Case No. 17-71692

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON,
Respondent,
and
KELSEY CASCADIA ROSE JULIANA, *et al.*,
Real Parties in Interest

On Petition For Writ of Mandamus In Case No. 6:15-cv-01517-TC-AA (D. Or.)

ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Real Party in Interest 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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INTRODUCTION

Real Parties in Interest ("Plaintiffs") brought this constitutional case against Petitioners ("Defendants") because the affirmative aggregate and systemic actions of Defendants infringe Plaintiffs' fundamental rights to life, liberty, and property. Defendants admit their actions imperil Plaintiffs with "dangerous, and unacceptable economic, social, and environmental risks," and that "the use of fossil fuels is a major source of [greenhouse gas] emissions, placing our nation on an increasingly costly, insecure, and environmentally dangerous path." Dkt. 98 ¶¶ 7, 150.[1] Depositions of Defendants' witnesses independently confirm that current levels of atmospheric CO_2 and climate change are "dangerous," and that our nation is in an "emergency situation." Declaration of Julia A. Olson ("Olson Decl.") ¶¶ 53-54. In his deposition, the head of the federal climate research program testified he is "fearful," that "increasing levels of CO_2 pose risks to humans and the natural environment," and that he does not "think current federal actions are adequate to safeguard the future." *Id*. at ¶ 54.

In spite of these threats, Defendants claim this Court's intervention is necessary solely due to discovery issues, which they erroneously characterize as burdensome. However, the parties have been meeting and conferring, and Plaintiffs are reasonably responding to Defendants' concerns and assertions of privilege. No

[1] Plaintiffs refer to the District Court docket as "Dkt." and to the Ninth Circuit docket as "Doc."
[2] The National Association of Manufacturers, the American Fuel & Petrochemical

discovery motions have been filed and no discovery orders have been entered. Plaintiffs have no interest in overburdening Defendants or in drawing out discovery disputes given the urgency of the climate crisis. They intend to begin trial, as ordered by the District Court, on February 5, 2018.

Defendants also fundamentally mislead this Court by suggesting that Plaintiffs' case hangs on an unenumerated right supposedly recognized for the first time by the District Court. That is false. In order to grant the writ and dismiss this case, this Court would also need to reverse over a hundred years of Supreme Court jurisprudence and find the Fifth Amendment does not provide Americans the fundamental rights to personal security, property, life, or family autonomy and security. The radical request made by Defendants seeks to deny these children access to their third branch of government when they allege infringement of fundamental rights long recognized by the judiciary and when Defendants themselves admit the threat to Plaintiffs' lives and security. This case raises constitutional questions that must first be answered by the very capable District Court in the ordinary course of judicial review. When Defendants admit the climate system is in the "danger zone," unsupported claims of inconvenient discovery do not warrant staying this constitutional case.

STATEMENT OF THE RELEVANT FACTS

On August 12, 2015, 21 youth Plaintiffs brought this action against the United States government. Compl., Dkt. 1. Plaintiffs allege Defendants have known for decades that CO_2 pollution has been causing catastrophic climate change, and that continuing to burn fossil fuels would destabilize the climate system and threaten the personal security, lives, liberties, and property of our nation's present and future generations, including Plaintiffs. First Am. Compl. ("FAC") ¶¶ 1, 279, Dkt. 7. Despite their knowledge, Defendants affirmatively acted, and continue to act, to promote and allow increasing extraction, production, consumption, transportation, and exportation of fossil fuels, as part of the national energy system, which has resulted in dangerous levels of carbon pollution.[2] FAC ¶¶ 5, 98, 105, 111, 114, 117, 119, 121, 123, 125, 129, 130, 151-200.

In their Answer, Defendants made significant admissions, such as "'business as usual' CO_2 emissions" imperil Plaintiffs with "dangerous, and unacceptable economic, social, and environmental risks." Dkt. 98 at ¶ 150. Dr. Michael Kuperberg, Executive Director of the U.S. Global Change Program, testified: "our

[2] The National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute (collectively, "Intervenors") successfully intervened in this action. Dkt. 14, 15, 50. After losing their motions to dismiss and for interlocutory appeal, and faced with answering Requests for Admissions, Intervenors subsequently withdrew from this case. Dkt. 182; Olson Decl. ¶ 24-25.

country is currently in a danger zone when it comes to our climate system." Olson Decl. ¶ 54. Plaintiffs seek an order declaring their fundamental rights and the infringement thereof and compelling Defendants to prepare a national emissions inventory and plan to protect our nation's climate system, according to factual findings on the best available science. Dkt. 7.

After reasoned analyses on four occasions, two judges rejected the merits of Defendants' Motion to Dismiss. *See* Dkts. 68, 83, 146, 172. On April 8, 2016, Magistrate Judge Coffin recommended denying Defendants' Motion to Dismiss. Dkt. 68. On November 10, District Court Judge Aiken denied Defendants' Motion to Dismiss. Dkt. 83. Nearly two months after Defendants answered the FAC, Dkt. 98, and four months after Judge Aiken's Order, on March 7, 2017, Defendants moved to certify the November 10 Order for interlocutory appeal, arguing for a stay pending interlocutory review. Dkts. 120, 121. Judges Coffin and Aiken both rejected these motions. Dkts. 146, 172.

On June 9, 2017, Defendants filed this Petition. Doc 1-1. On June 19, Plaintiffs opposed Defendants' request for stay. Doc. 4. On July 25, this Court issued a temporary stay, Doc. 7, and on July 28, ordered Plaintiffs to respond to Defendants' Petition, Doc. 8.

ARGUMENT

I. THE DISCOVERY PROCESS IN THIS CASE DOES NOT WARRANT THE EXTRAORDINARY REMEDY SOUGHT.

Defendants' claim of "an unbounded discovery process" is factually inaccurate and fails to justify mandamus. Pet. at 2. The discovery propounded does not present a "staggering burden," as the parties have met and conferred to resolve discovery issues without the need for court intervention. *Id.*; Olson Decl. ¶¶ 8-10. To date, the District Court has issued ***no*** discovery orders to Defendants. *Id.* at ¶ 3. Defendants have presented ***no*** evidence demonstrating any harm from participating in discovery or that the District Court will not properly manage discovery. A purely hypothetical "discovery burden" does not justify mandamus relief.

A. Defendants Mischaracterize the Status of Discovery.

Defendants omit that the parties have successfully met and conferred to resolve all discovery disputes without the need for motion practice or formal court intervention. *Id.* at ¶ 3-10. In addition, Intervenors withdrew from the case on June 28, 2017, substantially narrowing the scope of discovery that Plaintiffs were required to conduct. Defendants, unlike Intervenors, admit many of the core facts of the case.[3] *Id.* at ¶¶ 25-27; Dkt. 182. Finally, the District Court has successfully

[3] The District Court repeatedly directed Intervenors to take a position on Defendants' admissions to narrow the issues for trial. Olson Decl. ¶¶ 12-27. Intervenors refused, necessitating more expansive discovery. *Id.*; Dkt. 98; Dkt. 146 at 2-4.

used monthly status conferences to facilitate informal resolution of potential discovery disputes. *Id.* at ¶ 5.

Defendants overstate the significance of Plaintiffs' standard-practice Notice of Litigation Hold and Request for Preservation served on January 24, 2017. *See* Pet. at 33; *see also* Olson Decl. at ¶¶ 32-34. This letter was prompted by news reports of the Trump Administration removing and destroying records regarding climate change. *Id.* at ¶ 32. Plaintiffs repeatedly assured Defendants the January 24 letter is not a request for production. *Id.* at ¶ 33. Ultimately, Defendants promised Plaintiffs the relevant evidence was being preserved and there are no ongoing concerns regarding the January 24 letter. *Id*. at ¶ 34.

Plaintiffs have taken extraordinary efforts to narrow the scope of discovery. *Id.* at ¶ 3. First, Plaintiffs spent years conducting informal discovery, their primary discovery tool, to build their case. *Id.* at ¶ 11, 61. Second, Plaintiffs withdrew many of the discovery requests that Defendants contend "intru[de] on the separation of powers." Pet. at 33. Specifically, Plaintiffs withdrew their Third Set of Requests for Production ("RFPs") seeking emails of Rex Tillerson when he was CEO at ExxonMobil and withdrew RFPs to the Executive Office of the President ("EOP") and the President. *Id.* at ¶ 37-38. Plaintiffs also narrowed RFPs submitted to Departments of State, Defense and Agriculture. *Id.* at ¶ 39, 42. Third, Plaintiffs are not seeking discovery as to senior executive officials. *Id*. at ¶ 57.

Defendants' claim that they "will be forced to respond in the coming weeks to document requests that seek material dating back over at least five decades," is far from the truth. Pet. at 8. The primary historical documents requested by Plaintiffs are housed at Presidential libraries or the U.S. National Archives and Records Administration ("NARA"). On February 21 and March 7, Plaintiffs' RFPs identified specific documents by file and box sought from presidential libraries and NARA facilities. *Id.* at ¶¶ 35-36. Defendants agreed to make non-privileged documents available for viewing at NARA upon entry of a protective order. *Id.* at ¶ 36, 44. On January 20, 2017, Plaintiffs served ten Requests for Admission ("RFAs") on the EOP and the Environmental Protection Agency ("EPA"), to which Defendants served responses and objections. *Id*. at ¶ 28-30. Plaintiffs do not intend to move to compel further responses to these RFAs. *Id*. at ¶ 31.

On March 31, 2017, Plaintiffs served RFPs on the Departments of Agriculture, Defense, and State. *Id*. at ¶ 39. After conferring, Plaintiffs served Revised RFPs and Defendants committed to provide a document production plan by June 23, identifying proposed search terms, custodians, time periods, and media. *Id*. at ¶ 39-42. Defendants later identified responsive documents to be produced, prior to the temporary stay. *Id*. at ¶ 41. Plaintiffs continue to narrow RFPs and work with Defendants to identify responsive documents for production without implicating separation of powers issues, as indicated in Plaintiffs' most

recent correspondence. *Id.* at ¶ 39-42.

To date, Plaintiffs have taken two depositions: (1) Mark Eakin, Coordinator of NOAA's Coral Reef Watch program; and (2) Michael Kuperberg, Executive Director, U.S. Global Change Research Program. *Id.* at ¶¶ 52-54. During Dr. Kuperberg's deposition, the executive and deliberative process privileges were raised and resolved in a manner that did not impose any burden on Defendants nor implicate separation of powers concerns.[4] *Id.* at ¶ 55-56. Plaintiffs served Federal Rule of Civil Procedure 30(b)(6) deposition notices on the Departments of Defense, Energy, Interior, Transportation, State, Agriculture, and EPA. Plaintiffs expect to resolve any issues through meet and confer.[5] *Id.* at ¶ 49, 51, 58-59.

To date there have been no discovery disputes as to experts. *Id*. at ¶ 46-50. Plaintiffs disclosed expert witnesses on March 24, 2017; on June 26, the District Court scheduled the exchange of expert reports. *Id*. at ¶¶ 47-48. Many expert reports have been served on Defendants; the remaining reports will be served when the stay is lifted. *Id*. at ¶ 49. Plaintiffs do not anticipate any disputes associated with scheduling expert depositions or the exchange of expert reports. *Id*. at ¶ 50.

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[4] One outstanding issue is the scope of the deliberative process privilege as to outstanding discovery requests. *Id*. at ¶ 55. Plaintiffs anticipate resolving this issue. *Id.*

[5] While Plaintiffs initially conferred on deposing four agency officials, as required by Local Rule 30-2, Dkt.151-9, no deposition notices were served and Plaintiffs will not seek to depose these officials. *Id.* at 57.

B. Defendants Provided No Evidence of Burdensome Discovery.

Defendants contend "the burden and cost of complying with the extraordinarily intrusive and inappropriate discovery sought by plaintiffs cannot be corrected" through the appellate process. Pet. at 33. However, Defendants offered ***no*** evidence of the burden they allegedly would suffer by responding to existing discovery. Nor do Defendants present evidence to show "[t]he damage this will do to vital federal operations." Pet. at 37. In fact, Defendants misleadingly submit only the discovery requests themselves (many of which have been resolved through meeting and conferring and/or withdrawn). *See* Olson Decl. ¶¶ 2-70.

A party seeking mandamus must show that he will be "damaged or prejudiced in a way not correctable on appeal." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2009). This Circuit held irreparable harm must be supported by actual evidence; cursory and conclusory statements are insufficient. *Herb Reed Enterprises, LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013). Responding to discovery is a normal part of litigation and does not constitute irreparable harm, let alone damage or prejudice not correctable on appeal. *See F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (citing *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938)); *Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24, (1974).

Absent affirmative evidence justifying mandamus, the petition should be denied. The federal government is capable of submitting testimony from federal employees as evidence that a discovery order is unduly burdensome. *See, e.g., In re: Thomas E. Price, Secretary of Health & Human Serv., et al.*, No. 17-71121 (Pet. for Writ of Mandamus) (filed April 19, 2017) at 19-20 ("As explained in declarations submitted below . . . reviewers would require more than three years to complete review of the hundreds of thousands of pages of material amassed thus far in response to the district court's order."). In the instant case, no such evidence exists. Pet. at 2.

This case presents a notable *absence* of discovery issues. Defendants have produced no documents in response to Plaintiffs' discovery requests. Olson Decl. at ¶ 9. No discovery orders have been entered by the District Court. The meet and confer process has thus far successfully eliminated the need for discovery motions. *Id.* at ¶ 8-10. Only two depositions have been conducted, imposing minimal burden and expense.[6] *Id.* at ¶ 9. Defendants have failed to show mandamus is warranted.

[6] In *Medhekar v. U.S. Dist. Court for the Dist. of California*, 99 F.3d 325, 326 (9th Cir. 1996), cited by Defendants, the petitioners submitted evidence showing tremendous burden and expense associated with complying with disclosures ordered by the court. Similarly, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004) presented a court approved discovery plan and "entered a series of orders allowing discovery to proceed." *Id.* at 376. Here, no orders exist directing Defendants to produce privileged information. In *Cheney*, the government had asked the district court to narrow the scope of discovery, but "its arguments were ignored." *Id.* at 388. Finally, the high stakes of this constitutional

Defendants insinuate that *all* forms of discovery against the federal government are impermissible as overly burdensome and intrusive based on separation of powers. That is not the law. "When the government is named as a party to an action, it is placed in the same position as a private litigant, and the rules of discovery in the Federal Rules of Civil Procedure apply." *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 776 n.4 (9th Cir. 1994); *United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958); Sisk, A Primer on Civil Discovery Against the Federal Government, 52-June Fed. Law. 28, 29 (2005);

Plaintiffs acknowledge the federal government can invoke privileges to constrain discovery sought from senior officials. *See, e.g.*, *Cheney*, 542 U.S. at 390; *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231-32 (9th Cir. 1979). While some forms of discovery against agency heads have been upheld by this Court, s*ee, e.g., Kyle Engineering Co.*, 600 F.2d at 231-32, that issue is not present here. Plaintiffs have no pending discovery requests for information from senior officials, nor do Plaintiffs intend to seek discovery from senior officials. Olson Decl. ¶ 57.

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case differentiate it from the factual scenario in *Cheney* where the Supreme Court found that vindication of Congress' policy objectives under FACA did not rise to the level of impairment of "a court's Article III authority or Congress' central Article I powers." *Id.* at 384-85. The instant case is more similar to cases referenced in *Cheney* where efforts were taken "to explore other avenues, short of forcing the Executive to invoke privilege" to avoid separation of powers issues. *Id.* at 390.

C. The District Court Should Be Afforded Wide Discretion to Manage Discovery and Resolve Discovery Disputes.

While Plaintiffs do not anticipate protracted discovery disputes, the District Court must be allowed broad discretion to first address them. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); Olson Decl. ¶ 64-70. "[D]istrict courts can, and will balance the government's concerns under the general rules of discovery." *Exxon Shipping Co.*, 34 F.3d at 779. District courts can quash or modify subpoenas, protect privileged information, and limit discovery of documents or testimony of officials. *Id.* at 779-80. Similarly, the District Court can ensure Plaintiffs are entitled only to discovery appropriate under the federal rules. *Kyle Engineering Co.*, 600 F.2d at 231-32.

The *Cheney* decision does not change this analysis: "there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas." 542 U.S. at 390. That is what the District Court has encouraged here. Olson Decl. ¶ 4, 5, 10, 23, 64-65. Plaintiffs do not anticipate discovery disputes that cannot be resolved by the District Court, that implicate separation of powers issues, or that will delay trial of these critical claims. *Id.* at ¶ 63-70.

II. THE DISTRICT COURT HAS JURISDICTION OVER PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO SECTION 201 OF THE ENERGY POLICY ACT.

In a footnote citing one out-of-circuit case, Defendants insinuate for the first time that the District Court is without jurisdiction to decide Plaintiffs' constitutional challenge to Section 201 of the Energy Policy Act, 15 U.S.C. § 717b(c). However, the District Court has original jurisdiction over Plaintiffs' constitutional challenge to Section 201 alongside other aggregate acts identified in the FAC. 28 U.S.C. § 1331. This is so notwithstanding 15 U.S.C. § 717r, which provides for exclusive appellate court review of certain Department of Energy ("DOE") orders following agency rehearing.

The District Court retains federal question jurisdiction over a facial constitutional challenge to a statute, "unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within the statutory structure.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207, 212 (1994)). Courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting *Thunder Basin,* 510 U.S. at 212-13).

Plaintiffs' constitutional challenge is not "of the type Congress intended to be reviewed within" the Natural Gas Act's review scheme, which provides for agency rehearing of certain *discretionary* DOE orders. *Id.*; 15 U.S.C. § 717r. First, because approval of export authorization permits under Section 201 is mandatory, Section 717r's venue provision is inapplicable. Defendants admit DOE's approval did not provide "any opportunity for public participation in the decision-making process." Dkt. 98 ¶ 96. For this reason, precluding District Court jurisdiction would foreclose any judicial review of Plaintiffs' constitutional challenge. Second, because Plaintiffs "do not claim that DOE/FE Order No. 3041 suffers from any procedural or facial defect," but instead challenge the constitutional validity of the underlying statute, their challenge is wholly collateral to Section 717r's review scheme and implicates issues outside the DOE's expertise. Dkt. 27 at 3.

A. There Is No "Fairly Discernable" Congressional Intent to Channel Review of Mandatory Natural Gas Export Authorizations Pursuant to Section 201.

Whether a statutory review scheme displays a "fairly discernable" intent to limit jurisdiction "is determined from the statute's language, structure, and purpose." *Thunder Basin,* 510 U.S. at 207. Where these factors show the statutory review scheme is inapplicable to a claim, the district court retains jurisdiction. *Latif v. Holder*, 686 F.3d 1122, 1127-29 (9th Cir. 2012).

Here, because Section 201's export authorizations are mandatory, and therefore not reviewable under Section 717r, the statutory scheme does not display a fairly discernable intent to limit district court jurisdiction. 15 U.S.C. § 717b(c). Defendants concede Section 201 does not "include any environmental review or other public interest analysis by DOE," and "the requirement for public notice of applications and other hearing-type procedures" are inapplicable, which means further review of the Commission's order in the Court of Appeals is precluded. Dkt. 98 at ¶ 96; DOE/FE Order No. 3041 at 11 n.5; 15 U.S.C. § 717r(a). As in *Latif*, Section 717r's review scheme – limiting judicial review to parties to the proceeding who have sought agency rehearing – is inapplicable to authorizations under Section 201, for which intervention and rehearing are not possible. *Latif*, 686 F.3d at 1127-29.

Furthermore, allowing district court jurisdiction over such claims could not undermine Section 717r's "integrated scheme of review," since the scheme does not apply. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 14 (2012); *see McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479, 497 (1991). Pursuit of such claims in the district court could not be "a way of evading entirely established administrative procedures." *Latif*, 686 F.3d at 1128. Ultimately, Plaintiffs' claims, which could not be brought pursuant to Section 717r's review scheme, are not "of the type Congress intended to be reviewed within the statutory structure." *Thunder*

Basin, 510 U.S. at 212. In contrast, orders issued pursuant to Section 717b(a) are discretionary, subject to a public interest analysis, a public hearing, and are reviewable.

B. Precluding District Court Jurisdiction Would Foreclose All Meaningful Judicial Review.

For Plaintiffs, *all* meaningful judicial review would be foreclosed under Section 717r's review scheme. *McNary,* 498 U.S. at 496-97; *see NO Gas Pipeline v. F.E.R.C.*, 756 F.3d 764, 768–69 (D.C. Cir. 2014) (appellate court lacked jurisdiction under Section 717r because petitioner had not challenged FERC ruling as to its reasoning or findings).

Intervention in an export authorization proceeding under Section 201 is not allowed, since approval is mandatory under the statute "without modification or delay." 15 U.S.C. § 717b(c); 15 U.S.C. § 717r(a); Olson Decl. ¶ 71. DOE does not even publish notices in the Federal Register when it reviews permit applications under Section 201. *See* DOE/FE Order No. 3041 at 8. Accepting Defendants' argument would make it impossible to bring a constitutional challenge to Section 201. This Court should "presume that Congress does not intend to limit jurisdiction." *Free Enter. Fund*, 561 U.S. at 489.

Here, paralleling *NO Gas Pipeline*, Plaintiffs challenge the constitutionality of the underlying statute and Defendants admit Plaintiffs are not challenging the order itself. Dkt. 27 at 3-4. Plaintiffs' challenge thus does not "depend on the

merits of any given individual" order. *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 876 (9th Cir. 2009).

C. Plaintiffs' Constitutional Challenge Is Wholly Collateral to Section 717r's Provisions and Outside DOE's Expertise

Constitutional claims challenging the underlying statutory authority are wholly collateral to a statute's review provisions and courts cannot infer Congressional intent to "limi[t] judicial review of these claims to the procedures set forth in [the statutory scheme]," including "general collateral challenges to unconstitutional practices and policies." *McNary,* 498 U.S. at 491-493; *Free Enter. Fund*, 561 U.S. at 489; *cf. Johnson v. Robison*, 415 U.S. 361, 373–74 (1974); *Latif*, 686 F.3d at 1128-29.

Plaintiffs' constitutional challenge is "wholly collateral" to Section 717r's review scheme and implicates constitutional questions outside DOE's expertise. *Thunder Basin,* 510 U.S. at 212-13, 215. The fact that Plaintiffs also mount an as-applied challenge to DOE/FE Order No. 3041 does not alter this analysis. The challenge to Order No. 3041 is a logical extension of Plaintiffs' facial challenge: if the statutory provision is unconstitutional, then orders issued pursuant to it are also unconstitutional. The line between facial and as-applied constitutional challenges is "hazy at best," and no talismanic invocation of this distinction can change that Plaintiffs are not seeking review of the merits of any order but instead raise constitutional claims. *Elgin*, 567 U.S. at 15, 22; *Latif*, 686 F.3d at 1129. Unlike

Elgin, Plaintiffs do not bring their claim against Section 201 as a "vehicle" to overturn a particular order, but as a facial challenge to a statute mandating promotion of fossil fuels, in the context of a larger set of challenges to government actions that infringe on Plaintiffs' constitutional rights. *Elgin*, 567 U.S. at 22; FAC ¶ 288, 299.

III. THIS CASE SATISFIES *NONE* OF THE *BAUMAN* REQUIREMENTS FOR MANDAMUS

"Mandamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 369 (citation omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* (quotes, citations omitted). As petitioners, Defendants bear the heavy burden of showing that their "right to issuance of the writ is clear and indisputable." *Id.* (quotes, citations omitted).

As the Supreme Court recently reaffirmed:

> 'From the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.' *McLish v. Roff*, 141 U. S. 661, 665–666 (1891). This final-judgment rule, now codified in [28 U.S.C.] §1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.

Microsoft Corp. v. Baker, 582 U.S. __ (2017) (slip op., at 11-12).

The guidelines employed by this Court to determine "whether mandamus is appropriate" are:

> (1) [W]hether 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 a 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.[7]

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2009) (citing *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Because this case does not implicate *any* of the *Bauman* guidelines, Defendants' request for this Court to employ "one of 'the most potent weapons in the judicial arsenal'" should be denied outright. *Cheney*, 542 U.S. at 380.

A. Defendants Will Not Be Prejudiced in a Way Not Correctable On Appeal, and Have Obvious and Effective Alternative Means to Obtain the Relief Requested

Defendants' claimed prejudice rests entirely upon unsubstantiated, conclusory allegations as to the burdens of responding to discovery, which Plaintiffs fully refute above. Pet. at 32-37. *See* Section I, *supra*.

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[7] Defendants do not argue the fourth guideline applies. Plaintiffs' response to arguments with respect to the fifth guideline are in Plaintiffs' prior briefing, Resp. Br. to Request for Stay, Doc. 4 at 12-13, as is Plaintiffs' response to Defendants' argument that supervisory mandamus is appropriate. *Id.* at 13-15.

Further, the lack of a single discovery motion to, or order from, the District Court is fatal to Defendants' request: a petitioner must "have no other means…to obtain the relief requested." *Perry*, 591 F.3d at 1156.[8] If discovery in this matter becomes unduly burdensome, Defendants' remedy is a protective order under Federal Rule of Civil Procedure 26(c). *McDaniel v. U.S. Dist. Ct. for the Dist. of Nevada*, 127 F.3d 886, 888-89 (9th Cir. 1997) (per curiam); *Id.* at 890 (Rymer, concurring). For this reason alone, the petition should be denied.

The very cases upon which Defendants rely establish the impropriety of the drastic relief they seek. *Cheney* and *Credit Suisse v. United States District Court for the Central District of California*, 130 F.3d 1342 (9th Cir. 1997) are the ***only cases ever dismissed*** on mandamus due to alleged discovery prejudices. Crucially, the parties in both cases first sought resolution of the disputes in district court, and the district courts subsequently *ordered* production. *Cheney*, 542 U.S. at 379, 384; *Credit Suisse*, 130 F.3d at 1346. In addition, both cases presented rare circumstances not present here. *Cheney*, 542 U.S. at 385, 394 (Stevens, J., concurring) (ordering disclosure of the records would effectively prejudge the merits of the case); *Credit Suisse,* 130 F.3d at 1346 (discovery order violated Swiss banking secrecy and other laws which carried criminal penalties if petitioners

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[8] *See In re Ozenne*, 841 F.3d 810, 816 (9th Cir. 2016) (en banc); *Washington Public Utilities Group v. U.S. Dist. Court for Western Dist. of Washington*, 843 F.2d 319, 325 (9th Cir. 1987).

complied); *see DeGeorge v. U.S. Dist. Ct. for Cent. Dist. of California*, 219 F.3d 930, 935 (9th Cir. 2000) (confirming *Credit Suisse* was limited to its unique circumstances). These circumstances do not apply here.

Defendants' premature and improper focus on discovery, unsubstantiated by anything but conclusory statements, really presents an inappropriate collateral attack on denial of their motion to dismiss. Defendants claim prejudice arising from discovery requests, yet improperly seek dismissal of this entire case, rather than relief from those requests. The proper course for seeking mandamus premised on discovery burdens is to challenge a *discovery order* under which the alleged burdens arise, not the very existence of the case under which discovery issues. Without a discovery order to challenge, even the more typical mandamus cases are inapposite. *See, e.g., Medhekar v. U.S. Dist. Court for the N. Dist. Of Cal.*, 99 F.3d 325 (9th Cir. 1996); *Perez v. United States Dist. Court*, 749 F.3d 849 (9th Cir. 2014); *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011); *Kerr v. United States Dist. Court for N. Dist. of California*, 511 F.2d 192, 199 (9th Cir. 1975), *aff'd* 426 U.S. 394 (1976). Defendants' Petition is not actually about discovery issues; rather, it presents an improper, premature attack on denial of the motion to dismiss, demonstrating abuse of the mandamus process.

The rarity of circumstances justifying mandamus "is particularly salient in the discovery context because the courts of appeals cannot afford to become

involved with the daily details of discovery," although courts of appeals "have exercised mandamus jurisdiction to review *discovery orders*" in exceptional circumstances. *In re Anonymous Online Speakers*, 661 F.3d at 1173 (quotes, citations omitted and emphasis added).

Defendants provide no other justification why denial of their motion to dismiss or the District Court's underlying conclusions will damage or prejudice them "in a way not correctable upon appeal." *Perry*, 591 F.3d at 1156. "If writs of mandamus could be obtained merely because an order [denying dismissal] was not immediately appealable…mandamus would eviscerate the statutory scheme established by Congress to strictly circumscribe piecemeal appeal and mandamus would become a substitute for the normal appellate process." *DeGeorge*, 219 F.3d at 935 (quotes, citations omitted). Similarly, the time and expense spent litigating a case, even if resulting from an erroneous legal ruling, does not constitute prejudice warranting mandamus, even in "massive civil actions." *Washington Public Utilities Group*, 843 F.2d at 325; *see also, e.g., Calderon v. U.S. Dist. Court for Cent. Dist. Of California*, 163 F.3d 530, 534-35 (9th Cir. 1998) *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003). "There is no reason why this motion to dismiss should be treated differently, *i.e.*, reviewed by mandamus rather than on appeal from a final judgment, than the dozens of 12(b)(6) rulings that district courts in this circuit make every day." *Calderon*, 163 F.3d at 535 n. 4.

B. The District Court Committed No Clear Error Denying Defendants' Motion to Dismiss

"The key factor to be examined" in resolving a petition is whether Defendants "firmly convinced" this Court that the District Court committed clear error as a matter of law. *Christensen v. U.S. Dist. Court*, 844 F.2d 694, 697 (9th Cir. 1988). "[T]he absence of the third factor, clear error, is dispositive." *Burlington Northern v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005). Judge Aiken's reasoned and thorough opinion, denying the Motion to Dismiss based on Supreme Court and Ninth Circuit precedent, amply demonstrates absence of error, let alone error so obvious that it is "'clear' to all." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016); *see* Dkt. 83.

1. Plaintiffs Indisputably Have Properly Plead Standing

Defendants mischaracterize Plaintiffs' claims as running afoul of Article III principles. For more than fifty years, Defendants knowingly and substantially contributed to the dangerous climate emergency upon which Plaintiffs' claims are founded. The judiciary represents Plaintiffs' "last resort" and exercise of judicial jurisdiction is a "necessity." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Plaintiffs' claims, and the standing allegations supporting them, are eminently suitable for judicial resolution without implicating separation of powers concerns. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Defendants' arguments to the contrary are premised on significant

misunderstandings of the pleading requirements for standing. *See Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855 (5th Cir. 2009) (finding standing to bring negligence, trespass, and nuisance claims based on climate change);[9] *Connecticut v. Am. Elec. Power Co., Inc.,* 582 F.3d 309, 347 (2d Cir. 2009) (causation in climate change cases is "best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing"), *rev'd on other grounds, Am. Elec. Power Co., Inc. v. Connecticut,* 564 U.S. 410, 429 (2011).

a. Plaintiffs' Alleged Injuries Are Concrete and Particularized

Plaintiffs have satisfied the standard for injury-in-fact, demonstrating unique and highly personalized ways in which Defendants' actions are affecting them. Defendants erroneously claim Plaintiffs' climate change harms are "generalized phenomena" which affect Plaintiffs the same way as everyone in the world. Pet. 14. A simple reading of Plaintiffs' pleadings shows the unique ways in which Plaintiffs' injuries vary according to their particular locations, interests, and circumstances. Dkt. 7 ¶¶ 16-97; *see also* Dkt. 78 (supplemental declaration of Jayden F. detailing inundation of her home with sewer water due to increased storm severity directly attributable to climate change); *see also* Declaration of Levi

[9] *Comer* was vacated for rehearing *en banc* which never occurred. *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 465 (5th Cir. 2015).

D. ("Levi Decl.") ¶¶ 1-19; Declaration of Jacob L. ("Jacob Decl.") ¶¶ 1-25; Declaration of Dr. Harold R. Wanless ("Wanless Decl.") ¶¶ 3, 51-63; Dkt. 47 (Supplemental Declaration of Dr. James Hansen).

Defendants' generalized grievance argument is equally mistaken on the law. A generalized grievance insufficient to establish injury is one claiming harm only to an abstract interest such as the "proper application of the Constitution and laws . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992). However, if an alleged harm is personally and concretely manifested in an individual, it does not matter how many people share in its effect. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). "It would surely be an irrational limitation on standing which allowed isolated incidents of deprivation of constitutional rights to be actionable, but not those reaching pandemic proportions." Dkt. 146 at 14.

Contrary to Defendants' incomplete quote, Pet. at 12-13, it *is* the role of courts to address "actual present or immediately threatened injury resulting from unlawful government action." *Allen*, 468 U.S. at 760.

Defendants' reliance on *Washington Environmental Council v. Bellon*, is misplaced. 732 F.3d 1131 (9th Cir. 2013). In *Bellon*, this Court assumed, without deciding, that the plaintiffs had made a satisfactory showing of injury-in-fact, *on summary judgment*, by submitting affidavits attesting to specific climate change impacts. *Id.* at 1140-41.

Notwithstanding Defendants' mischaracterization of *Massachusetts v. EPA*, extension of standing based on personal and concrete manifestation of a widely-shared harm is not limited to claims involving quasi-sovereign interests. 549 U.S. 497 (2007); *see, e.g., Novak*, 795 F.3d at 1018; *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998). Likewise, there is "[a]bsolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Notwithstanding this clear principle, Defendants incongruously assert Plaintiffs' claims, because they are constitutionally rather than statutorily based, are not "traditionally thought to be capable of resolution through the judicial process." Pet. at 15 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)), and are not "eminently suitable to resolution in federal court." *Id.* (quoting *Mass. v. EPA*, 549 U.S. at 516). However, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. In fulfilling this duty, "courts of the United States" are "the ultimate guardians of the Constitution…." *Hannah v. U.S.*, 260 F.2d 723, 728 (D.C. Cir. 1958). The *Raines* Court recognized "the irreplaceable value of the power articulated [in *Marbury*] lies in the protection it has afforded the *constitutional* rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." 521 U.S. at 829 (emphasis added). Plaintiffs properly pleaded injury-in-fact.

b. Plaintiffs Have Adequately Pleaded Causation

Plaintiffs' allegations are sufficient to adequately plead injuries "fairly traceable" to the challenged actions and omissions of Defendants. *Lujan*, 504 U.S. at 590. Defendants' arguments rely solely on mischaracterizations of Plaintiffs' pleadings and a misunderstanding of the law. Objecting that their aggregate acts and omissions cannot be used to establish causation for Plaintiffs' injuries, Defendants attempt to create a new obstacle to standing by foreclosing constitutional claims that arise from multiple actions, irrespective of the relatedness of those actions or the common identities of the actors. Pet. at 15-19. In so arguing, Defendants ignore clear precedent recognizing such claims, *see, e.g., Brown v. Plata*, 563 U.S. 493 (2011), as well as the proper standard for analyzing the sufficiency and specificity of causation in pleadings.

"At the pleading stage, general factual allegations" suffice to establish standing, "for, on a motion to dismiss" courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561; Fed. R. Civ. P. 8(a)(2). Standing, when challenged in a motion to dismiss, is judged based on allegations in the complaint. *See Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2342 (2014). Though Plaintiffs' allegations contain *more* than the requisite specificity, a complaint need only present sufficient allegations, which, accepted as true, "state a claim to relief that is plausible on its

face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). In deciding whether a claim is plausible on its face, a court relies on "its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Plaintiffs alleged with *significant* specificity particular categories of Defendants' systemic affirmative actions, distinct failures to use delegated authority, and specific examples of the same, delineated by specific Defendant, which caused and are causing Plaintiffs' injuries. Dkt. 7. For instance, comparable to the complaint in *Brown v. Plata*, the FAC describes discrete categories of government policies, practices, and actions, showing how each Defendant permits, licenses, leases, authorizes, and/or incentivizes the extraction, development, processing, combustion, and transportation of fossil fuels, which cause Plaintiffs' injuries. Dkt. 7 ¶¶ 5, 7, 11, 97, 99, 112, 115, 117, 119, 123, 125, 129-130, 151, 171, 179-181, 183, 186-187; *See* First Amended Complaint Class Action, *Brown v. Plata*, 563 U.S. 493 at ¶ 192(a) – (q) (N.D. Cal. Aug. 2001). In addition, Plaintiffs provided particular examples of actions, with numeric quantification by category, for particular Defendants. Dkt. 7 *e.g.* ¶¶ 160, 161, 164-70, 171-78, 180-84. After delineating specific actions within each category, Plaintiffs allege that, through each of these categories, "Defendants authorize the combustion of all fossil fuels in the U.S." and that historically, the United States is responsible for emitting 25.5% of the worlds cumulative CO2 emissions," thereby establishing Defendants' causal

contribution to Plaintiffs' injuries. Dkt. 7 ¶¶ 151, 185.[10]

Plaintiffs' exhaustive allegations, and the specific facts provided, are indisputably sufficient to "give the [D]efendant[s] fair notice of what the…claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citation and quotation marks omitted).[11]

Defendants' argument that individual actions in the aggregate cannot establish causation directly contradicts Supreme Court precedent. In *Brown v. Plata*, the Court determined the collective policies and actions of California's state prison officials resulted in a "systemic" violation of prisoners' constitutional rights. 563 U.S. at 551. The Court recognized causation based upon aggregate acts:

> Because plaintiffs do not base their case on deficiencies in care provided on any one occasion, this Court has no occasion to consider whether these instances of delay–or any other particular deficiency in medical care complained of by the plaintiffs–would violate the Constitution…if considered in isolation. Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to 'substantial risk of serious harm'….

Id. at 500 n.3 (citations omitted).

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[10] The significance of this share of global emissions renders Defendants' reliance on *Bellon* wholly misplaced. *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1158 (9th Cir. 2015) ("such minor contributors to greenhouse gas emissions…that the contribution 'was scientifically indiscernible.'"). The causation ruling in *Bellon* was made at summary judgment, rather than a motion to dismiss. 732 F.3d at 1143 n. 6.

[11] That Defendants admitted key paragraphs of Plaintiffs' FAC on causation demonstrates *actual* notice of Plaintiffs' claims. Dkt. 98 ¶¶ 7, 150, 151.

Similarly, in *Wilson v. Seiter*, discrete elements, which might not in themselves establish causation of a constitutional violation, established causation in the aggregate. 501 U.S. 294, 304 (1991). As in *Plata* and *Wilson*, each of Defendants' acts with respect to fossil fuel emissions might not individually violate the Constitution. However, taken "in combination" and on a "systemwide" basis, these aggregate acts have a "mutually enforcing effect" in violation of Plaintiffs' rights. *Id.*

Defendants cite only two cases in their attempt to invent a new "particular causation" requirement in the constitutional standing analysis—tellingly, they severely mischaracterize both. Contrary to Defendants' implication, Pet. at 17-18, the Court was not discussing causation and aggregated causal elements when it stated: "If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, the Court merely reiterated the uncontroversial principle that a plaintiff "who has been subject to injurious conduct of one kind" does not have standing to challenge unrelated harms "to which he has not been subject." *Id.* This, of course, is irrelevant to the instant case, in which each of Defendants' aggregate actions and omissions, taken together, cause Plaintiffs' injuries.

The Court in *Allen v. Wright* established that, where there is "actual present or immediately threatened injury *resulting* from unlawful governmental action," it is the courts' duty to review those actions, be they systemic or insular. 468 U.S. at 760 (citation and quotation marks omitted). In contrast to *Allen*, Defendants' responsibility for a major share of global CO_2 emissions is "enough" such that their elimination would "make an appreciable difference" as to the devastating injuries upon which Plaintiffs' claims are founded. *See* Dkt. 98 ¶¶ 7, 150, 151.

c. Plaintiffs Adequately Pleaded Redressability

Defendants object to the prospect of any relief in this case, mistakenly asserting "the complaint never alleges that the agencies have statutory authority" to remedy Plaintiffs' harms. Pet. at 20. The FAC clearly alleges statutory and regulatory authority of Defendants to provide the relief requested.[12] Moreover, no reference to statutory authority need be provided in order to enjoin Defendants from engaging in affirmative actions to a degree that violates Plaintiffs'

[12] Dkt. 7 ¶¶ 98-130, 137, 147, 180, 183, 265, 266 (setting forth Defendants' authorities under the Clean Air Act, the EPA's endangerment finding, the Clean Water Act, the Rivers and Harbors Act, RCRA, CERCLA, the Safe Drinking Water Act, the National Science and Technology Policy, Organization and Priorities Act, the Natural Gas Act, the Energy Policy Act, the Department of Energy Organization Act, the Energy Policy and Conservation Act, the Mineral Leasing Act, the Federal Land Policy and Management Act, the Outer Continental Shelf Lands Act, the Department of Transportation Act, the Energy Independence and Security Act, and the National Climate Program Act.).

constitutional rights.

Defendants' arguments are also unfounded because courts retain broad authority "to fashion practical remedies when faced with complex and intractable constitutional violations." *Plata*, 363 U.S. at 526. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15 (1971).

Defendants' rehash of *Lewis, Lujan*, and *Allen*, and their unfounded assertion that Plaintiffs must "identify specific agency actions or inactions that could be redressed," do not upend the redressability of Plaintiffs' injuries. Pet. at 21; *see Bellon*, 732 F.3d at 1146 (causation and redressability are two facets of single requirement). While the FAC puts Defendants on notice of the actions that may be redressed, it is not Plaintiffs' obligation to specify a step-by-step plan for Defendants to remedy their own unconstitutional behavior. *See* Section (III)(B)(1)(b), *infra*. "Traditionally, equity has been characterized by a practical flexibility in shaping remedies . . . ." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

As in *Plata*, the District Court can set the constitutional floor necessary for preservation of Plaintiffs' rights– the minimum safe level of atmospheric CO_2 concentrations and the timeframe in which that level must be achieved – and leave

to Defendants the specifics of developing and implementing a compliant plan. 563 U.S. at 533; Dkt. 83 at 17, Dkt. 146 at 8.[13]

Likewise, Defendants' argument that no relief in this case "could be obtained against the President", Pet. at 7, is without merit and has been flatly rejected by this Court as "contrary to the fundamental structure of our constitutional democracy" in *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017). Defendants improperly attempt an "aggrandizement of one of the three co-equal branches of the Government at the expense of another." *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (citations omitted). The judiciary may "severely burden the Executive Branch by reviewing the legality of the President's official conduct," *Id.* at 682, 705, and "direct appropriate process to the President himself." *Id.*

Further, Defendants' arguments on this topic were waived, as they were not presented to the District Court until Defendants' motion to certify this case for interlocutory appeal, Dkt. 120, and the District Court has not yet addressed the issue. *Westinghouse Elec. Corp. v. Weigel*, 426 F.2d 1356, 1357 (9th Cir. 1970). Even were the District Court to decide that no relief could be obtained against the

[13] Like the determination in *Plata* that prison populations needed to be reduced by a specific percentage to preserve prisoners' constitutional rights, determining the scientific level of atmospheric CO_2 concentrations necessary to preserve Plaintiffs' constitutional rights no more requires "essentially legislative determinations," Pet. at 15, than in any other case in which governmental action violates constitutional principles. *See, e.g.*, *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

President, relief would still be available against agency officials. *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Plaintiffs have adequately pleaded redressability.

2. Plaintiffs' Due Process Claims are Grounded in Well-Established Law

Defendants frame their objections to Plaintiffs' due process claims as not setting forth sufficient supporting facts. Pet. at 22. However, the FAC delineates the causal mechanisms underlying climate change, the national injuries and unique personal injuries to Plaintiffs resulting from climate change, and Defendants' responsibility for those injuries. Dkt. 7. "Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards." Dkt. 83 at 13.

Defendants misconstrue Plaintiffs' claims to suggest this case turns exclusively on recognition of the right to a "climate system capable of sustaining human life." Contrary to Defendants' mischaracterizations, in addition to their claim seeking recognition of this right, the FAC alleges violations of enumerated and unenumerated rights recognized in Fifth Amendment jurisprudence, including infringement of fundamental rights to personal security, to property, to life, to family autonomy and security, and to freedom from discrimination as a protected class and with respect to their fundamental rights, as well as violations of rights under the Public Trust Doctrine. FAC ¶¶ 277-310.

a. The Right to the Ability to Sustain Human Life is Well-Grounded

The District Court properly recognized a fundamental right to a "climate system capable of sustaining human life." Dkt. 83 at 32. When deciding upon previously unrecognized fundamental rights, the Supreme Court has inquired whether such rights are *either* "fundamental to our scheme of ordered liberty, *or*…deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (citations and quotations marks omitted and emphasis added). However, "identification and protection of fundamental rights…has not been reduced to any formula." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015) (citation and quotation marks omitted). The right to a climate system capable of sustaining human life unquestionably meets the standard under any "formula."

Here, the District Court indisputably "exercise[d] the utmost care" in recognizing the right at issue by "beginning with a careful description" of the right, *Reno v. Flores*, 507 U.S. 292, 302 (1993), as that to a climate system *capable of sustaining human life*. Dkt. 83 at 32-33. That other courts rejected the existence of significantly broader and easily distinguishable rights to a "healthy" or "pollution-free environment" in cases presenting significantly different factual scenarios does not alter the propriety of recognizing the narrowly-cabined right within the

particular circumstances of this case.[14] Further, the unique facts underlying Plaintiffs' claims inform the fundamental rights inquiry.

> The generations that wrote and ratified the Bill of Rights…did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S.Ct. at 2598. The unprecedented circumstances of the climate crisis and Defendants' responsibility for that crisis are the kind of "new insight" justifying recognition of the "claim to liberty" asserted.

The right to a climate system capable of sustaining human life is both "deeply rooted in this Nation's history and tradition" and "fundamental to our scheme of ordered liberty." *McDonald*, 561 U.S. at 767*; see* Decl. of John E. Davidson, Dkt. 46 and Amicus Curiae Brief ISO Plaintiffs, Dkt. 60 (delineating the deep historical roots of the right). At the core of the Constitution is a system of intergenerational ethics focused on preservation of the human species. Dkt. 60 (citing John Locke, *Two Treatises of Government*, ¶¶ 7, 16, 134, 135, 149, 159, 171, 183 (1689) (Peter Laslett ed., 2d ed. 1967). These ideals were widely shared by the framers, and the principle that government may not deplete the resources

[14] *S.F. Chapter of A. Phillip Randolph Inst. v. EPA*, in which the plaintiffs asserted a "right to be free of global warming pollution" is not to the contrary. No. C 07-04936 CRB, 2008 WL 859985, at *6 (N.D. Cal. Mar. 28, 2008). Plaintiffs in that case challenged only the issuance of permits for two power plants. *Id.* at *1.

upon which later generations needed to survive served as a foundational principle to the Bill of Rights. *Id.* at 20-28. In his celebrated speech of May 12, 1818, James Madison expounded the importance of the balance and symmetry of nature and nature's laws:

> 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….***
>
> ***The atmosphere is not a simple but a compound body. In its least compound state, it is understood to contain, besides what is called vital air, others noxious in themselves, yet without a portion of which, the vital air becomes noxious. ... Is it unreasonable to suppose, that if, instead of the actual composition and character of the animal and vegetable creation, to which the atmosphere is now accommodated, such a composition and character of that creation, were substituted, as would result from a reduction of the whole to man and a few kinds of animals and plants; is the supposition unreasonable, that the change might essentially affect the aptitude of the atmosphere for the functions required of it; and that so great an innovation might be found, in this respect, not to accord with the order and economy of nature?***
>
> ***
>
> The immensity of the atmosphere, compared with the mass of animals and vegetables, forms an apparent objection only to this view of the subject. ***The comparison could at most suggest questions as to the period of time necessary to exhaust the atmosphere of its unrenewed capacity to keep alive animal or vegetable nature***, when deprived, either, of the support of the other.[15]

[15] "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.

The foundational importance of our atmosphere and climate system to the nation was unequivocally recognized by the Founding Fathers. These deep roots of the right to a stable climate system capable of sustaining human life are exemplified in our nation's conservation legislation. *See, e.g.,* Clean Air Act § 101, 42 U.S.C. § 7401; National Environmental Policy Act § 101, 42 U.S.C. § 4331(b)(1) ("[I]t is the responsibility of the Federal Government to…fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.")

Further, the Supreme Court has long championed recognizing rights necessary to preserve other fundamental rights. *See. e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "a fundamental political right, because [it is] preservative of all rights."); *Obergefell*, 135 S.Ct. at 2602. As the District Court properly recognized, the right to a climate system capable of sustaining human life is similarly preservative of all rights. "Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization, nor progress.'" Dkt. 83 at 32. The rights to life, liberty, and property depend upon preservation of a climate system capable of sustaining their meaningful exercise. Our previously recognized unenumerated rights rest upon a climate system capable of sustaining human life, including rights touching upon "deeply personal choices central to individual dignity and autonomy," *Obergefell*, 135 S.Ct. at 2597, including, among others, the right to

safely raise families and control the upbringing of children, to practice religious beliefs, to maintain bodily integrity and personal security, and to safely provide for basic human needs. Dkt. 7 ¶ 283. The right to a stable climate system capable of sustaining human life preserves the baseline conditions on which each of these rights depend.

b. Plaintiffs Properly Alleged a Valid Post-*DeShaney* Claim

Under the state-created danger exception to *DeShaney*,[16] the government has an affirmative obligation to act when its conduct places a person "in peril with deliberate indifference to their safety." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). State-created danger claims are not, as Defendants assert, limited "to cases involving actions of police officers that placed individual plaintiffs in direct and immediate peril." Pet. at 22; *see Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016) (employee's long-term exposure to toxic mold). In fact, this Court's interpretation of the state-created danger exception establishes its applicability to claims involving exposure to adverse environmental conditions. *Pauluk*, 836 F.3d 1117 (toxic mold); *Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (freezing weather). Defendants' knowing contributions to the climate crisis put this case on all fours with this body of law.

[16] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

Defendants' causation of and failure to address the climate crisis clearly "shocks the conscience." Pet. at 26 n.8. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850, 853 (1998). For over five decades, Defendants knew of the extreme dangers that their actions create. Dkt. 7 ¶¶ 1, 4, 131-150. Despite "extended opportunities" over this same period, Defendants deliberately persisted in those actions, failing to safeguard Plaintiffs from the perils in which Defendants placed them. *Id.* ¶¶ 151-191. This shocks the conscience. Each of Plaintiffs' due process claims are well-grounded and properly before the District Court.[17]

c. Plaintiffs' Claims Rest Directly On the Constitution

Equitable relief is available directly under the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Defendants' argument to the contrary, while correctly identifying the distinction between "a cause of action for damages" and a claim seeking equitable relief, misses the reason the

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[17] Defendants disjointedly address Plaintiffs' post-*DeShaney* claim alongside Plaintiffs' claim to a right to a stable climate system capable of sustaining human life. Pet. at 22-24. These separate claims present distinct standards. Courts apply strict scrutiny to governmental action implicating a fundamental right. Whether the government has an affirmative duty to act to preserve a claimant's personal security is determined by whether the government has placed the claimant "in peril with deliberate indifference to their safety." *Penilla*, 115 F.3d at 709. Plaintiffs also bring claims alleging direct infringement of their enumerated and previously recognized unenumerated rights, as well as claims arising under the Equal Protection Clause and the Public Trust Doctrine. Dkt. 7.

Supreme Court developed the distinction in the first place. Pet. at 26. In *Davis v. Passman*, the Court recognized a private right of action for damages under the Fifth Amendment. 442 U.S. 228 (1979). In doing so, the Court first asked whether the Fifth Amendment provides a right of action, irrespective of the remedy sought, concluding a party may "rest[] her claim directly on the Due Process Clause of the Fifth Amendment." *Id.* at 243-244. Only then did the Court "consider whether a damages remedy is an appropriate form of relief." *Id.* at 244. The Court's subsequent jurisprudence on this issue focuses entirely on whether *monetary damages* are available, absent statutory authorization, as a remedy for constitutional violations. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983).

Courts need not conduct a comparable inquiry as to whether equitable remedies are available for constitutional violations.

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution….Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

Bell v. Hood, 327 U.S. 678 (1946). The right of every citizen to injunctive relief from ongoing and prospective "official conduct prohibited" by the Constitution does not "depend on a decision by" the legislature "to afford him a remedy. Such a position would be incompatible with the presumed availability of federal equitable

relief…." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring). The Supreme Court confirmed this reasoning in *Ziglar v. Abbasi*, where plaintiffs sought money damages against "executive officers," challenging "large-scale policy decisions" as violative of their Fifth Amendment substantive due process rights and the Court stated "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief.". 582 U.S. __, slip op. at 2, 5, 16-17 (2017).

3. The Public Trust Doctrine Applies to Defendants

As an inherent attribute of sovereignty, the Public Trust Doctrine applies to all governments, state and federal. *Ill Cent. R. Co. v. State of Ill.*, 146 U.S. 387, 455 (1892). Defendants' argument that the federal government holds no Public Trust Doctrine obligations rests upon a single, erroneously decided case, affirmed by unpublished decision, reliant upon dictum from a case that did not even address the existence of a federal Public Trust.

The district court in *Alec L. v. Jackson* erroneously rejected the existence of the federal Public Trust based on the Supreme Court's dictum that "the public trust doctrine remains a matter of state law." 863 F.Supp.2d 11, 15 (D.D.C. 2012) (quoting *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012)).[18] In a

[18] Defendants misstate that some Plaintiffs in this case were plaintiffs in *Alec L.* Pet. at 28. The plaintiffs are not the same.

similarly inattentive opinion, the D.C. Circuit affirmed on the same basis. *Alec L. v. McCarthy*, 561 Fed.Appx. 7 (D.C. Cir. 2014).

Importantly, *PPL Montana* did not even involve, let alone address, whether the Public Trust Doctrine applies to the federal government and, accordingly, *Alec L.*'s reliance on *PPL* dicta without analysis improperly avoided the merits of the plaintiffs' claims. *See* M. Blumm and L. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 418- 421, 421 (Spring 2015). In contrast, the District Court provided a thorough and reasoned analysis of *PPL Montana*, concluding the case does not foreclose the existence of a federal Public Trust. Dkt. 83 at 43-46. As Magistrate Judge Coffin observed: "If the doctrine were to be extinguished, it assuredly would not be in the form of tangential dicta in the context of a Supreme Court ruling on a matter that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories." Dkt. 146 at 13-14.

Like *PPL Montana*, *United States v. 34.42 Acres of Land* did not involve, and this Court did not consider, the existence of the federal Public Trust. 683 F.3d 1030 (9th Cir. 2012). In *34.42 Acres*, this Court invoked *PPL Montana*, and its proclamation that a state's Public Trust is a matter of state law, to support the proposition that when the federal government condemns state lands, it takes title

free from the *state's* Public Trust obligations by virtue of the Supremacy clause. *Id.* at 1038. That holding is wholly inapplicable to this case. The applicability of a state's Public Trust doctrine to the federal government does not speak to the existence of a separate federal Public Trust. Because the Public Trust Doctrine is an attribute of sovereignty, its contours and applicability are necessarily a matter of each sovereign's law. *Ill. Cent. R. Co.*, 146 U.S. at 455. Importantly, the district court in *34.42 Acres* had ruled the tidelands included in the parcel condemned by the federal government were subject to the federal Public Trust. 683 F.3d at 1033, 1039 n. 2. This ruling was not overturned on appeal. *Id.* Further, as the District Court noted, two additional cases recognized that where the federal government condemns state Public Trust assets, it takes title free of the state's Public Trust obligations, but subject to obligations under the federal Public Trust Doctrine. Dkt. 83 at 46-47 (citing *United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cnty., Mass*. 523 F.Supp. 120, 124 (D. Mass. 1981); *City of Alameda v. Todd Shipyards Corp.*, 635 F.Supp. 1447 (N.D. Cal. 1986)). The District Court committed no clear error.

IV. ANY DELAY IN RESOLVING THIS CONSTITUTIONAL CASE AT TRIAL IRREPARABLY HARMS PLAINTIFFS AND THE PUBLIC INTEREST.

The harm Plaintiffs will suffer if their case is stayed before trial is irreparable. Environmental harm is by nature irreparable as is often infringement of

constitutional rights. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Both are threatened here by the ongoing actions of Defendants. Unlike other cases where environmental harm is threatened, here, the harm to the climate system threatens the very foundation of life, including the personal security, liberties, and property of Plaintiffs. Unlike other cases, ***Defendants concede the scope of harm***, admitting that existing harm has already put our nation in the danger zone, and that the harm could be irreversible for millennia. *See* Statement of Relevant Facts.

Because atmospheric CO_2 levels are already dangerous, every day of more carbon emissions and increased fossil fuel extraction and infrastructure exacerbates the danger. Defendants have provided no expert testimony to support their bald assertion that delay of months or years to resolve Plaintiffs' claims will not cause Plaintiffs harm. Dr. Harold Wanless, a highly respected geologist and climate expert, explains how urgent the climate emergency is and how even a short delay causes Plaintiffs harm. Wanless Decl. ¶¶ 1-5, 18-19, 22, 25-63. Dr. Wanless explicates that sea level rise of 15-40 feet is very likely by the end of the century and that Defendants' estimates of up to 8 feet of sea level rise by 2100, while still devastating to coastal cities, properties, and populations, does not present the full risks and magnitude of sea level rise we are very likely locking in by heating the

oceans. Wanless Decl. ¶¶ 29-38. Almost 94% of human-caused heating is going into the oceans and melting our planet's largest ice-sheets. Wanless Decl. ¶ 25. The U.S. is responsible for more than 25% of that heat. Dkt. 98 ¶ 7.

Moreover, the harm is not generalized harm, but is particular to Plaintiffs. Plaintiff Levi D. lives on an island off the Atlantic coast of Florida at 3 feet above sea level. Levi Decl. ¶ 1-3; Wanless Decl. ¶ 50. Already locked-in ocean heating and sea level rise could inundate Levi's island and home by mid-century, making it unlivable. Wanless Decl. ¶ 50. The only chance Levi has to protect his home, his personal security, and his health from the ongoing systemic actions of Defendants depends upon an injunction that requires carbon emissions to decline quickly. Wanless Decl. ¶¶ 51-63. "We are in the danger zone in southern Florida and any delay in a judicial remedy for Plaintiff Levi poses clear and irreversible harm to his interests and his future." *Id.* ¶ 62.

Plaintiff Jacob Lebel moved to Oregon with his family to start a farm and grow nearly all of their own food. Jacob's land and livelihood are uniquely threatened by climate change and Defendants' ongoing fossil fuel energy system. Jacob Decl. ¶¶ 1-25. Jacob experiences increasing drought, wildfire threats, threats to air quality, and farming days exceeding 100 degrees F. Jacob Decl. ¶¶ 6-13.

Defendants do not dispute the irreparable harms asserted by Levi, Jacob, or Plaintiffs' experts. Because these irreparable environmental and human harms are

undisputed and because fundamental rights are at stake, the balance of harm clearly favors denying the requested stay and mandamus.

The public interest is served by allowing Plaintiffs to vindicate constitutional violations. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). "The public interest is fundamentally harmed by ongoing fossil fuel combustion, which urgently needs reparation." Wanless Decl. ¶ 63.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants' Petition for Writ of Mandamus.

DATED this 28th day of August, 2017, at Eugene, OR.

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: August 28th, 2017

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 11233 words (based on the word processing system used to prepare the brief).

Dated: August 28th, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing Answer of Real Parties In Interest to Petition for Writ of Mandamus with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. In addition, a courtesy copy of the foregoing brief has been provided via-email to the following counsel:

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Case No. 17-71692

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *et al*.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON
Respondent,

and

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

On Petition For Writ of Mandamus In
Case No. 6:15-cv-01517-TC-AA (D. Or.)

**DECLARATION OF JULIA A. OLSON
IN SUPPORT OF ANSWER OF REAL PARTIES IN INTEREST
TO PETITION FOR WRIT OF MANDAMUS**

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