No. 18A-410

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

APPLICATION FOR A STAY PENDING 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 AND REQUEST FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States of America; Donald J. Trump, in his official capacity as the President of the United States*; Office of the President of the United States; the Director of Council on Environmental Quality; Mick Mulvaney, in his official capacity as the Director of the Office of Management and Budget; the Director of the Office of Science and Technology Policy; U.S. Department of Agriculture; Sonny Perdue, in his official capacity as the Secretary of Agriculture; U.S. Department of Commerce; Wilbur Ross, in his official capacity as the Secretary of Commerce; U.S. Department of Defense; James N. Mattis, in his official capacity as the Secretary of Defense; U.S. Department of Energy; Rick Perry, in his official capacity as the Secretary of Energy; U.S. Environmental Protection Agency (EPA); Andrew R. Wheeler, in his official capacity as the Acting Administrator of the EPA; U.S. Department of the Interior; Ryan Zinke, in his official capacity as the Secretary of the Interior; U.S. Department of State; Michael R. Pompeo, in his official capacity as the Secretary of State; U.S. Department of Transportation; and Elaine Chao, in her official capacity as the Secretary of Transportation.

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* On October 15, 2018, the district court dismissed President Trump from the suit without prejudice. See Pet. App. 77a. The government opposes that relief because the President should be dismissed with prejudice. The President accordingly joins in this petition for a writ of mandamus.

Respondent in this Court is the United States District Court for the District of Oregon. Respondents also include 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 Toña 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; and future generations, through their Guardian Dr. James Hansen (collectively plaintiffs in the district court, and real parties in interest in the court of appeals).

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the United States, the President of the United States, the Executive Office of the President, the U.S. Environmental Protection Agency, the U.S. Departments of Agriculture, Commerce, Defense, Energy, the Interior, State, and Transportation, and all other federal parties, respectfully applies for a stay of discovery and trial in the United States District Court for the District of Oregon, pending the disposition of the government's petition for a writ of mandamus, filed concurrently with this application, and any further proceedings in this Court. Petitioners also request an administrative stay pending the Court's consideration of this stay application.

This suit is an attempt to redirect federal environmental and energy policies through the courts rather than through the political process, by asserting a new and unsupported fundamental due process right to certain climate conditions. Rather than challenging specific agency actions or inactions, the plaintiffs allege that the "affirmative aggregate acts" of the federal defendants for the past 50 years in the area of fossil-fuel production and use are causing a "dangerous climate system" and systematically violating their asserted substantive due process rights. Am. Compl. ¶ 289. The plaintiffs ask the district court to address these alleged wrongs by ordering the defendant agencies and officials to prepare and implement a national remedial plan, without regard to the procedural and substantive limitations in those agencies' organic statutes and the Administrative Procedure Act (APA), and by retaining jurisdiction indefinitely to ensure compliance.

The district court has allowed this improper suit to proceed for nearly three years over the repeated objections of the government, and the case is now on the eve of a bifurcated trial, of which the liability phase alone is estimated to last for 50 days. In 2016, the court refused to dismiss the plaintiffs' claims, concluding that the plaintiffs had adequately pleaded facts sufficient to establish Article III standing, that the plaintiffs had stated a violation of an asserted fundamental right to "a climate system capable of sustaining human life," Pet. App.

141a, and that the court could remedy that violation by ordering defendants to "move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system," id. at 137a.

When the district court declined to certify its ruling for interlocutory appeal, the government sought from the Ninth Circuit a writ of mandamus ordering dismissal. But that court declined to intervene. In the court's view, there remained the opportunity for the government to raise and re-raise legal objections to the plaintiffs' claims and for the district court to reconsider its prior decisions, including whether the claims are "too broad to be legally sustainable" and whether this litigation must be "focus[ed] * * * on specific governmental decisions and orders." Pet. App. 99a-101a. The court of appeals stated that it expected the claims to be "vastly narrowed as litigation proceed[ed]" beyond that "very early stage" of litigation. Id. at 101a-102a.

Following the Ninth Circuit's first decision, the government took every step contemplated by that court in its decision to raise and re-raise the government's legal objections and at least to narrow this case. In a motion for judgment on the pleadings, the government moved to dismiss the President and made two additional arguments for why the plaintiffs' claims are not justiciable. In

a motion for summary judgment, the government restated its prior objections to the plaintiffs' standing and to the merits of their claims, permitting the district court to reconsider those rulings on the basis of a more developed record. And the government moved for a protective order against all discovery, explaining that discovery was categorically inappropriate because it violated the APA's judicial-review provisions, as well as the APA's comprehensive regulation of agency decisionmaking and the Constitution's separation of powers.

The district court summarily denied the government's motion for a protective order, refused to stay discovery and trial pending consideration of the two dispositive motions, and repeatedly stated its expectation that, absent intervention from a higher court, trial would begin on October 29, 2018. The government therefore again petitioned the Ninth Circuit for mandamus relief, requesting an order directing dismissal or, at a minimum, an order directing the district court to stay all discovery and trial pending the resolution of the government's pending dispositive motions. The government also separately moved -- first in the district court, then in the court of appeals, and finally in this Court -- for a stay of discovery and trial pending disposition of its petition for a writ of mandamus by the court of appeals and any further proceedings in this Court.

The Ninth Circuit again denied the government's petition, insisting that "[t]he merits of th[is] case can be resolved by the

district court or in a future appeal." Pet. App. 85a. On July 30, 2018, this Court denied the government's application for a stay "without prejudice." United States v. U.S. Dist. Court, No. 18A65, 2018 WL 3615551, at *1 (Juliana). Although the Court noted its view that the government's application was "premature," it stated that the "breadth of respondents' claims is striking" and "the justiciability of those claims presents substantial grounds for difference of opinion." Ibid. The Court directed the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." Ibid.

More than two months after this Court's order, and only weeks before trial was set to commence, the district court had yet to resolve the government's dispositive motions. On October 5, the government informed the district court that it planned to petition this Court for a writ of mandamus (or, in the alternative, a writ of certiorari) and respectfully requested a stay of discovery and trial pending this Court's consideration.

Two days ago, the district court issued an opinion largely denying the government's dispositive motions. The court dismissed the President "without prejudice" and granted the government summary judgment on respondents' "freestanding" Ninth Amendment claim, but it otherwise denied the government's motions. Pet. App. 23a, 69a. The court rejected the government's argument that respondents were required to assert their challenges under the

APA, concluding that the "APA does not govern" claims seeking equitable relief for alleged constitutional violations based on "aggregate action by multiple agencies," id. at 31a; refused to revisit its prior holdings on the justiciability and merits of respondents' due process and public-trust claims; and denied the government summary judgment on respondents' equal protection claim to the extent it is based on the same fundamental right to a particular climate composition.

The district court declined to certify its order for interlocutory appeal under 28 U.S.C. 1292(b), which authorizes certification where, inter alia, an "order involves a controlling question of law as to which there is substantial ground for difference of opinion." Despite this Court's intervening statement that "the justiciability of [respondents'] claims presents substantial grounds for difference of opinion," Juliana, 2018 WL 3615551, at *1, the district court concluded that there have been no relevant changes in legal authority since that court's earlier refusal to certify. Pet. App. 74a (reasoning that the court's prior refusal to certify is "law of the case"). The court subsequently denied the government's request to stay discovery and trial pending this Court's consideration of this petition. App., infra, 1a-2a.

Given the district court's resolution of the government's dispositive motions and the trial set to begin on October 29, the government has little choice but to renew its requests for relief

from this Court. Contemporaneous with this application, the government has filed a petition for (1) a writ of mandamus to the district court seeking dismissal of this suit; (2) a writ of certiorari to the court of appeals seeking review of that court's denial of similar relief; or (3) a common-law writ of certiorari to the district court seeking review of that court's denial of the government's dispositive motions. And the government respectfully requests a stay of any further discovery and trial pending consideration of its petition and any further proceedings in this Court.[1]

The standards for granting a stay are readily met in this case. As explained more fully in the government's petition (at 13-28), the district court manifestly erred in recognizing a new fundamental substantive due process right to certain climate conditions in the context of litigation over which the district court lacks jurisdiction under Article III and that is otherwise deeply flawed as a procedural matter. Absent relief from this Court, the government imminently will be forced to participate in a 50-day trial that would violate bedrock requirements for agency decisionmaking and judicial review imposed by the APA and the separation of powers. In light of these impending harms, the Court

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[1] In accordance with Supreme Court Rule 23.3, on October 12, the government also requested a stay of discovery and trial from the court of appeals pending this Court's consideration of its petition for a writ of mandamus or, in the alternative, a writ of certiorari. That request remains pending before the court of appeals.

is therefore likely to order dismissal of this suit. Moreover, in contrast to the obvious harms to the government, respondents can make no credible claim of imminent, irreparable harm. Their alleged injuries stem from the cumulative effects of CO_2 emissions from every source in the world over decades; whatever additions to the global atmosphere that could somehow be attributed to the government over the time it takes to resolve the pending petition are plainly de minimis. Accordingly, the government requests that this Court stay discovery and trial pending consideration of the government's petition and any further proceedings in this Court. In addition, the government requests an administrative stay of discovery and trial while the Court considers this application.

STATEMENT

1. As explained in more detail in the petition (at 2-3), this suit was filed in 2015 by 21 minor individuals, an organization known as Earth Guardians, and future generations, purportedly represented by a self-appointed guardian. Respondents sued President Obama, the Executive Office of the President, and numerous Cabinet-level Executive officials and agencies, alleging that these Executive officials and agencies have enabled the combustion of fossil fuels, which releases greenhouse gases into the atmosphere, thereby violating rights that respondents assert under the Fifth and Ninth Amendments to the Constitution and an asserted federal public-trust doctrine. Respondents do not challenge specific agency actions, but rather focus on what they

term the government's "aggregate actions," Am. Compl. ¶ 129, which they assert have caused "climate instability," id. ¶ 288. Respondents ask the district court to order the Executive Branch to "prepare a consumption-based inventory of U.S. CO_2 emissions" and "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2," id. at 94, and to retain jurisdiction for an indefinite period of time to monitor the government's compliance with that remedial plan.

2. In 2016, the district court denied the government's motion to dismiss respondents' claims for lack of jurisdiction and failure to state a claim. Pet. App. 104a-200a. The court concluded that respondents had established standing by alleging that they had been harmed by the effects of climate change; the government's regulation of (and failure to further regulate) fossil fuels had caused respondents' injuries; and the court could redress those injuries by "order[ing] [the government] to cease [its] permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system." Id. at 137a (citation omitted); see id. at 124a-137a.

On the merits, the district court concluded that respondents had stated a claim under the Fifth Amendment's Due Process Clause and a federal public-trust doctrine. Pet. App. 137a-167a. The court found in the Due Process Clause a new fundamental right to a "climate system capable of sustaining human life." Id. at 141a. It also articulated a federal public-trust doctrine, also grounded in substantive due process, which it held imposes a judicially enforceable prohibition on the federal government against "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." Id. at 148a (citation omitted).

3. When the district court declined to certify its order for interlocutory appeal, the government filed its first petition to the Ninth Circuit for a writ of mandamus ordering dismissal. The court of appeals stayed the case for nearly eight months while it considered the government's request, but ultimately "decline[d] to exercise [its] discretion to grant mandamus relief." Pet. App. 103a; see id. at 91a-103a. The court recognized that "some of [respondents'] claims as currently pleaded are quite broad, and some of the remedies [respondents] seek may not be available as redress." Id. at 103a. But the court reasoned that the case was "at a very early stage," and the government would "have ample opportunity to raise legal challenges to decisions made by the district court on a more fully developed record, including decisions as to whether to focus the litigation on specific

governmental decisions and orders." Id. at 101a. The court also observed that "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that it had "no reason to assume this case will be any different." Id. at 103a. And the court stated that the government could continue to "raise and litigate any legal objections," including moving to "dismiss the President as a party"; "reasserting a challenge to standing, particularly as to redressability"; or "asking the district court to certify orders for interlocutory appeal of later rulings," id. at 99a, 101a-103a.

4. The government then filed a series of motions in the district court as contemplated by the Ninth Circuit's decision. First, the government filed a motion for judgment on the pleadings, reiterating that respondents lack standing and the fundamental rights they assert lack any support in the Constitution, as well as presenting three new grounds for dismissing some or all of respondents' claims: (1) the court lacks jurisdiction to enjoin the President in his official duties; (2) the APA provides the sole mechanism for challenging the federal administrative actions that underlie respondents' claims, but respondents fail to challenge specifically identified and discrete agency action as the APA requires; and (3) respondents' claims and requested relief would violate the separation of powers by requiring the court to usurp the roles of Congress in enacting a government-wide regulatory framework and the President in calling on the expertise

and resources of the Executive Branch to formulate environmental and energy policies. D. Ct. Doc. 195 (May 9, 2018).

Shortly thereafter, the government filed a motion for summary judgment, reasserting that (1) respondents lack standing, as a matter of law and as judged against the evidentiary record; (2) respondents have not satisfied the APA's requirement to challenge discrete agency action; and (3) respondents' claims fail on the merits. The government also contended that, even aside from respondents' lack of standing, this suit is not a case or controversy within the meaning of Article III. D. Ct. Doc. 207 (May 22, 2018).

The government also filed a motion for a protective order barring all discovery, arguing that (1) because this case may proceed only under the APA, judicial review must be based on the administrative record of specifically identified actions and (2) in any event, discovery in this case would be independently barred by the procedural requirements that the APA imposes on agency fact-finding and decisionmaking and the separation of powers. The government further requested, at a minimum, a stay of all discovery until the court ruled on the government's dispositive motions. D. Ct. Doc. 196 (May 9, 2018).

5. On May 25, 2018, the magistrate judge denied the government's motion for a protective order. Pet. App. 88a-90a. He rejected the government's argument that challenges to agency action must proceed pursuant to the APA, under which review must

be based on the administrative record and discovery unavailable, concluding that respondents may proceed in a sweeping manner against all federal defendants collectively because their claims are "based on alleged violations of their constitutional rights." Id. at 89a. He also declined to grant a protective order based on the separation of powers, stating instead that "[s]hould a specific discovery request arise during discovery in this case that implicates a claim of privilege the government wishes to assert, the government may file a motion for a protective order directed at any such specific request." Id. at 90a.

The district court summarily affirmed the magistrate judge's order, Pet. App. 86a-87a, stating that it had "carefully reviewed [that] order in light of [the government's] objections" and "conclude[d] that the order is not clearly erroneous or contrary to law," id. at 87a. The court provided no further explanation for its decision and declined "to certify [its] decision for interlocutory appeal under 28 U.S.C. § 1292(b)." Ibid.

The district court set an opening trial date of October 29, 2018, and indicated its expectation that the trial will last for approximately 50 trial days. See D. Ct. Doc. 189 (Mar. 26, 2018); D. Ct. Doc. 192 (Apr. 12, 2018); 4/12/18 Tr. 8 (Coffin, J.). The court has repeatedly made clear that it has no intention of delaying trial. See, e.g., 10/4/18 Tr. 19 (Coffin, J.) ("Th[e] trial date of October 29th is a firm trial date and will not be changed unless changed by order of an appellate court or the

Supreme Court."); 5/23/18 Tr. 16-17 (Aiken, J.); 5/10/18 Tr. 27 (Coffin, J.).

6. On July 5, 2018, the government again petitioned the Ninth Circuit for a writ of mandamus. The government explained that, in an effort to terminate or narrow this case, it had taken every step that the Ninth Circuit had contemplated in its prior decision, but the district court was moving forward with discovery and an impending trial without narrowing the claims in any respect. The government accordingly asked the Ninth Circuit to order dismissal of this case, or at a minimum, to direct the district court to stay all discovery and trial pending the resolution of the government's dispositive motions, and to consider certifying for interlocutory appeal any rulings on those motions.

On July 20, 2018, the court of appeals denied the government's mandamus petition. Pet. App. 78a-85a. The court noted that "the government has not challenged a single specific discovery request," and 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 81a-82a. The court further rejected the government's separation-of-powers argument, stating 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. The court denied the "mandamus petition without prejudice," adding that the

"merits of the case can be resolved by the district court or in a future appeal." Id. at 85a.

7. While its second mandamus petition was pending before the court of appeals, the government filed a stay application in this Court. The government asked this Court to stay discovery and trial pending the Ninth Circuit's consideration of the mandamus petition. As an alternative, the government noted that the Court could direct dismissal of the case itself by construing the stay application as a petition for a writ of mandamus or a petition for a writ of certiorari.

On July 30, 2018, this Court denied the stay application "without prejudice." Juliana, 2018 WL 3615551, at *1. While noting its view that the government's application was "premature," the Court observed that the "breadth of respondents' claims is striking" and that "the justiciability of those claims presents substantial grounds for difference of opinion." Ibid. The Court directed the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." Ibid.

8. Despite this Court's expectation of "a prompt ruling on the Government's pending dispositive motions," Juliana, 2018 WL 3615551, at *1, the district court issued no ruling on those motions for more than two months after this Court's order, which itself came more than two months after the motions were filed.

With the trial date of October 29 just weeks away, the government on October 5 filed another stay request with the district court. The government informed the court that it planned to file a petition for a writ of mandamus (or, in the alternative, a petition for a writ of certiorari) with this Court, and asked the district court to stay discovery and trial pending this Court's resolution of that petition. One week after asking the district court for a stay, the government asked the court of appeals to stay discovery and trial pending this Court's review of the government's petition.[2]

9. On October 15, 2018 -- roughly five months after the motions were filed, only two weeks before the start of the scheduled trial, and only after the government informed the court that it intended to file a mandamus petition in this Court -- the district court ruled on the government's dispositive motions. Pet. App. 1a-77a. The court dismissed the President "without prejudice" and granted summary judgment to the government on respondents' "freestanding claim under the Ninth Amendment," but otherwise denied the government's motions. Id. at 23a, 69a, 77a.

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[2] Under Ninth Circuit precedent, the court of appeals lacks jurisdiction to consider a motion for a stay pending Supreme Court review after the court of appeals has previously denied a mandamus petition. See In re United States, 875 F.3d 1177, 1178 (2017). The government disagrees with that precedent but accepted it for purposes of this case and accordingly submitted its stay request to the Ninth Circuit in the form of an additional petition for a writ of mandamus.

The district court first rejected the government's argument that respondents were required to assert their challenges under the APA, concluding instead that the "APA does not govern" claims seeking equitable relief for alleged constitutional violations based on "aggregate action by multiple agencies." Pet. App. 31a. It also rejected the government's argument that respondents had failed to establish standing under the more rigorous standard that applies at the summary-judgment stage (as compared to the motion-to-dismiss stage). Id. at 55a. It largely reiterated its earlier holdings on the governments other central arguments. Id. at 31a-34a; see also id. at 56a-69a. And the court denied the government summary judgment on respondent's equal protection claim, concluding that it "would be aided by further development of the factual record." Id. at 73a; see id. at 70a-73a.

The district court again declined to certify its order for interlocutory appeal under 28 U.S.C. 1292(b), which authorizes certification where, inter alia, an "order involves a controlling question of law as to which there is substantial ground for difference of opinion." See Pet. App. 73a-77a. The court did not address this Court's express statement that "the justiciability of [respondents'] claims presents substantial grounds for difference of opinion." Juliana, 2018 WL 3615551, at *1. The court subsequently denied the government's request to stay discovery and trial pending this Court's consideration of this petition. D. Ct. Doc. 374 (Oct. 15, 2018).

ARGUMENT

The government respectfully requests that this Court grant a stay of all further discovery and trial pending the disposition of the government's petition for a writ of mandamus (or, in the alternative, certiorari). The government also respectfully requests an administrative stay pending this Court's ruling on this application for a stay. Months ago, this Court flagged the "striking" breadth of respondents' claims and the "substantial" doubts about their justiciability, reciting the standard for interlocutory certification and thereby indicating that appellate review is warranted before trial. United States v. U.S. Dist. Court, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018). The district court refused to heed that instruction. The court has declined to meaningfully narrow respondents' claims or to certify its orders for interlocutory appeal. And trial is now set to begin in less than two weeks. The government therefore has no choice but to again ask this Court to intervene -- and to end this profoundly misguided suit.

A stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus," and (2) "a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). A stay pending the disposition of a petition for a writ of certiorari (which the government seeks in the alternative) is

appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." Ibid. All of those requirements are readily met here.

1. There is a "fair prospect" that a majority of this Court will decide either to issue a writ of mandamus directly to the district court or to reverse the Ninth Circuit's denial of mandamus relief. Perry, 558 U.S. at 190. As this Court has observed, the traditional use of mandamus has been "to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004) (brackets and citation omitted). Mandamus may also be justified by errors "amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion." Ibid. (citation omitted). A court may issue a writ of mandamus when the petitioner establishes that (1) the petitioner's "right to issuance of the writ is 'clear and indisputable'"; (2) "no other adequate means [exist] to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." Perry, 558 U.S. at 190 (quoting Cheney, 542 U.S. at 380-381) (brackets in original). As explained in the government's petition (at 13-33), those prerequisites for mandamus relief are met in this case and the court of appeals erred in concluding otherwise.

a. The government's right to the dismissal of this case is "clear and indisputable" in at least three independent ways. Perry, 558 U.S. at 190 (citation omitted); see Pet. 16-28.

i. Most fundamentally, this suit fails to qualify as a "Case[]" or "Controvers[y]" within the meaning of Article III. U.S. Const. Art. III, § 2, Cl. 1.

First, respondents lack Article III standing. Pet. 16-20. To demonstrate standing, a plaintiff must prove that (1) he has suffered "an invasion of a legally protected interest which is (a) concrete and particularized," "and (b) actual or imminent, not conjectural or hypothetical"; (2) such injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (citations and internal quotation marks omitted; brackets in original). Here, however, respondents cannot show any of the three standing requirements.

The injuries that respondents claim all involve the diffuse effects of a generalized phenomenon on a global scale that are the same as those felt by any other person in their communities, in the United States, or throughout the world at large. Such alleged injuries are "generalized grievance[s]," not "an invasion of a legally protected interest" that is "concrete and particularized"

sufficient to satisfy the first prong of the standing analysis. Defenders of Wildlife, 504 U.S. at 560, 575 (citation omitted); see, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125, 127 n.3 (2014); Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam).

Even if respondents alleged adequate injuries, they cannot establish that the government policies they challenge -- expressed in broad and undifferentiated terms, rather than directed to discrete agency actions -- caused their asserted injuries. See Defenders of Wildlife, 504 U.S. at 560. Respondents principally complain of the government's regulation (or lack thereof) of private parties not before the district court. But respondents cannot establish a causal link between the amorphously described policy decisions they purport to challenge and the specific harms that they allege, as opposed to the independent actions by private persons both within and outside the United States. As this Court has explained, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." American Elec. Power Co. v. Connecticut, 564 U.S. 410, 422 (2011). But even respondents' extremely broad challenge does not suggest that petitioners can control "emissions in China." Ibid.

Finally, even if respondents could somehow establish cognizable injury-in-fact and causation, respondents have not even begun to articulate a remedy that a federal court would have authority to award and that could move the needle on the complex

phenomenon of global climate change, much less likely redress their alleged injuries. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40-46 (1976). The district court assumed that it had the authority to "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." Pet. App. 172a (quoting Am. Compl. 94); see id. at 184a. But neither respondents nor the court cited any legal authority that would permit such a usurpation of legislative and executive authority by an Article III court.

Second, quite aside from these fatal flaws with respect to standing, this suit simply is not one that a federal court may entertain consistent with the Constitution. Pet. 20-22. The "judicial Power of the United States," U.S. Const. Art. III, § 1, is "'one to render dispositive judgments'" in "cases and controversies" as defined by Article III. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-219 (1995) (citation omitted). It can "come into play only in matters that were the traditional concern of the courts at Westminster" and when those matters arise "in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000) (citation omitted). Respondents' suit is not such a case or controversy.

Respondents ask the district court to review and assess the entirety of Congress's and the Executive Branch's programs and

policies relating to climate change and then to undertake to pass upon the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate. See, e.g., Am. Compl. ¶¶ 277-310. No federal court, nor any court at Westminster, has ever purported to use the "judicial Power" to perform such a review -- and for good reason: the Constitution commits to Congress the power to enact comprehensive government-wide measures of the sort respondents seek. And it commits to the President the power to oversee the Executive Branch in its administration of existing law and to draw on its expertise and formulate policy proposals for changing existing law. Such functions are not the province of Article III courts. See U.S. Const. Art. I, § 1; id. Art. II, § 2, Cl. 1; id. § 3; cf. Cheney, 542 U.S. at 385. "There simply are certain things that courts, in order to remain courts, cannot and should not do." Missouri v. Jenkins, 515 U.S. 70, 132 (1995) (Thomas, J., concurring). One of those things is "running Executive Branch agencies." Id. at 133. And it surely includes running all of them.

ii. Beyond these limitations imposed by Article III, the APA also supplies an insurmountable obstacle to this suit. Pet. 22-25. The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. It authorizes a reviewing court to "hold unlawful and set aside agency action" that is

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. 706(2)(A)-(B), and to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1). In so doing, the APA provides a comprehensive remedial scheme for a person "adversely affected or aggrieved by agency action" or alleged inaction with respect to regulatory requirements and standards, permitting, and other administrative measures. See Wilkie v. Robbins, 551 U.S. 537, 551-554 (2007). It is, in other words, "an umbrella statute governing judicial review of all federal agency action." Webster v. Doe, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting). "[I]f review is not available under the APA it is not available at all." Ibid.

Respondents allege that a vast number of largely unspecified "agency action[s]" and inactions spanning the last several decades are, in the words of the APA, "contrary to constitutional right." 5 U.S.C. 702, 706(2)(B). But respondents' claims cannot proceed under the APA because the APA allows only for challenges to specifically identified and "circumscribed, discrete" final agency action, not the sort of "broad programmatic attack" on agency policies that respondents assert here. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62, 64 (2004) (SUWA); see Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990). Respondents expressly cast their claims as a challenge to "affirmative

aggregate actions" by the numerous defendant agencies, Am. Compl. ¶ 5 -- the antithesis of a challenge to specifically identified and "discrete agency action" as permitted by Congress under the APA, SUWA, 542 U.S. at 64.

Respondents and the district court suggest that respondents' claims need not comply with the APA's limitations because the Constitution itself provides the right of action for constitutional claims. Am. Compl. ¶ 13; see Pet. App. 23a-31a. But as noted, the APA itself contemplates claims that agency action is "contrary to constitutional right." 5 U.S.C. 706(2)(B). And this Court has never suggested the Constitution itself provides an across-the-board right of action for all constitutional claims -- and especially not for the sweeping constitutional claims concerning governmental regulation that respondents advance here or for the sweeping relief they seek. To the contrary, this Court has recognized that, although federal courts have equitable authority in some circumstances "to enjoin unlawful executive action," that equitable power is "subject to express and implied statutory limitations." Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015). Here, even if the equitable authority of an Article III court could ever extend to a suit of a sort remotely resembling what respondents have brought here, the APA provides "express * * * statutory limitations" that "'foreclose,'" ibid. (citation omitted), respondents' asserted constitutional claims against the broad and largely unspecified

"aggregate actions" of the federal government as a whole, Am. Compl. ¶ 129.

iii. Finally, even if the district court could reach the merits of respondents' constitutional theories, it should not have allowed their claims to move forward, let alone to a ten-week trial. Pet. 25-28. In declining to dismiss the case, the district court concluded that respondents stated two related constitutional claims based on substantive due process: (1) a previously unidentified judicially enforceable fundamental right to "a climate system capable of sustaining human life"; and (2) a federal public-trust doctrine to the same effect. Pet. App. 141a; see id. at 138a-167a. Both claims are baseless.

The district court's recognition of an "unenumerated fundamental right" to "a climate system capable of sustaining human life," Pet. App. 141a, is entirely without basis in "this Nation's history and tradition." Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citation omitted). It threatens to wrest fundamental policy issues of energy development and environmental regulation affecting everyone in the country from "the arena of public debate and legislative action," id. at 720, and to thrust them into the supervision of the federal courts -- indeed, here, into a single district court at the behest of a handful of individuals, a person purporting to act on behalf of future generations, and a single environmental organization, advancing just one perspective on the complex issues involved. And although the court relied principally

on the Court's recognition of a fundamental right to same-sex marriage in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), Pet. App. 140a-141a, there is plainly no relationship between a distinctly personal and circumscribed right to same-sex marriage and the alleged right to a climate system capable of sustaining human life that apparently would run indiscriminately to every individual in the United States.

Respondents' novel public-trust claim fares no better. Respondents appeal to a public-trust concept that has been relied upon to hold that, as a matter of state law, the sovereign "owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." National Audubon Soc'y v. Superior Court, 658 P.2d 709, 718 (Cal.), cert. denied, 464 U.S. 977 (1983) (citation and internal quotation marks omitted). They attempt to invoke that concept to impose judicially enforceable, extra-statutory obligations on the federal government's regulation of the fossil-fuel industry and its alleged effects on the atmosphere. They fail, however, to identify a single decision applying a public-trust doctrine in this novel manner. And even if such a doctrine could ever dictate a sovereign's regulation of private parties, respondents' claim would be unavailing against the federal government because, as this Court has recognized, the public-trust concept is purely a matter of state law and pertains only to a State's functions. See, e.g., PPL Montana LLC v. Montana, 565 U.S. 576, 603 (2012) ("[T]he

public trust doctrine remains a matter of state law.") (citing Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 284-286 (1997)).

b. As the petition further explains (at 28-31), the government has no adequate means to obtain relief from the district court's egregious errors in refusing to dismiss this litigation or to prevent the impending trial. To be sure, the government could raise some of the arguments asserted here after the 50-day liability phase of trial, a finding that the federal government is effectively liable for the harms of climate change, and further proceedings to impose an unprecedented invasive remedy, but an appellate reversal at that point would hardly provide an "adequate means" of obtaining relief. Cheney, 542 U.S. at 380 (emphasis added; citation omitted); see, e.g., In re Kellogg Brown & Root, Inc., 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (granting mandamus where appeal after a final judgment would not provide an "adequate" means of obtaining relief), cert. denied, 135 S. Ct. 1163 (2015); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 20-25 (1st Cir. 1982) (Breyer, J.) (same).

The federal sovereign and the Executive Branch agencies and officials sued by respondents will "suffer a special institutional harm by being forced to remain" in this suit through a trial, a finding of liability, and the entry of a remedy. In re Justices, 695 F.2d at 20. As this Court observed in Cheney, "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to

discharge its constitutional responsibilities." 542 U.S. at 382; see ibid. (recognizing the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties"). Here, compelling petitioners to participate in the fundamentally misguided trial envisioned by the district court would constitute a "judicial 'usurpation of power'" warranting mandamus for at least two additional reasons. Id. at 380 (citation omitted).

First, subjecting petitioners to trial on respondents' claims would violate the APA's carefully reticulated scheme for agencies to make factual assessments and policy determinations through rulemaking with public participation and through agency adjudication, not civil litigation in Article III courts. The APA sets forth a "comprehensive regulation of procedures" for agency decisionmaking. Wong Yang Sung v. McGrath, 339 U.S. 33, 36 (1950); see 5 U.S.C. 551-554 (2012 & Supp. V 2017). To require agencies to take official positions on factual assessments and questions of policy concerning the climate through the civil litigation process -- and then, if liability is found, to participate in further judicial proceedings to impose on them an "enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2," Am. Compl. 94 -- would impermissibly conflict with the APA's procedures and deprive other interested parties and the public of the ability to provide input where those procedures require.

Second, subjecting petitioners to trial on respondents' claims would violate the Constitution's separation of powers. Even before the enactment of the APA, this Court recognized that permitting an agency's "findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal," Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444 (1930), a step that would improperly allow the court to "usurp[] the agency's function," Unemployment Comp. Comm'n v. Aragon, 329 U.S. 143, 155 (1946). Limiting judicial review to agency actions taken in the administrative process reflects fundamental separation-of-powers principles.

By seeking to leverage the civil litigation process to direct petitioners' decisions outside the congressionally prescribed statutory framework, respondents would run roughshod over those separation-of-powers principles. Respondents' proposed approach violates the vesting of the "legislative Powers" in Congress to the extent it would require agencies to transgress the substantive and procedural constraints imposed on them by statute. U.S. Const. Art. I, § 1. And to the extent respondents seek to require the President and Executive agencies to develop and implement such policies, they seek to violate the Constitution's vesting of "executive Power * * * in a President of the United States." Id. Art. II, § 1, Cl. 1. Granting mandamus relief is the only "adequate means" of preventing such intrusions. Cheney, 542 U.S. at 380 (citation omitted).

c. As the petition explains (at 31-32), mandamus relief is "appropriate under the circumstances." Cheney, 542 U.S. at 381. As noted, mandamus was traditionally used "to confine [an inferior court] to a lawful exercise of its prescribed jurisdiction," and granting mandamus based on the total absence of Article III jurisdiction and of any cognizable constitutional rights on the merits would be consistent with that use. Id. at 380 (citation omitted); see Pet. 32 (collecting examples of such cases).

Mandamus is particularly appropriate here because dismissing the case is the only way "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." Cheney, 542 U.S. at 382; see ibid. (emphasizing "separation-of-powers considerations"). Indeed, in its order declining to intervene at an earlier stage of this case, this Court indicated that appellate review before trial was appropriate by reciting critical language from the statute authorizing certification for interlocutory appeal, 28 U.S.C. 1292(b),. See Juliana, 2018 WL 3615551, at *1. But the district court declined to follow this Court's lead, leaving an extraordinary writ as the only means for appellate review before much of the Executive Branch is subject to a trial on baseless claims that the district court has no authority to remedy. The "novelty of the District Court's" ruling, "combined with its potentially broad and destabilizing effects," underscores that granting the writ is "'appropriate under the circumstances.'" In re Kellogg Brown & Root, 756 F.3d

at 763 (quoting Cheney, 542 U.S. at 381). And for many of the same reasons, even if the Court declines to issue a writ of mandamus directly to the district court, it would be appropriate for the Court to issue a writ of certiorari under 28 U.S.C. 1254(1) to review the Ninth Circuit's refusal to intervene or a common-law writ of certiorari under 28 U.S.C. 1651 to directly review the district court's resolution of the government's dispositive motions. See Pet. 14-15.

2. Irreparable harm inevitably "will result from the denial of a stay" of further discovery and trial pending consideration of the government's petition. Perry, 558 U.S. at 190. Absent a stay, the government will be forced to proceed with a 50-day liability trial that is fundamentally inconsistent with Article III and the separation of powers under the Constitution, as well as with procedures Congress has prescribed in agencies' organic statutes and the APA for agencies to consider factual and legal issues concerning major policy and for the courts to review their determinations. Trial would force the government to address climate-change policy not in APA rulemakings and other agency actions authorized by statutes such as the Clean Air Act, but in a single trial court in Oregon. These injuries caused by the trial itself could not be remedied on appeal.

The more tangible costs of these proceedings should also not be ignored. The Department of Justice alone has already devoted nearly 13,000 attorney and paralegal hours and spent millions of

taxpayer dollars in expert fees, travel expenses, and other non-attorney fees defending against respondents' baseless claims. App., infra, 3a-4a. If the liability phase of trial proceeds as scheduled, the parties are expected to present up to 72 witnesses -- 43 lay witnesses and 29 expert witnesses -- and 3000 exhibits. Id. at 4a. Expert testimony would be expected on a diverse range of topics -- including the impacts of climate change on ocean chemistry, sea level, glaciers, terrestrial ecosystems, and human physical and emotional health, as well as the technical and economic feasibility of transitioning to renewable sources of energy and sequestering carbon from the atmosphere, to name just a few examples -- described in over 1,100 pages worth of expert reports. Ibid. And respondents' exhibit list includes documents dating back to the Washington Administration. See id. at 31a-150a. To conduct a trial of this staggering complexity, even under conservative estimates, the Department's Environmental and Natural Resources Division attorneys and paralegals are likely to commit an additional 7300 hours of their time between now and February 2019 to proceedings that should never occur. Id. at 4a-5a. The government, of course, recognizes the need to devote resources to defend against plausible claims and, in the ordinary course, it does not seek extraordinary relief from this Court or the courts of appeals simply because it disagrees with a district court's resolution of a dispositive motion. But the claims in this case are extraordinary and the district court's errors are egregious.

The real-world monetary and human costs that those errors would impose on the government, if the trial is permitted to proceed, would unavoidably "distract [the Department] from the energetic performance of its constitutional duties" in a manner that warrants this Court's intervention. Cheney, 542 U.S. at 382.

By contrast, respondents can make no credible claim that a relatively brief stay to decide the government's petition will cause them irreparable harm. Because respondents' alleged injuries stem from the cumulative effects of CO_2 emissions from every source in the world over decades, whatever additions to the global atmosphere that may somehow be attributed to the defendant agencies over the time it takes to resolve the government's pending petition are plainly de minimis in context and not a source of irreparable harm.

CONCLUSION

For the foregoing reasons, this Court should stay discovery and trial pending the disposition of the government's petition for a writ of mandamus (or, in the alternative, certiorari) and any further proceedings in this Court. The government also requests that this Court enter an administrative stay pending its consideration of this stay application.

Respectfully submitted.

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