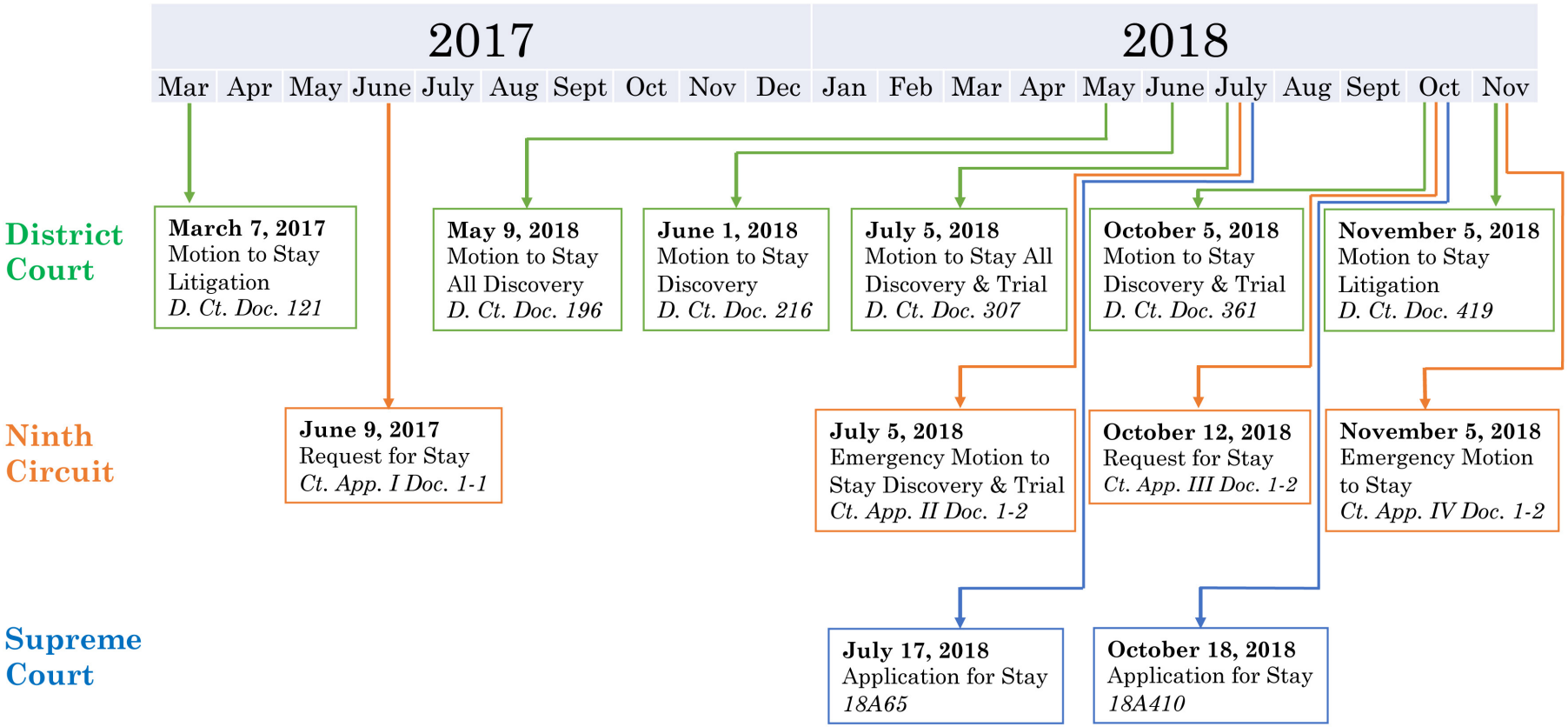
9. The Government has repeatedly presented materially identical legal arguments in successive, duplicative motions and petitions for early appeal in contravention of the final judgment rule in all three tiers of the federal judiciary. A chart demonstrating repeated, successive attempts to present the same issues in these filings is included below:

GOVERNMENT'S ARGUMENTS PRESENTED BY STAGE IN *JULIANA V. UNITED STATES*

	District Court Order Denying Motion to Dimiss November 10, 2016	Ninth Circuit Order Denying Mandamus March 7, 2018	Ninth Circuit Order Denying Mandamus July 20, 2018	District Court Order Denying Summary Judgment October 15, 2018
Plaintiffs' Art. III Standing	X	X	X	X
Stable Climate Right	X	X	X	X
Public Trust Doctrine	X	X	X	X
Separation of Powers	X	X	X	X
Failure to Plead Fifth Amendment Claims Under Right of Action, Such as APA	X	X		
APA Provides Sole Right of Action for Plaintiffs' Claims			X	X

10. The Government has moved for a stay in this case a total of twelve times between the district court, the Ninth Circuit, and this Court. A timeline of the Government's motions for stay is presented below:

GOVERNMENT'S MOTIONS FOR STAYS
IN *JULIANA V. UNITED STATES*



11. The parties currently anticipate a trial lasting 8-10 weeks. In terms of scheduling the length of trial, at a meet and confer session with counsel for the Government on April 11, 2018, counsel for Plaintiffs initially projected 20 days for their case in chief. Counsel for the Government responded that 20 days would not be enough for Defendants' case and stated that it would be better for the parties to ask the district court for more time than less for trial. Thus, as a result of that meet and conferral, the parties agreed to jointly request 50 trial days. The next day, at the April 12 Status Conference, counsel for the Government confirmed the parties' agreement of 5 weeks per side with the Court. *See* Transcript of Proceedings, D. Ct. Doc. 191 at 7:19-8:7. The length of the trial, due to the need for expert testimony on different scientific and historical issues, Plaintiff testimony, and presentation of documentary evidence, will not change based on the number of legal claims. The same body of evidence will be presented at trial in support of Plaintiffs' standing and each of Plaintiffs' constitutional claims.

12. Since August 1, 2018, Plaintiffs incurred significant litigation costs to be prepared to commence trial as scheduled on October 29, 2018. Plaintiffs continue to incur significant litigation costs in order to be prepared to commence trial as soon as possible.

13. Plaintiffs also expended a significant amount of time and resources to ensure that the youth Plaintiffs and their experts would be in Eugene, Oregon, and prepared to testify at trial beginning October 29, 2018. Many of the youth Plaintiffs arranged their school schedules so that they could

attend trial commencing on October 29, 2018, with some making arrangements to temporarily live in Eugene so that they could attend the entirety of the trial as previously scheduled.

14. Plaintiffs made and confirmed travel arrangements for the youth Plaintiffs and their experts to come to Eugene and testify consistent with a trial schedule commencing October 29, 2018, with some experts traveling from as far away as London, United Kingdom, Brisbane, Australia, and throughout the United States.

15. Due to the stay of trial, Plaintiffs' pre-arranged plans to attend trial had to be cancelled and all of Plaintiffs' experts' travel and lodging had to be cancelled at great expense and inconvenience. All of Plaintiffs' experts are donating their services *pro bono* and have already invested a significant number of hours in preparing expert reports and sitting for depositions.

16. Plaintiffs are prepared to commence trial as soon as possible and will be harmed significantly if this trial is further delayed. Plaintiffs and their experts are on standby to reschedule their travel arrangements as soon as possible in order to accommodate a trial commencing as soon as possible.

17. The only procedural matters prior to commencing trial are the pre-trial conference and rulings on pending pre-trial motions.

I declare that the foregoing is true and correct. Executed this 19th day of November, 2018, at Eugene, Oregon.

Respectfully submitted,
/s/ Julia A. Olson