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No. 17A-_____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., APPLICANTS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

APPLICATION FOR A STAY PENDING DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 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.

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 on July 5, 2018, in the United States Court of Appeals for the Ninth Circuit 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 any specific agency action or inaction (save one), 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 President and the defendant agencies to prepare and implement a national remedial plan, without regard to the procedural and substantive limitations of those agencies' organic statutes and the Administrative Procedure Act (APA), and by retaining jurisdiction indefinitely to ensure compliance.

Remarkably, the district court has allowed this improper suit to proceed for nearly three years over the repeated objections of the government and has now set aside 50 trial days this fall for the plaintiffs' requested "Trial of the Century."[1] In 2016, the court refused to dismiss the plaintiffs' claims, concluding that

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[1] Youth v. Gov, Draw #youthvgov., http://www.youthvgov.org/artist-search/ (last visited July 16, 2018).

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," App., infra, 27a, 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 24a-25a.

After the district court declined to certify its ruling for interlocutory appeal, the government immediately sought from the Ninth Circuit a writ of mandamus ordering dismissal. That court declined to intervene. The court of appeals observed that no order concerning discovery had yet issued and the government had not yet moved for a protective order, to dismiss the President, or for summary judgment. 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." App., infra, 61a-62a. 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 62a-63a.

Following the Ninth Circuit's decision, the government took every step contemplated by that court in its decision. 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 in this case 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 is categorically inappropriate because it would violate the APA's judicial-review provisions, as well as the APA's comprehensive regulation of agency decisionmaking and the Constitution's separation of powers.

Meanwhile, the plaintiffs have done nothing to narrow their claims or focus them on specifically identified agency actions. Nonetheless, the district court summarily denied the government's motion for a protective order and denied the government's request for a stay pending consideration of the two dispositive motions that would obviate the occasion for any discovery. The court has repeatedly stated its expectation that, absent intervention from a higher court, trial will begin in just over three months and will likely proceed for 50 trial days.

In light of these developments, on July 5, 2018, the government again petitioned the Ninth Circuit for mandamus relief, requesting an order directing dismissal of this ill-conceived suit 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. In accordance with Supreme Court Rule 23.3, the government also separately moved in the district court and the court of appeals for a stay of discovery and trial pending disposition of its petition for a writ of mandamus filed in the court of appeals. The district court has not yet acted on the government's motion. After briefing from the parties, the Ninth Circuit yesterday denied the government's motion for a stay.

The standards for granting a stay pending consideration of a matter in the court of appeals are readily met in this case. If the Ninth Circuit does not grant the government's mandamus petition, this Court is likely to grant review to consider the district court's manifestly wrong recognition of 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 the Ninth Circuit or this Court, the government will be forced to participate in a highly compacted period of discovery and trial preparation followed by a 50-day trial, all of which will itself violate bedrock limitations on agency decisionmaking and the judicial

process imposed by the APA and the separation of powers. In light of these impending harms, the Court is therefore likely to order dismissal of this suit or, at a minimum, direct the district court to stay discovery and trial until the government's pending dispositive motions are resolved. 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 may somehow be attributed to the government over the time it takes to resolve the pending mandamus petition are plainly de minimis.

Accordingly, the government requests that this Court stay discovery and trial pending the Ninth Circuit's consideration of the government's mandamus petition and any further proceedings in this Court. Alternatively, given the numerous manifest defects in this suit and the district court's egregious errors, the government respectfully submits that the Court may wish to construe this application as a petition for a writ of mandamus or as a petition for a writ of certiorari from the Ninth Circuit's prior mandamus decision and directly order dismissal of this suit or a stay of discovery and trial until the government's pending dispositive motions are resolved.

STATEMENT

1. The plaintiffs below (respondents in this Court) are 21 minor individuals, an organization known as Earth Guardians, and

future generations (by and through their self-appointed guardian Dr. James Hansen). They filed this suit in 2015 against President Obama, the Executive Office of the President, and numerous Cabinet-level Executive agencies, alleging that these Executive officials and agencies contributed to climate change in violation of rights that respondents assert under the Fifth and Ninth Amendments to the Constitution and an asserted federal public-trust doctrine. Am. Compl. ¶¶ 277-310. Respondents allege that the federal defendants (now President Trump and officials in his Administration) have, through action and inaction, enabled the combustion of fossil fuels, which releases greenhouse gases into the atmosphere. Id. ¶ 1. With one exception, respondents do not challenge any specific agency actions, such as agency orders, permits, adjudications, or rulemakings, or even any failure to undertake any specific required actions. Instead, they challenge what they term the government's "aggregate actions," id. ¶ 129, which they assert have caused "climate instability" that injures their prospects for long and healthy lives, id. ¶ 288.

Respondents ask the district court to declare that they have the right under the Constitution to a particular climate system and to require that the Executive Branch "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." Am. Compl. 94. In addition, they ask the court to retain jurisdiction for an

indefinite period of time to monitor the government's compliance with this "national remedial plan." Ibid.

2. In November 2016, the district court denied the government's motion to dismiss respondents' claims for lack of jurisdiction and failure to state a claim. App., infra, 1a-53a. The court found that respondents had established Article III standing by alleging that they had been harmed by the effects of climate change through increased droughts, wildfires, and flooding; and that the government's regulation of (and failure to further regulate) fossil fuels had caused respondents' injuries. The court determined that it 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 24a-25a (citation omitted); see id. at 19a-25a.

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. App., infra, 25a-38a. The court found in the Fifth Amendment's protection against the deprivation of "life, liberty, or property, without due process of law," U.S. Const. Amend. V, a previously unrecognized fundamental

right to a "climate system capable of sustaining human life," and the court determined that respondents had adequately alleged infringement of that fundamental right, App., infra, 27a. The court further determined that respondents had adequately stated a claim under a federal public-trust doctrine, 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 30a (citation omitted). Respondents' claims under this doctrine, the court concluded, are also "properly categorized as substantive due process claims." Id. at 38a.

3. The government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal, contending that the district court's order denying the motion to dismiss contravened fundamental limitations on judicial review imposed by Article III of the Constitution and clearly erred in recognizing a sweeping new fundamental right to certain climate conditions under the Due Process Clause. The government further requested a stay of the litigation pending the court of appeals' consideration of the mandamus petition.

On July 25, 2017, the court of appeals granted the government's request for a stay. App., infra, 54a. But on March 7, 2018, the court ultimately "decline[d] to exercise [its] discretion to grant mandamus relief at th[at] stage of the litigation." App., infra, 63a; see id. at 55a-63a. In its

decision, 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 62a. The court reasoned, however, that "the district court need[ed] to consider those issues further in the first instance." Id. at 63a. The court of appeals "underscore[d] that this case [wa]s at a very early stage, and that 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 62a. The court of appeals 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 63a. And the court stated that the governmental defendants could continue to "raise and litigate any legal objections they have," id. at 62a, including by challenging future discovery orders; moving to "dismiss the President as a party"; "reasserting a challenge to standing, particularly as to redressability"; "seeking mandamus in the future"; or "asking the district court to certify orders for interlocutory appeal of later rulings," id. at 61a, 63a.

On May 29, 2018, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to review the Ninth Circuit's decision to and including July 5. On June 25, Justice Kennedy further extended the time within which to file a

petition for a writ of certiorari to review the Ninth Circuit's decision to and including August 4, 2018.

4. Following the court of appeals' decision, the government 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 its prior arguments for dismissal: respondents lack standing, and their novel assertion of judicially enforceable fundamental rights to a particular climate system lacks any support in the Constitution or this Nation's history and tradition. See D. Ct. Doc. 195, at 6-7 (May 9, 2018). The government also set forth three new grounds for dismissing some or all of respondents' claims: (1) the President must be dismissed because the court lacks jurisdiction to enjoin him in the performance of his official duties; (2) all of respondents' claims must be dismissed because the APA provides the mechanism for challenging the federal administrative actions that underlie respondents' claims, but respondents fail to challenge discrete, identified agency actions or alleged failures to act, as the APA requires; and (3) in any event, respondents' claims and requested relief violate the constitutional separation of powers by effectively requiring the district court to usurp the role 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

and to make recommendations to Congress concerning changes to laws governing those policies. Id. at 7-25.

Second, on the same day, the government filed a motion for a protective order barring all discovery or, at a minimum, a stay of all discovery pending resolution of its motion for judgment on the pleadings and its forthcoming motion for summary judgment. D. Ct. Doc. 196, at 1-2 (May 9, 2018). The government argued that, because this case may proceed only under the APA, judicial review must be based on the administrative record of specifically identified actions or decisions, and therefore no discovery is proper. Id. at 9-14. The government also contended that, even if review were not otherwise limited to the administrative record of specific agency actions, 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. Id. at 14-19. Finally, the government argued that, at a minimum, the district court should stay all discovery until the court ruled on the government's pending motion for judgment on the pleadings and its forthcoming motion for summary judgment, the granting of which would either eliminate any occasion for discovery or substantially affect its scope. Id. at 19-20.

Third, the government filed a motion for summary judgment, arguing that (1) respondents lack standing both as a matter of law and as judged against the evidentiary record; (2) respondents have

failed to identify a right of action for their claims apart from the APA and have not satisfied the APA's requirement to challenge discrete agency actions or inactions; and (3) respondents' claims fail on the merits. D. Ct. Doc. 207, at 5-19, 24-30 (May 22, 2018). In addition, the government contended that it was entitled to summary judgment because, even aside from respondents' lack of standing, this suit is not a case or controversy within the meaning of Article III. Id. at 20-24.

5. In the meantime, both respondents and the district court wholly failed to narrow or focus the claims in this case. Immediately following the court of appeals' prior decision, the district court ordered the parties to proceed with discovery, and it set an opening trial date of October 29, 2018. D. Ct. Doc. 189 (Mar. 26, 2018); D. Ct. Doc. 192 (Apr. 12, 2018). The court indicated its expectation that the trial will last for approximately 50 trial days. See, e.g., 4/12/18 Tr. 8 (Coffin, J.) (estimating "five weeks per side in essence"). And the court has repeatedly made clear that it has no intention of delaying trial. See, e.g., 5/23/18 Tr. 16 (Aiken, J.) ("[A]s we have talked about in this case before, we are not delaying the trial at this point. We are moving forward."); id. at 17 ("[W]e have got a trial date and we are moving forward."); 5/10/18 Tr. 27 (Coffin, J.) ("[H]ere's the big picture. October 29, 2018, trial starts unless some higher court says no."); D. Ct. Doc. 239 (June 14, 2018) (Aiken, J.) (denying request to extend the trial date for the same

period as extension of time for respondents to oppose summary judgment).

At the same time, the district court extended the deadline for respondents to respond to the government's motion for judgment on the pleadings to June 15, D. Ct. Doc. 210 (May 23, 2018), and set argument on that motion for July 18, D. Ct. Doc. 214 (May 30, 2018). It similarly extended the deadline for respondents to respond to the government's motion for summary judgment until June 28. D. Ct. Doc. 240 (June 14, 2018). After the government filed its mandamus petition, the court granted the government's request to set argument on the motion for summary judgment for the July 18 hearing. D. Ct. Doc. 316 (July 13, 2018).

Meanwhile, in April 2018, respondents served the government with 17 expert reports. In May 2018, respondents served 413 requests for admissions (RFAs) and Federal Rule of Civil Procedure 30(b)(6) deposition notices on the U.S. Departments of Agriculture, the Interior, and Transportation. These RFAs are broad in scope, seeking admissions dating back to the 1960s on topics such as whether, in the agencies' views, certain resources are "at risk"; and admissions concerning "cultural services" such as "spiritual renewal[] and aesthetic enjoyment." See, e.g., D. Ct. Doc. 194-3, at 17 (May 8, 2018); D. Ct. Doc. 194-4, at 29. Among the topics noticed for the Rule 30(b)(6) depositions, respondents demanded that the government designate witnesses to express the defendant agencies' official positions on "[a]ny

analysis or evaluation" related to "atmospheric CO2 concentrations, climate change targets, or greenhouse gas emission" that "would avoid endangerment of human health and welfare for current and future generations," as well as on the role of the agencies in implementing President Trump's energy policy. D. Ct. Doc. 196-1, at 6 (capitalization omitted) (Rule 30(b)(6) notice of deposition of U.S. Department of the Interior); D. Ct. Doc. 196-2, at 6 (capitalization omitted) (Rule 30(b)(6) notice of deposition of U.S. Department of Agriculture); D. Ct. Doc. 217-6, at 6 (June 4, 2018) (capitalization omitted) (Rule 30(b)(6) notice of deposition of U.S. Department of Transportation).

In June 2018, respondents served similar RFAs and nearly identical Rule 30(b)(6) deposition notices on the U.S. Departments of Energy and Defense. When the government sought a protective order with respect to the May RFAs and deposition notices on multiple grounds, respondents refused to withdraw the requests but asked the district court to hold the government's responses in abeyance while respondents seek to obtain the same information through contention interrogatories and requests for judicial notice. D. Ct. Doc. 247, at 2-4 (June 25, 2018).

6. Magistrate Judge Coffin denied the government's motion for a protective order for all discovery or, at a minimum, a stay of all discovery pending resolution of the government's motions for judgment on the pleadings and summary judgment. App., infra,

64a-66a. Judge Coffin determined that respondents' complaint does not assert claims arising under the APA because their claims are "based on alleged violations of their constitutional rights." Id. at 65a. He expressed the view that the district court had already rejected the government's argument that respondents must bring their claims under the APA. Ibid. And he refused to grant a protective order based on the separation of powers, ruling 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 66a. Judge Coffin denied the government's request for a stay of discovery without explanation. Ibid.

On June 29, the district court summarily affirmed Judge Coffin's order, 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." App., infra, 68a; see id. at 67a-68a. The court provided no additional explanation for its decision. Also without explanation, the court "decline[d] to certify [its] decision for interlocutory appeal under 28 U.S.C. § 1292(b)." Id. at 68a. Meanwhile, the government's trial-preparation burdens continue, as the October trial date fast approaches. Among other obligations, the government is required to provide expert reports to respondents by August 13, 2018. D. Ct. Doc. 192.

7. On July 5, the government again petitioned the Ninth Circuit for a writ of mandamus and a stay pending the court's consideration of the government's petition. 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. And yet respondents had failed to narrow their claims in any respect, and the district court's orders made clear that this case will not be terminated or respondents will not be required to narrow their manifestly overbroad claims in time to have any meaningful effect on discovery or trial. Accordingly, the government asked the Ninth Circuit (1) to direct the district court to dismiss this case or (2) at a minimum, to direct the district court to stay all discovery and trial pending the resolution of the government's dispositive motions, and consider certifying for interlocutory appeal any rulings on those motions, and (3) to stay all discovery and trial while the court of appeals considered the government's mandamus petition.

The court of appeals ordered respondents to respond to the government's stay request by July 10, with the government to file any reply the following day. On July 16, the court denied the stay request, stating that it would rule on the government's mandamus petition "on an expedited basis." App., infra, 69a. The court has not yet ordered a response to the government's mandamus petition.

ARGUMENT

The government respectfully requests that this Court grant a stay of all discovery and trial pending the Ninth Circuit's resolution of the government's petition for a writ of mandamus and any further proceedings in this Court. The government also respectfully requests an administrative stay pending this Court's ruling on this application for a stay. Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to enter a stay pending proceedings in a court of appeals.[2] In considering an application for such a stay, the Court or Circuit Justice considers whether four Justices are likely to vote to grant a writ of certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then likely conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). All of those factors support a stay here.

1. This Court is likely to grant review if the court of appeals denies the government's petition for mandamus. The

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[2] See, e.g., Trump v. International Refugee Assistance Project, 138 S. Ct. 542 (2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

district court has egregiously erred in declaring a never-before-recognized fundamental right to a particular climate system that lacks any support in the Constitution, this Court's precedents, or this Nation's history and tradition. It has done so in the context of litigation over which the court lacks Article III jurisdiction in multiple respects and is otherwise fundamentally procedurally flawed. Absent relief from the Ninth Circuit or this Court, this litigation is barreling toward an extremely compacted period of discovery that, in one form or another, will force the government to violate its obligations under the APA and the separation of powers, followed immediately by a 50-day trial that would itself violate the same constraints. If the court of appeals sanctions such a dramatic "depart[ure] from the accepted and usual course of judicial proceedings," an exercise of this Court's supervisory power would be warranted. Sup. Ct. R. 10(a).

2. Moreover, if the court of appeals denies the government's petition, a majority of this Court will likely reverse the Ninth Circuit's denial of mandamus relief or issue a writ of mandamus directly to the district court. 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). Moreover, 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." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (quoting Cheney, 542 U.S. at 380-381) (brackets in original). Each of those prerequisites for mandamus relief is met here.

a. The government's right to the dismissal of this case is "clear and indisputable." Perry, 558 U.S. at 190 (citation omitted). Respondents' implausible and far-reaching claims are procedurally and substantially defective in at least three ways.

i. Most fundamentally, the district court lacks jurisdiction over respondents' claims. "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)). This suit fails to qualify as a "Case[]" or "Controvers[y]" within the meaning of Article III for two independent reasons. U.S. Const. Art. III, § 2, Cl. 1.

First, respondents lack Article III standing. To demonstrate standing, respondents must prove that (1) they "have suffered an injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or

imminent, not conjectural or hypothetical"; (2) the 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, footnote, and internal quotation marks omitted; brackets in original). The purpose of these standing requirements is "to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). "In keeping with that purpose," a court's inquiry must be "'especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" Ibid. (citation omitted). Respondents cannot establish any of the standing requirements here.

Respondents assert "generalized grievance[s]," not "concrete and particularized" injuries sufficient to satisfy the first prong of the standing analysis. See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386, 1387 n.3 (2014); Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam); Cuno, 547 U.S. at 344-346. This Court has made clear that "standing to sue may not be predicated upon an interest * * * which is held in common by all members of the public, because of the necessarily

abstract nature of the injury all citizens share." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974). 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.

Moreover, respondents 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. Among their widely scattered objections, for example, respondents claim that the United States subsidizes the fossil-fuel industry. Am. Compl. ¶¶ 171-178. But when a plaintiff's alleged harms may have been caused directly by the conduct of parties other than the defendants (and only indirectly by the defendants), it is "substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." Warth v. Seldin, 422 U.S. 490, 504-505 (1975). And respondents cannot establish a causal link between the amorphously described policy decisions and the specific harms that they allege, as opposed to the independent

actions by private persons both within and outside the United States.

Finally, even if respondents could somehow establish injury-in-fact and causation, they could not establish that it is likely that their asserted injuries could be redressed by an order of a federal court. Indeed, 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, e.g., Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40-46 (1976) (holding that plaintiffs challenging tax subsidies for hospitals serving indigent patients lacked standing where they could only speculate on whether a change in policy would "result in [the plaintiffs] receiving the hospital services they desire"). 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." App., infra, 41a (quoting Am. Compl. 94). 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. 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 only 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 cognizable under Article III. 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 the courts 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.

Respondents appeal to the district court's equitable powers as justifying the review they seek in this case. But a federal court's equitable powers are "subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945). The relief respondents request is plainly not of the sort "traditionally accorded by courts of equity." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999). "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, a suit challenging an agency's regulatory measures would have to be targeted at specifically identified agency actions or alleged failures to act, and review would have to be based on the administrative record for those actions. 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. The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

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). The APA thus provides a "comprehensive remedial scheme" for a "person 'adversely affected' * * * by agency action" or alleged failure to act with respect to regulatory requirements and standards, permitting, and other administrative measures. Western Radio Servs. Co. v. United States Forest Serv., 578 F.3d 1116, 1122-1123 (9th Cir. 2009) (citation omitted), cert. denied, 559 U.S. 1106 (2010); see Wilkie v. Robbins, 551 U.S. 537, 551-554 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions"); Webster v. Doe, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting) (explaining that the APA "is an umbrella statute governing judicial review of all federal agency action" and that "if review is not available under the APA it is not available at all").

Respondents allege that a vast number of (mostly 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). As currently formulated, however, respondents' claims cannot proceed under the APA, because the APA allows only for challenges to "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 that "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels." Am. Compl. ¶¶ 1, 5. A challenge to "aggregate actions" is the antithesis of the "discrete agency action" that this Court has explained must be challenged under the APA. SUWA, 542 U.S. at 64.

Respondents suggest that they can evade the APA's limitations because the Constitution itself provides the right of action for constitutional claims. Am. Compl. ¶ 13. But this Court has never held that the Constitution itself provides an across-the-board right of action for all constitutional claims -- and especially for the sweeping constitutional claims concerning governmental regulation that respondents advance here and the sweeping relief they seek. Cf. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) ("[T]he Supremacy Clause does not confer a right of action."). Federal courts do have equitable authority in some circumstances "to enjoin unlawful executive action." Id. at 1385. But that equitable power is "subject to express and implied statutory limitations." Ibid. Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74

(1996). Here, even if the equitable authority of an Article III court could ever extend to a case of this sort, the APA provides "express * * * statutory limitations" that "'foreclose,'" Armstrong, 135 S. Ct. at 1385 (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. Even if a court could reach the merits of respondents' constitutional theories, they plainly fail. In denying the government's motion to dismiss, 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. App., infra, 27a; see id. at 25a-38a. Those claims are baseless.

This Court has instructed courts considering novel due process claims to "'exercise the utmost care whenever * * * asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed" into judicial policy preferences, and lest important issues be placed "outside the arena of public debate and legislative action." Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citation omitted). The Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are,

objectively, 'deeply rooted in this Nation's history and tradition.'" Id. at 720-721 (citation omitted). The district court's recognition of an "unenumerated fundamental right" to "a climate system capable of sustaining human life," App., infra, 26a-27a, is entirely without basis in this Nation's history or tradition. 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," Glucksberg, 521 U.S. 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.

The district 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). App., infra, 26a. There is no relationship, however, 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. The right recognized by the district court has no relationship to any right as "fundamental as a matter of history and tradition" as the right to marry recognized in Obergefell. 135 S. Ct. at 2602. Nor was the Obergefell Court's recognition of

that narrow right an invitation to abandon the cautious approach to recognizing new fundamental rights that is demanded by the Court's prior decisions.

Respondents' public-trust claim fares no better. The roots of a public-trust doctrine "trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country." PPL Montana, LLC v. Montana, 565 U.S. 576, 603 (2012). Where it applies, such a doctrine generally holds that the sovereign "owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." 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).

Respondents attempt to invoke that doctrine 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 the 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 because, as this Court has repeatedly recognized, the public-trust doctrine is purely a matter of state law and pertains only to a State's functions. See, e.g., PPL Montana, 565 U.S. at 603 ("[T]he public trust doctrine remains a

matter of state law.") (citing Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 285 (1997)). Indeed, the D.C. Circuit recently concluded that a nearly identical public-trust claim was so insubstantial that it could not provide even a basis for federal court subject-matter jurisdiction. See Alec L. ex rel. Loorz v. McCarthy, 561 Fed. Appx. 7, 8 (per curiam), cert. denied, 135 S. Ct. 774 (2014).

iv. Finally, even if the Court were hesitant at this moment to direct dismissal in light of all these defects, it is likely at least to direct the district court to stay discovery and trial pending resolution of the government's motion for judgment on the pleadings and its motion for summary judgment. A favorable ruling on either motion would terminate the litigation or substantially narrow it to allow challenges only to specifically identifiable agency action under the APA, thus eliminating any occasion for discovery or trial. At the very least, such a ruling would substantially affect the scope of any trial or discovery, including the government's expert reports that are due in the coming weeks.

In similar circumstances, this Court recently held that the Ninth Circuit erred in denying the government's petition for a writ of mandamus against district court orders that would have required the government to produce certain materials before the district court had resolved the government's threshold arguments for dismissal. See In re United States, 138 S. Ct. 443 (2017) (per curiam). In that case, the district court had refused to

stay all discovery pending resolution of the government's motion to dismiss the case as nonjusticiable and the court ordered the expansion of the administrative record that the government had produced. Id. at 444. After the Ninth Circuit denied the government's mandamus petition challenging those orders, this Court unanimously vacated the decision, remanding with instructions that the district court first rule on the government's threshold arguments and then "consider certifying that ruling for interlocutory appeal under 28 U.S.C. § 1292(b) if appropriate." Id. at 445. At the very least, the same relief is warranted here.

b. Mandamus is an appropriate remedy to correct the district court's egregious errors because the government has no adequate means to obtain relief from the court's refusal to dismiss this litigation or to prevent the impending discovery and trial. This Court observed in Cheney that mandamus may be used to correct a "judicial 'usurpation of power,'" 542 U.S. at 380 (citation omitted), and "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," id. 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, as a result of the district court's denial of a protective order, the defendant agencies will now be required to proceed with discovery and, in

all likelihood, participate in a fast-approaching 50-day trial that is not only flatly inconsistent with the APA's rules requiring a challenge to be directed to specific agency actions based on record review, but would also (i) violate the APA's carefully reticulated scheme for agencies to make factual assessments and policy determinations through rulemaking and adjudication in matters within their jurisdiction and (ii) contravene the constitutional separation of powers.

i. The APA sets forth a "comprehensive regulation of procedures" for agency decisionmaking. Wong Yang Sung v. McGrath, 339 U.S. 33, 36, modified, 339 U.S. 908 (1950); see 5 U.S.C. 551-554. "Time and again," this Court has explained that the APA establishes the exclusive procedural requirements for agency decisionmaking, and courts are not free to alter those requirements. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015). To require agencies to comply with discovery seeking official positions on factual assessments and questions of policy concerning the climate and then participate in a trial 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 procedures prescribed by the APA and deprive other interested parties and the public of the ability to provide input where the APA's rulemaking provisions or agency procedures require.

In pending discovery requests, for example, respondents seek to depose under Rule 30(b)(6) an official representative of the U.S. Department of Transportation on the agency's "role in implementing President Trump's America First Energy Plan," D. Ct. Doc. 217-6, at 6, and have the agency "admi[t]" propositions such as "[p]etroleum use in the transportation sector in the United States is expected to remain at about 13.5 million barrels per day through 2040 and beyond," D. Ct. Doc. 217-9, at 19 (capitalization omitted). If discovery proceeds in this case, the agencies' official statements and conclusions on such topics would be offered without public input from other stakeholders and without any of the relevant orderly procedures of agency decisionmaking contemplated by the APA. See 5 U.S.C. 553, 554. Those and similar required responses to discovery thus would be in direct contravention of Congress's judgment in the APA and the agencies' respective organic statutes to vest such determinations in the agencies' administrative processes in the first instance. And trial on such matters seeking to bind the defendant agencies (much less the President) would be fundamentally inconsistent with the APA and the agencies' organic statutes.

ii. Discovery and trial in this case would also 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). Moreover, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed," the Court "has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963).

Limiting judicial review to the administrative record of actions taken within the scope of the agency's authority as conferred by Congress in its organic statute reflects fundamental separation-of-powers principles. This suit, in which respondents seek discovery in aid of requiring the defendant agencies (and the President) to develop and implement a comprehensive, government-wide climate policy outside the congressionally prescribed statutory framework runs roughshod over those principles. It violates the vesting of the "legislative Power" 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 it seeks to require the President and Executive agencies to develop and implement such policies, it violates the Constitution's vesting of "executive Power * * * in a President of the United States." Id. Art. II, § 1, Cl. 1.

Allowing respondents to simply file a complaint in federal court and then leverage the civil litigation system to marshal the views of federal agencies on broad questions concerning climate conditions and national environmental and energy policies would displace the President in his superintendence of the Executive Branch and encroach on his exclusive authority to elicit the views of federal agencies in formulating national policies for addressing important issues of general concern. See U.S. Const. Art. II, § 2, Cl. 1 (vesting in the President the exclusive power to "require the Opinion * * * of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"); id. § 3 (vesting the President with power to "recommend to" Congress for "Consideration such Measures as he shall judge necessary and expedient"). Just as the President may not compel an advisory opinion from a court on a question of law, see, e.g., Flast v. Cohen, 392 U.S. 83, 96 & n.14 (1968), a court may not compel the opinions and proposals of executive officials on such matters. The Court should grant mandamus relief to prevent the irreparable harm that would be caused by such intrusions.

3. The balance of equities strongly supports granting a stay of discovery and trial pending consideration of the government's mandamus petition. Absent a stay, the government will be forced to proceed with burdensome discovery on a highly compressed timeframe and to prepare for (and eventually

participate in) a fast-approaching 50-day trial while, at the same time, violating its obligations under the APA and transgressing the separation of powers under the Constitution. Most immediately, by August 13 the government must produce expert reports rebutting respondents' 17 expert witnesses. Respondents' expert reports opine on wide-ranging topics from the merits vel non of implementing a carbon tax, D. Ct. Doc. 266-1, at 33-35 (June 28, 2018), to the technological and economic feasibility of converting 100% of the United States' energy from fossil fuels to renewable energy for all sectors by 2050, D. Ct. Doc. 261-1, at 4-11 (June 28, 2018). Respondents also have not withdrawn their requests for admission propounded on the U.S. Departments of Agriculture, Defense, Energy, the Interior, and Transportation or their Rule 30(b)(6) notices seeking an official designee from the same agencies to testify to each agency's positions on various aspects of climate change and the agency's view of its role in implementing the President's energy policies. See pp. 14-15, supra. Indeed, respondents have promised that more discovery requests on similar topics will be served soon, D. Ct. Doc. 247, at 4, all of which are unlawful and unnecessary.

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 court of appeals' disposition of the government's petition for a writ of mandamus and any further proceedings in this Court. Alternatively, the Court should construe this application as a petition for a writ of mandamus to the district court, or as a petition for a writ of certiorari seeking review of the Ninth Circuit's prior mandamus decision (App., infra, 55a-63a), and it should order that the district court dismiss this suit or that the district court stay discovery and trial until the government's pending dispositive motions are resolved and then consider certifying for interlocutory appeal any rulings on those motions. The government also requests that this Court enter an administrative stay pending its consideration of this stay application.

Respectfully submitted.

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