No. 18A65

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., APPLICANTS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF IN SUPPORT OF APPLICATION FOR A STAY PENDING THE DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OR 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 AND REQUEST FOR AN ADMINISTRATIVE STAY

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Respondents filed this suit in 2015, effectively alleging that every action taken (and some not taken) by the federal government concerning the production and use of fossil fuels for the past 50 years violated the fundamental right of every individual in the country to certain climate conditions. Both the previous and current Administrations sought to dismiss this suit as groundless and improper. Three years later, neither respondents nor the district court have narrowed this case in any way, and it is now on the verge of a highly compacted period of discovery and trial preparation, followed by a 50-day trial to impose on the Executive Branch as a whole a "national remedial plan" to "swiftly phase out CO2 emissions," to be supervised by the district court indefinitely. Am. Compl. 4, 94. Since the government filed its

stay application, the district court has confirmed that it sees no impediment to ordering such relief, comparing the requested relief to "tak[ing] over" and "run[ning]" foster care systems or mental institutions. 7/18/18 Tr. 21. And the court of appeals made clear last week that it will not prevent this case from going forward when it denied mandamus. C.A. Doc. 11 (July 20, 2018) (slip op.).

It is therefore left to this Court to intervene. As explained in the application, this sprawling suit is procedurally defective and substantively meritless. And while the court of appeals insists that any errors may be addressed "in a future appeal," slip op. 9, the very process of compelling agencies to make factual assessments and policy judgments on the complex matters involved in this case through ordinary civil discovery, not to mention a trial to impose a government-wide plan to comprehensively address those issues, will violate the requirements of the Administrative Procedure Act (APA) and the separation of powers. And the official positions articulated in this litigation -- without public input from other stakeholders or any of the other orderly procedures of agency decisionmaking -- will be used against these agencies for years in ways that cannot be corrected by simply reversing the district court's final judgment.

Because the court of appeals has now denied the government's mandamus petition, the government respectfully submits that this Court should construe its stay application as a petition for a writ of certiorari from the Ninth Circuit's most recent mandamus

decision or for a writ of mandamus, and order either (1) the dismissal of this suit or (2) a stay of discovery and trial until the government's pending dispositive motions are resolved and any orders denying relief are considered for interlocutory appeal. At a minimum, the Court should grant a stay of all discovery and trial pending the government's filing of a petition for a writ of certiorari or for a writ of mandamus to enable this Court to carefully consider whether such relief is appropriate.

ARGUMENT

1. Now that the court of appeals has denied mandamus relief, this Court is likely to reverse the court of appeals' decision or directly grant mandamus relief by either directing the dismissal of this suit, or at a minimum staying all discovery and trial until the government's dispositive motions are resolved. Appl. 19-32.

a. First, the district court lacks jurisdiction over this suit because (1) respondents may not establish Article III standing to assert generalized grievances against the diffuse effects of climate change not tied to any particular action or inaction by the defendant agencies and not redressable by any order of a federal court, Appl. 20-23; and (2) in any event, respondents' attempt to redirect federal environmental and energy policies through litigation simply is not the sort of dispute that an Article III court has the authority to entertain, Appl. 23-25.

Respondents do not even argue that they assert cognizable Article III harms under this Court's precedents, contending (Br.

in Opp. 32 n.14) instead that the government conceded the point before the district court. But government counsel's statement to the district court was addressed to a different question: namely, why the district court, which has already rejected the purely legal argument the government asserts here, should nevertheless find that respondents lack standing on summary judgment. 7/18/18 Tr. 25. This Court, of course, has made no such determination and need not consider the evidentiary basis for respondents' alleged injuries to conclude that, as a matter of law, they are not the kind of particularized injuries that Article III requires.

As for causation, respondents' reliance (Br. in Opp. 33) on this Court's decisions in Brown v. Plata, 563 U.S. 493 (2011); Wilson v. Seiter, 501 U.S. 294 (1991); and Hills v. Gautreaux, 425 U.S. 284 (1976), is misguided. None of those decisions even addresses standing or Article III jurisdiction. In any event, the relationships between the alleged harms and the defendants in those cases were starkly different from the speculative relationship asserted here. In Plata and Wilson, the plaintiffs alleged physical and mental injuries based directly on the conditions of confinement in the state defendants' prison systems; and in Hills, the alleged racial discrimination by the defendants in considering the plaintiffs' applications for public housing was itself cognizable Article III harm. See Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam). Bennett v. Spear, 520 U.S. 154 (1997), does at least address Article III causation. But respondents' bare

assertion (Br. in Opp. 33-34) concerning the effects of unspecified actions by unspecified agencies in "authorizing, permitting, promoting, sanctioning, and incentivizing" the use of fossil fuels falls well short of establishing the "virtually determinative effect" on third-party behavior that was created by the civil and criminal penalties (including imprisonment) threatened by the specific agency action at issue in Bennett. 520 U.S. at 170.

As for redressability, respondents argue (Br. in Opp. 34) only that the district court could adequately redress their asserted injuries by ordering the federal government to stop "caus[ing] and sanction[ing] CO_2 emissions." Like the district court, however, respondents fail to identify the source of any authority to order the federal government writ large to stop all CO_2 emissions. As explained below, there is none. And even if there were, respondents fail to plausibly allege that, in light of the virtually limitless number of sources of CO_2 emissions both inside and outside the United States, such an order would meaningfully achieve global climate change in a manner that would redress their specific asserted injuries.

Finally, standing aside, respondents' cursory argument (Br. in Opp. 34-35) about a federal court's equitable authority to review discrete executive actions fails to show that this misguided suit resembles the sort of case or controversy that was "the traditional concern of the courts at Westminster," Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765,

774 (2000) (citation omitted), and is therefore within the "judicial Power of the United States," U.S. Const. Art. III, § 1. Respondents rely (Br. in Opp. 34-35) on institutional-reform cases where federal courts addressed certain systemic constitutional violations. But even those broad claims paled in comparison to respondents' claims and requested relief.

The courts in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Milliken v. Bradley, 418 U.S. 717 (1974); and Plata granted injunctions against particular institutions to remedy discrete constitutional violations experienced by particular individuals. Respondents challenge Congress's and the Executive Branch's policies relating to climate change across the entire federal government over decades, allegedly affecting the population at large, and ask the district court to take control of that entire range of policymaking for decades to come. As the district court explained recently at the July 18 hearing: "And so really the endgame is setting up a survival plan unless one of the other branches of government act[s]." 7/18/18 Tr. 21. The court dismissed any concerns about its authority to order such relief, noting that "[s]almon runs," "foster care systems," and "mental health facilities are taken over by the court and run for years." Ibid. Apparently, in the court's view, assuming responsibility for the Nation's energy and environmental policies for the foreseeable future is no different. Ibid. The government respectfully disagrees.

b. Second, even if this suit could proceed within the boundaries of Article III, the APA would preclude it. The APA provides the exclusive mechanism for challenging federal administrative actions and inactions of the kind that underlie respondents' claims, and it permits challenges only to discrete, identified agency actions or failures to act, not the broad, programmatic challenge respondents mount here. Appl. 25-28.

Respondents argue these constraints do not apply because respondents "do not premise their claims on violations of statutorily-granted rights," but "'directly on the Due Process Clause of the Fifth Amendment.'" Br. in Opp. 37 (citation omitted). But the APA expressly provides for judicial review of such constitutional claims. See 5 U.S.C. 706(2)(B) (authorizing courts to "hold unlawful * * * agency action, findings, and conclusions * * * contrary to constitutional right") (emphasis added). Federal courts may not disregard that comprehensive scheme simply because the plaintiff purports to assert stand-alone constitutional claims. See Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015); see also, e.g., Chiayu Chang v. U.S. Citizenship & Immigration Servs., 254 F. Supp. 3d 160, 161-162 (D.D.C. 2017) (collecting cases). "To hold otherwise, * * * would 'incentivize every unsuccessful party to agency action to allege . . . constitutional violations' in order to 'trade in the APA's restrictive procedures for the more evenhanded ones of the Federal Rules of Civil Procedure.'" Ibid. (citation omitted).

None of the decisions on which respondents rely (Br. in Opp. 36) is to the contrary. In Franklin v. Massachusetts, the Court agreed that "[t]he APA sets forth the procedures by which federal agencies are accountable to the public and their actions are subject to review by the courts." 505 U.S. 788, 796 (1992). It simply found that the APA did not apply because the President -- who was the final actor in the challenged scheme -- was not himself "an 'agency.'" Ibid. In Webster v. Doe, the plaintiff did raise his claim "under the APA." 486 U.S. 592, 602 (1998). And the Court's decision in Hills did not discuss the appropriate cause of action for seeking injunctive relief against agencies at all.

c. Third, respondents' claims of a fundamental right to a particular climate system and a never-before-recognized public-trust obligation on the federal government are baseless. Appl. 28-31. Contrary to respondents' contention (Br. in Opp. 38-39), no "empirical inquiry" or "robust factual record" is needed to recognize that a constitutional right to a particular climate system is neither "fundamental to [the Nation's] scheme of ordered liberty" nor "'deeply rooted in this Nation's history and tradition.'" McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (citation omitted). Unlike this Court's decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), the district court did not even attempt to ground its recognition of that new fundamental right in this Court's prior decisions or this Nation's history and tradition. Id. at 2598. No court, including this one, has ever

recognized a fundamental right with any relation to one asserted here. Rather, the district court consciously broke from the "cautious and overly deferential" decisions of other courts to recognize an "unprecedented" right. Appl. App. 39a.

As for respondents' public-trust claim, the D.C. Circuit recently recognized that this Court has "directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." Alec L. ex rel. Loorz v. McCarthy, 561 Fed. Appx. 7, 8 (2014) (per curiam) (citing PPL Montana, LLC v. Montana, 565 U.S. 576, 603-604 (2012)), cert. denied, 135 S. Ct. 774 (2014); see Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 285 (1997) (describing the public-trust doctrine as "necessarily a statement of [state] law") (citation omitted). As in Alec L., respondents fail to identify a single decision from any court applying a public-trust doctrine to actions of the federal government -- and certainly not to the government's regulation of private parties. As a result, the D.C. Circuit rightly described the same claim brought by many of respondents here as "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy" at all. Alec L., 561 Fed. Appx. at 8 (citation omitted).

d. Finally, even if this Court were not inclined to direct dismissal at this stage in light of these defects, it is likely at least to direct the district court to stay discovery and trial

until the government's pending dispositive motions are resolved. Appl. 31-32. Indeed, the similarities between this case and In re United States, 138 S. Ct. 443 (2017) (per curiam), are striking. Here, as in In re United States, the government "makes serious arguments" that further supplementing the record is unnecessary and unlawful. Id. at 445. Here, as in In re United States, the government presents arguments in pending motions that this case is not justiciable or otherwise should be dismissed, which, "if accepted, likely would eliminate the need" for factual development. Ibid. And here, as in In re United States, the district court nevertheless has refused a stay while the government's threshold arguments are resolved. Id. at 444. That error warranted mandamus relief in In re United States and, indeed, reversal of the Ninth Circuit's refusal to grant such relief. It warrants at least the same relief here.

The court of appeals attempted (slip op. 7) to distinguish In re United States on the ground that the district court there had issued a specific discovery order before resolving the government's threshold arguments. But the government's contention in this case is that any discovery would be unlawful. See Appl. 32-36. The district court's rejection of that contention means the government can be compelled to participate in such unlawful discovery -- the only question is the form. Respondents do not dispute that premise; they simply repeat (Br. in Opp. 29) the court of appeals' suggestion that the government must object to "specific

discovery [it] believe[s] is improper." There is no reason to insist that the government assert the same categorical objections with respect to specific requests before this Court intervenes.

Respondents also claim (Br. in Opp. 23) that the district court has already considered all of the relevant threshold arguments. That is simply wrong. In the government's motion to dismiss, it made two arguments: (1) respondents lack standing, D. Ct. Doc. 27-1, at 7-19 (Nov. 17, 2015); and (2) respondents' claims fail on the merits, id. at 19-29. The government reasserts those arguments in the pending dispositive motions. See D. Ct. Doc. 195, at 6-7 (May 9, 2018); D. Ct. Doc. 207, at 6-14, 24-30 (May 22, 2018). But it also makes two additional arguments for judgment in its favor: (1) even if respondents could establish standing, their claims are not of the sort cognizable in an Article III court, D. Ct. Doc. 195, at 22-25; D. Ct. Doc. 207, at 20-24; and (2) if permitted at all, respondents' claims must be asserted under the APA, targeted at specific agency actions or inactions, D. Ct. Doc. 195, at 10-22; D. Ct. Doc. 207, at 14-19. Like the arguments in the government's motion to dismiss, either of these arguments is fatal to the continuation of this lawsuit, and the district court has addressed neither one.*

* Plaintiffs quote (Br. in Opp. 22, 35) an errant reference to the APA in the background section of the government's first application for an extension of time in which to seek review of the Ninth Circuit's first mandamus decision. They characterize (ibid.) that mistaken reference as a "conce[ssion]" that the Ninth Circuit has already rejected the government's APA arguments. But the APA is not cited even once in either the government's first

2. The balance of the equities also weighs strongly in favor of staying discovery and trial.

a. Absent relief from this Court, the government will be forced to proceed with a highly compressed period of discovery and trial preparation and, in all likelihood, a rapidly approaching 50-day trial while, at the same time, violating its obligations under the APA and the Constitution. Appl. 36-37. In fact, the district court recently indicated that may only be the beginning, as it intends to bifurcate the remedy phase. 7/18/18 Tr. 9.

Respondents attempt to deny the likelihood of harm to the government by making a series of misleading claims about the course of discovery. Respondents repeatedly cite (Br. in Opp. 25, 45), for example, their request to hold in abeyance the pending deposition notices. But respondents made clear in that motion they plan to "substitut[e] contention interrogatories for [the] depositions" seeking the same information, D. Ct. Doc. 247, at 2 (June 25, 2018), and if the parties cannot "reach agreement" on such substitutions, they may simply "reinstate the [prior]

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mandamus petition or the Ninth Circuit's decision. For that reason, if the Court wishes to construe the government's application as a petition for a writ of certiorari, it should construe it as seeking review of the Ninth Circuit's most recent mandamus decision, so that all relevant arguments are squarely before the Court. See Letter from Noel J. Francisco, Solicitor General, Office of the Solicitor General, U.S. Dep't of Justice, to Scott S. Harris (July 20, 2018); slip op. 8 (noting that the government argued "for the first time" in its most recent mandamus petition that discovery in this case would violate the APA's procedural requirements for agency decisionmaking).

disovery requests," id. at 4. As the motion itself makes clear, the government did not "agree[]" (Br. in Opp. 25) to the substitution.

Respondents claim (Br. in Opp. 26) that the government "ha[s] not specifically objected to expert discovery" and, in fact, agreed to the schedule for producing expert reports. But the government has repeatedly and consistently objected to all discovery in this case. See, e.g., D. Ct. Doc. 196, at 8 (May 9, 2018) ("The Court Should Grant a Protective Order Precluding All Discovery"); 4/12/18 Tr. 13 ("From our position, if there's any case at all, it's going to be an administrative record review case."). While the government obviously worked with the district court on the deadlines it set for expert discovery, the court set that schedule over the government's objection, not at its invitation.

Finally, respondents suggest (Br. in Opp. 19-20) that the parties agreed to request a 50-day trial. The government has consistently maintained that a trial on respondents' claims is improper, and objected to the district court's setting a trial date at all before considering the government's motions for dismissing respondents' claims. See 4/12/18 Tr. 17-19. The government did agree that, as this sprawling litigation currently stands -- with potentially 21 fact witnesses and over two dozen expert witnesses -- 50 trial days would likely be required if a trial were actually held. But there could be no confusion that the government objected to every one of those days.

More fundamentally, respondents' contention (Br. in Opp. 25, 46) that there is no likelihood of irreparable harm to the government because they are working to "streamline discovery," and because any remaining inconvenience amounts to nothing more than the "ordinary burdens of discovery and trial," mischaracterizes the government's objections. The government's concern is not solely (or even principally) the time or effort required of government officials to respond to overly burdensome discovery requests. Rather, regardless of the time required, the very process of requiring agency officials to articulate factual assessments and positions regarding national environmental and energy policies through discovery followed by a 50-day trial to make district court findings about the same is harmful: it violates the provisions for public input and other procedures imposed by the APA on agency factual assessments and decisionmaking, the APA's provision for judicial review, and the separation of powers. Appl. 32-36. Such violations are not part of "routine discovery and bench trials" (Br. in Opp. 28), and they cannot be remedied on appeal.

b. By contrast, respondents can make no credible claim that a relatively brief stay to decide the government's petition will cause them irreparable harm. Appl. 37-38. Respondents assert (Br. in Opp. 13 n.8) that even a modest delay in court-ordered relief "could substantially injure" them. But they make no effort to actually tie any of the government's actions to the harm they

claim to suffer from the diffuse effects of global climate change. The closest they come is citing a paragraph in the government's answer, addressing CO_2 emissions in the United States. Br. in Opp. 49 (citing Gov't Answer ¶ 7). But all that paragraph addresses is the cumulative contributions from every person and entity in the country "from 1850 to 2012." Gov't Answer ¶ 7. It says nothing about the portion of current emissions attributable to the defendant agencies, let alone during the brief period of a stay.

Respondents' actions over the course of this litigation are far more instructive about the likelihood that a modest stay would cause respondents any irreparable harm. Despite respondents' doomsday predictions in this Court, they have been litigating this case for three years without ever moving for a preliminary injunction (which would be immediately appealable) to prevent their asserted ongoing and imminent harms. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (reasoning that an "eight-week delay" in seeking equitable relief undermined the applicant's "allegation of irreparable harm"). Respondents should not be heard to complain now that they cannot endure even a brief pause to permit this Court's review.

Respectfully submitted.

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