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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-TC

PLAINTIFFS' MOTION TO DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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LR 7-1 CERTIFICATION

The undersigned certifies that the counsel for the parties have conferred regarding both a briefing schedule and this Motion to Defer Consideration of Defendants' Motion for Summary Judgment, but have been unable to reach agreement. *See* Decl. of Julia A. Olson in Support of Plaintiffs' Motion to Defer Consideration of Defendants' Motion for Summary Judgment ("Olson Decl."), ¶ 10.

MOTION

Plaintiffs respectfully move this Court to exercise its discretion and authority to defer briefing and hearing on Defendants' Motion for Summary Judgment (ECF No. 207) until after the conclusion of discovery and in conjunction with trial. Plaintiffs also move this Court pursuant to its separate authority and discretion under Rule 56(d) to defer briefing and hearing on Defendants' Motion for Summary Judgment until after the conclusion of discovery and in conjunction with trial. In the alternative, Plaintiffs request an extension of the briefing schedule on Defendants' Motion for Summary Judgment until after discovery is completed. Development of a full factual record through discovery is essential for adequate resolution of the issues of fact raised by the Motion for Summary Judgment. Plaintiffs' deadline for filing their response brief is presently June 12, 2018, but Plaintiffs have also sought an extension of time pending resolution of this motion. ECF No. 225. As this Court indicated during the hearing on May 23, 2018 with reference to Defendants' Motion for Summary Judgment: "Even just filing it last night it puts this case way -- you know, in terms of argument, way into the fall regardless." Transcript of Hearing, at 17:13-15 (May 23, 2018). If oral argument will not be until the fall, there is no reason to schedule briefing while discovery is ongoing. Because Plaintiffs' development of the factual record and conduct of discovery are ongoing, deferral is appropriate.

PROCEDURAL BACKGROUND

The legal issues raised in Defendants' Motion for Summary Judgment present arguments previously advanced by Defendants, and rejected by this Court and the Ninth Circuit (ECF Nos. 68, 83, 146, 172; *In re United States*, 884 F.3d 830 (9th Cir. 2018)). However, by seeking summary judgment, Defendants are now challenging Plaintiffs to come forward with facts to support their allegations. Yet Defendants filed their motion while the parties are in the middle of discovery. Until a factual record is fully developed and presented to this Court, there is no need for the Court to resolve these questions again, devoid of an evidentiary factual inquiry. Defendants have already significantly delayed resolution of this case through a series of dilatory tactics, meanwhile continuing to contribute to and exacerbate the urgency and severity of the climate crisis that is causing Plaintiffs' injuries.[1]

On March 7, 2018, the Ninth Circuit rejected Defendants' arguments advanced in their Petition for Writ of Mandamus and found that this Court committed no clear error in denying Defendants' Motion to Dismiss. *In re United States*, 884 F.3d 830 (9th Cir. 2018).[2] Pursuant to the Court's orders, Plaintiffs are actively engaged in and devoting substantial resources to conducting discovery, preparing requests for judicial notice of important government documents, developing the factual record, and otherwise preparing for trial on October 29, 2018. Olson Decl. ¶¶ 11, 25. On April 13, Plaintiffs served 17 expert reports. Olson Decl. ¶ 11. Requests for

[1] Carbon dioxide levels measured at NOAA's Mauna Loa Atmospheric Baseline Observatory exceeded 411 parts per million in May 2018, the highest monthly average ever recorded, according to scientists from Scripps Institution of Oceanography at the University of California San Diego and NOAA. Primarily driven by fossil fuel combustion, increasing carbon dioxide levels are tracked closely by the world's scientists as a measure of how human activity is changing the planet's atmosphere. This year, the average for May peaked at 411.31 ppm, according to Scripps researchers. NOAA's reading was 411.25 for the month. Analysis of

[2] Based on an extension granted by Justice Kennedy, Defendants' Petition for Writ of Certiorari with respect to the Ninth Circuit's denial of their Petition for Writ of Mandamus would be due July 5, 2018.

Admissions and Rule 30(b)(6) deposition notices have been served on five Defendants. *Id*. Plaintiffs intend to serve contention interrogatories on Defendants shortly in order to determine what non-expert factual evidence Defendants intend to rely upon, if any, at trial. *Id*. ¶¶ 11, 16.

In 2018, Defendants have yet to provide *any* substantive responses to discovery. Instead of responding to discovery, Defendants have taken the position that "discovery is improper" (*see e.g.,* May 8 and June 5 Joint Status Reports, ECF No. 194, at 10; ECF No. 218, at 2-3) and seek to resolve this case based on legal arguments that have already been rejected by this Court and the Ninth Circuit. *See* ECF Nos. 68, 83, 146, 172; *In re United States*, 884 F.3d 830 (9th Cir. 2018). On May 9, Defendants filed a Motion for Judgment on the Pleadings under Rule 12(c) and a Motion for Protective Order and Discovery Stay. ECF Nos. 195, 196. On May 25, Judge Coffin denied Defendants' Motion for a Protective Order and Discovery Stay. ECF No. 212. As a result, Defendants remain obligated to provide substantive responses to discovery requests. ECF No. 212. Yet on June 1, Defendants continued to maintain their position that "discovery is improper" and filed objections to Judge Coffin's May 25 Order and a *second* Motion to Stay Discovery. ECF Nos. 215, 216. Late on June 4, Defendants filed another Motion for Protective Order *again* seeking to preclude all discovery in the case. ECF No. 217.

On May 22, Defendants moved for Summary Judgment, arguing (1) Plaintiffs lack standing; (2) there is no statutory cause of action; and (3) Plaintiffs' claims are barred by separation of powers. ECF No. 207. Defendants also resuscitate their argument the claims fail as a matter of law because there is no fundamental right to a climate system capable of sustaining human life and that the public trust doctrine does not constrain the federal government's regulation of the atmosphere. *Id.* These are arguments this Court has addressed numerous times, in various iterations. ECF Nos. 68, 83, 146, 172. However, when this Court addressed those

arguments, Plaintiffs were not then required to provide facts to oppose Defendants' motions. Through moving for summary judgment, that situation has now changed.

An obvious issue currently pending before this Court is the failure of Defendants to timely provide information sought in outstanding discovery requests. The strategy of Defendants to prevent any and all discovery is contrary to the position taken in their Motion for Summary Judgment, where they claim there are no disputes as to material issues of fact. For example, Defendants assert in their Motion that Plaintiffs cannot establish the elements of standing (ECF No. 207, at 10), yet have refused to permit any discovery on that very issue. Defendants claim Plaintiffs cannot prove "Defendants actions caused their asserted injuries," *id*., yet Defendants continue to prevent any discovery going to causation. Until Plaintiffs receive responses to the outstanding discovery requests, any briefing or decision on Defendants' Motion for Summary Judgment would be premature and incomplete.

Given the procedural posture of this case and in light of the numerous factual questions presented by Defendants' Motion for Summary Judgment, which requires the Court to now look at the facts outside of allegations in the pleadings, this Court should defer briefing and hearing on that Motion for Summary Judgment until either trial or after the completion of discovery.

ARGUMENT

"[A]ppellate review is aided by a developed record and full consideration of issues by the trial courts." *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018). The development of a full factual record in this case is essential for the Court's determination of whether a genuine dispute as to any material fact exists. The Court made this clear in the April 12th Status Conference:

> [T]he District Court has discretion in motions for summary judgment to roll those into the trial to develop a fuller record with which to rule on the motions for

> summary judgment. And that's the intent of the District Court in this particular case. . . . the court is going to want to develop, especially in a case of this nature, the fullest record to deal with the motions, and that entails handling it at trial. We don't have a jury. It's the court ruling on your motion for summary judgment and it's the court that's going to conduct the trial without a jury. And the court is going to want to have the fullest record before it before ruling on your motion. And the court has discretion to do that.

Transcript of Status Conference, ECF No. 191 at 19:8-21 (Apr. 12, 2018).

I. This Court Should Exercise Its Inherent Authority and Discretion to Defer Consideration of Defendants' Motion for Summary Judgment Until Trial

As this Court has recognized, the District Court has the discretion to defer consideration of a motion for summary judgment until trial in order for a full record to be developed. *See* Transcript of Status Conference, ECF No. 190 at 11:18-22 (Mar. 26, 2018); Transcript of Status Conference, ECF No. 191 at 19:8-21 (Apr. 12, 2018); *see also Williams v. Howard Johnson's Inc. of Washington*, 323 F.2d 102, 105 (4th Cir. 1963) (Courts have the "discretion to postpone consideration of the motion for summary judgment until after a hearing . . . particularly . . .where the trial is called upon to decide a constitutional question on summary judgment on a potentially inadequate factual presentation.").

The U.S. Supreme Court has recognized that "[w]hile we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257, 68 S. Ct. 1031, 1034, 92 L. Ed. 1347 (1948); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513–14, 91 L. Ed. 2d 202 (1986) (citing *id.*) ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial."); *Anderson v. Hodel*, 899 F.2d 766, 770 (9th

Cir. 1990) (quoting *Silas*, 334 U.S. at 257) ("[I]n cases involving complex legal issues where the record lacks clarity it is 'good judicial administration to withhold decision of the ultimate questions involved in th[e] case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.'").

The Ninth Circuit has held that, while a denial of summary judgment may prejudice the moving party, it "believe[s] it would be even more unjust to deprive a party of a . . . verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987). In a patent case, the Ninth Circuit stated that:

> The need for the guidance of expert testimony is apparent. We are uncomfortable with this record, in which the testimony of experts and others has not been put to the scrutiny of an orderly and coherent process of examination and cross-examination. This is not to say that summary judgment is never appropriate in patent cases or in other cases requiring expert testimony. We say only that, as to these patent issues, with fraud claims so closely intertwined, a disoriented battle of affidavits is not enough.

Garter-Bare Co. v. Munsingwear Inc., 650 F.2d 975, 982 (9th Cir. 1980). Furthermore, the Ninth Circuit has emphasized that "courts must not rush to dispose summarily of cases—**especially novel, complex, or otherwise difficult cases of public importance**—unless it is clear that more complete factual development **could not possibly alter the outcome** and that the credibility of the witnesses' statements or testimony is not at issue." *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684–85 (9th Cir. 1990) (emphases added).

This Court has discretion to defer consideration of a summary judgment motion until a fuller record is developed and should do so in this case. Defendants' Motion presents issues of fact. ECF No. 207 at 10. Discovery and fact-finding are ongoing in this case. Defendants have

denied a significant number of the allegations in Plaintiffs' First Amended Complaint, including allegations that relate directly to the issues raised in Defendants' Motion for Summary Judgment, such as standing. Olson Decl. ¶ 14; *see also, e.g.,* Answer, ECF No. 98 at ¶ 185 (Defendants denying the allegation that "[e]ither directly or through the control of the Federal Government, Defendants authorize the combustion of all fossil fuels in the U.S., including coal, oil and gas."). In order to narrow and identify the disputed factual issues in the case, Plaintiffs have propounded on Defendants Requests for Admissions and notices of depositions, and intend to propound contention interrogatories and additional Requests for Admissions for the purpose of authenticating documents. Olson Decl. ¶¶ 11, 16. Plaintiffs are also awaiting access to National Archives (NARA) documents, which has just been approved by Defendants. Olson Decl. ¶ 11. Despite Plaintiffs' diligence and efforts to comply with Defendants' demands as to how to pursue discovery, Defendants have yet to provide any substantive responses to Plaintiffs' discovery requests. Instead, even though discovery has not been stayed, Defendants have asserted all "discovery is improper" and filed an eleventh-hour motion for a protective order on the day their responses were due to some of the discovery. ECF No. 217.

In a fact-intensive case such as this one, it is imperative that both parties have the opportunity to thoroughly conduct discovery, provide expert testimony, and contest facts as necessary. Plaintiffs have served 17 of their 18 expert reports,[3] but their final expert report of James Gustave Speth is an important report for the element of causation in proving Plaintiffs' standing. Olson Decl. ¶15. The Speth Report has yet to be completed, in part because Plaintiffs were awaiting discovery responses relevant to that expert report. *Id.* Additionally, Defendants

[3] To effectively respond to Defendant's Motion for Summary Judgment, Plaintiffs must work with their experts to develop declarations on essential issues presented by Defendants' arguments. Olson Decl. ¶¶ 20.

have not yet identified their experts and will not produce expert reports until August 13. ECF No. 192. Plaintiffs will provide rebuttal expert reports by September 12. *Id.* The full exchange of expert reports will also illuminate the material facts in dispute, which are relevant to the three components of standing and Plaintiffs' constitutional claims. Olson Decl. ¶15. In their Motion, Defendants failed to show that complete factual development, including expert testimony, could not possibly alter the outcome at trial, particularly in light of the many allegations they have denied in their Answer. In this case, where facts sought by Plaintiffs in discovery and presented in expert testimony will be critical in evaluating standing and the constitutional violations alleged, the best, most efficient course for the Court is to utilize its discretion to defer consideration of the summary judgment motion until trial.

This is a novel, complex case of great importance to Plaintiffs and the public at large. A decision should not be rushed ahead of trial. Deferral of Defendants' Motion for Summary Judgment would allow this Court the benefit of evaluating the claims with a complete record and the opportunity to decide this case after each party presents its strongest arguments and evidence. By deferring consideration of Defendants' Motion for Summary Judgment, the Court would avoid the prejudice that a premature decision on summary judgment could create for Plaintiffs. This Court should exercise its inherent authority and discretion to defer consideration of Defendants' Motion for Summary Judgment until trial, when a fuller record has been developed.

II. Alternatively, Under Rule 56(d), the Court Should Defer Consideration of Defendants' Motion Because Plaintiffs Have Not had Sufficient Opportunity to Conduct Discovery on Issues Raised in Defendants' Motion

While the Court can exercise its independent authority and discretion to defer consideration of a summary judgment motion until trial, the Court can also do so under Rule

56(d). "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).[4] "The primary purpose of Rule 56(d) is to ensure that parties have a reasonable opportunity to prepare their case and to ensure against a premature grant of summary judgment." *Tarutis v. Wal-Mart Stores, Inc.*, No. C12-5076 RJB, 2013 WL 247710, at *2 (W.D. Wash. Jan. 23, 2013).

This Court has stated the standard for a party seeking relief under Rule 56(d):

> In determining whether to grant the request, the court considers whether plaintiff had sufficient opportunity to conduct discovery, plaintiff's diligence, whether the information sought is speculative, and whether allowing the discovery would preclude summary judgment. *See, e.g., Martinez v. Columbia Sportswear USA Corp.*, 553 Fed. App'x. 760, 761 (9th Cir. 2014).

Schneider v. JTM Capital Mgmt., LLC, No. 6:16-CV-2057-JR, 2018 WL 2276238, at *2 (D. Or. Mar. 22, 2018), *findings and recommendation adopted*, No. 6:16-CV02057-JR, 2018 WL 2248451 (D. Or. May 15, 2018).

"[T]he denial of a Rule 56([d]) application is generally disfavored where the party opposing summary judgment makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists. Summary denial is especially inappropriate where the material sought is also the subject of outstanding discovery requests." *VISA Intern. Service Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986).

"Rule 56([d]) . . . allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full

[4] Note that Rule 56(d) was Rule 56(f) until 2010 when amendments were made to the Rule.

discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). "[T]he Supreme Court has restated the rule as requiring, rather than merely permitting discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986)).

The Court should defer consideration of Defendants' Motion for Summary Judgment until trial because consideration of Defendants' Motion at this point would deny Plaintiffs a reasonable opportunity to prepare their case. Defendants chose to file their Motion in the middle of discovery. Despite their diligent efforts, Plaintiffs have not had sufficient opportunity to complete discovery and thus will be unable to present all relevant facts to defeat Defendants' Motion. Olson Decl. ¶¶ 11, 13, 14. Upon lifting of the stay on March 7, Plaintiffs immediately began the process of finalizing expert witness reports, serving 17 of Plaintiffs' 18 experts as of April 13. Olson Decl. ¶¶ 11. Plaintiffs are continuing to work with the single outstanding expert whose report is highly relevant and important for Plaintiffs' standing and their constitutional claims, and also dependent on the outcome of certain discovery. Olson Decl. ¶ 15. Since April 13, Plaintiffs have propounded detailed Requests for Admissions citing government documents, noticed depositions of Defendants under Rule 30(b)(6), agreed with Defendants to utilize contention interrogatories to identify the underlying basis for the Defendants' denials of allegations in the First Amended Complaint, negotiated a protective order with Defendants to protect the confidentiality of sensitive information of Plaintiffs, many of whom are minors, sought access to NARA documents, and cooperated with Defendants in the scheduling of

depositions of the 21 Youth Plaintiffs and Plaintiffs' experts.[5] Olson Decl. ¶¶ 9, 11, 16. Plaintiffs also have to prepare to defend the upcoming depositions of the 18 expert witnesses, as well as engage in formal and informal discovery by reviewing government reports and other documents, including records at the NARA facility in Maryland. Olson Decl. ¶¶ 11, 25, 29. Plaintiffs will propound Requests for Admissions to authenticate documents, contention interrogatories and notice more depositions of Defendants. Olson Decl. ¶¶ 11, 16.

Plaintiffs have identified specific facts that they believe to exist; these facts are essential to Plaintiffs' opposition to Defendants' Motion for Summary Judgment, particularly as to standing; and the material sought is the subject of outstanding discovery requests. Olson Decl. ¶¶ 16-18. For example, in their Answer, Defendants have denied the following allegations that raise questions of fact relevant to many of the issues raised in their Motion for Summary Judgment:

- Defendants deny "that it has continued a policy or practice of allowing the exploitation of fossil fuels." ECF No. 95 at ¶1.
- Defendants deny that, "[i]n addition to leasing federal public lands for fossil fuel exploitation, the United States subsidizes, funds, and subsidizes fossil fuel production and consumption." ECF No. 98 at ¶ 171.
- Defendants deny that "Defendants have for decades ignored experts they commissioned to evaluate the danger to our Nation, as well as their own plans for stopping the dangerous destabilization of the climate system." ECF No. 98 at ¶ 5.

[5] Over one month after stating before Judge Coffin that they wanted to depose each Youth Plaintiff during June, July, and August, Defendants apparently reversed their strategy and announced they did not want to take the deposition of any fact witness. Olson Decl. ¶ 9. It is still unclear whether Defendants will pursue depositions of the 21 Youth Plaintiffs. Olson Decl. ¶ 9.

- Defendants deny that "[t]he United States subsidizes the fossil fuel industry by undervaluing royalty rates for federal public leasing, as well as through royalty relief resulting in the loss of billions of dollars of foregone revenue." ECF No. 98 at ¶ 172.

Defendants also deny several allegations based upon the claim that they lack information to respond to allegations such as "[f]rom 1996-2014, through tax breaks, the United States subsidized the purchase, and thus increased demand for, vehicles weighing more than 6,000 pounds ("SUVs")." ECF No. 98 at ¶ 190. Therefore, Plaintiffs are required to develop and present evidence to refute these and other denials by Defendants and should be entitled to pursue discovery in order to do so.

A. Plaintiffs have not had sufficient opportunity to conduct discovery and have been diligent in their efforts.

As a result of Defendants' maneuvers, Defendants have yet to provide any substantive responses to the vast majority of Plaintiffs' discovery requests and, as a result, Plaintiffs have not had sufficient opportunity to conduct discovery. Olson Decl. ¶ 13. While Plaintiffs have been extremely diligent in their efforts, investing substantial time in informal discovery to minimize the need for formal discovery, agreeing to refrain from doing discovery against the President, withdrawing several discovery requests propounded earlier in the litigation, providing Defendants with citations in footnotes to each Federal government source document referenced in the Requests for Admissions,[6] and serving 17 expert reports,[7] Defendants have failed to

[6] Since Defendants filed their Answer, Plaintiffs have worked with over 60 volunteer law students and lawyers who have spent over 2500 collective hours conducting document review and fact-finding through informal discovery in lieu of propounding requests for production of documents on Defendants. Olson Decl. ¶ 2.

[7] Plaintiffs' experts, who are generously donating their services to Plaintiffs, have spent hundreds of hours working under tight timelines to prepare and update their expert reports in order to meet the April 13 deadline. Several experts have also arranged and/or blocked off their schedules to ensure they will be available for testimony both at deposition and at trial. Olson Decl. ¶ 3.

respond as promised in the meet and confer process to numerous outstanding discovery issues. *See* Olson Decl. ¶¶ 4, 6-9, 13; May 8 and June 5 Joint Status Reports, ECF Nos. 194, 218. In fact, Defendants are taking the position that all "discovery is improper" even though there is no stay in place and the Court has clearly directed the parties to engage in discovery. ECF No. 217. Indeed, Judge Coffin told the parties that "this Court is not going to extend the trial date based upon any complaints that, Oh, we're not prepared. So get to work, folks, and get prepared. That's my advice." Transcript of Status Conference, ECF No. 209-2, at 28:7-10 (May 10, 2018). As reflected in their Motion, and in their position during meet and confers, Defendants want their Motion for Summary Judgment decided before discovery is concluded and without the benefit of facts or evidence, even though they raise issues of fact. They want it decided solely on the law, like their Rule 12(b) and 12(c) motions. Olson Decl. ¶ 5. At summary judgment, given the issues raised, consideration of material facts is essential.

As a result of the ongoing meet and confer efforts, Plaintiffs have gone to great lengths to narrow their discovery to avoid motion practice. Plaintiffs also have provided citations to the government source of the specific fact in their Requests for Admissions to streamline Defendants' verification process.[8] Olson Decl. ¶¶ 11, 16-18. Defendants, on the other hand, have been unwilling to engage in discovery conferences in any meaningful way, acting as if a stay exists and maintaining "discovery is improper." Olson Decl. ¶ 13; May 8 Joint Status Report, ECF No. 194, at 10; June 5 Joint Status Report, ECF No. 218, at 2-3; Mot. for Protective Order, ECF No. 217, at 1.

[8] In their latest Motion for Protective Order, Defendants suggest that many of the Requests for Admission are better suited to be admitted pursuant to judicial notice. ECF Nos. 217, 217-1. Plaintiffs are evaluating that approach as an alternative to Requests for Admission. However, a process of requesting judicial notice will also take time and involve re-serving Requests for Admission for document authentication only, followed by a motion to the Court to take judicial notice. Olson Decl. ¶ 12.

Plaintiffs have served Requests for Admissions on five Defendants in order to authenticate documents (Fed. R. Civ. P. 36(a)(1)(B)) and to seek admissions as to "facts, the application of law to fact, or opinions about either." (Fed. R. Civ. P. 36(a)(1)(A)). Olson Decl. ¶ 11. Plaintiffs have also served Notices of Depositions, with very narrow subject areas, pursuant to Fed. R. Civ. P. 36(b)(6) on the same five defendants: Department of Agriculture, Department of Interior, Department of Transportation, Department of Defense, and Department of Energy. Olson Decl. ¶ 11. After Plaintiffs agreed to narrow the subject areas in response to Defendants' concerns, Defendants are now taking the position that they will not be producing any Rule 30(b)(6) witnesses. Olson Decl. ¶ 13.

In order to be prepared for trial, Plaintiffs had endeavored to propound all discovery by the end of May; however, despite their diligent efforts, counsel for Plaintiffs' have been diverted by Defendants' repetitive and dilatory motion practice. Olson Decl. ¶ 13. Moreover, Defendants are acting as though a stay of discovery exists, even though no stay is in place. Olson Decl. ¶ 13. For example, after agreeing to take some of Plaintiffs' depositions in the first week of June during an in-person meet and confer, Defendants have apparently changed course, not because they are unavailable, but because "**discovery is categorically improper**." ECF No. 209, Olson Decl. in Support of Plaintiffs' Response in Opposition to Defendants' Motion for Protective Order, ¶ 7. Ignoring this Court's orders and their obligations under the Federal Rules, Defendants brazenly assert they will not participate in the discovery process ***at all*** while they pursue "the options for narrowing the case set forth in the Ninth Circuit's opinion denying mandamus." *Id*.

This Court has said "the Plaintiffs are asserting that their constitutional rights are being violated by government action and inaction . . . and that does permit discovery[.]" Transcript of Status Conference, ECF No. 209-2, at 16:5-10 (May 10, 2018). Judge Coffin denied Defendants'

motion for protective order and motion to stay all discovery and, thus, Defendants have an ongoing obligation to provide substantive responses to discovery requests and other pre-trial obligations. ECF No. 212.

Defendants cannot have it both ways in seeking summary judgment while at the same time denying the right to basic discovery. Plaintiffs have been persistent and flexible in their discovery efforts but have run into several barriers created by Defendants. Defendants should not be able to benefit from these barriers by having both no discovery and a hearing on summary judgment while discovery is pending. At this point, there has not been adequate discovery to inform the Court's resolution of the issues raised in Defendants' Motion for Summary Judgment, and the Court should defer consideration of the motion until trial.

B. The information sought by Plaintiffs is not speculative and is identified in pending discovery requests.

Plaintiffs must submit extrinsic factual materials on the issues to oppose Defendants' Motion for Summary Judgment. Olson Decl. ¶ 14. In their Motion for Summary Judgment, Defendants claim Plaintiffs' injuries are not caused by government conduct. ECF No. 207, at 9-10. That issue necessarily raises a question of fact. Defendants contend "Plaintiffs have presented no evidence establishing a causal link between the amorphously-described policy decisions and the specific harms they allege." ECF No. 207, at 9. That is not because such evidence does not exist, but because Plaintiffs are in the process of discovering the full body of evidence on causation so that it can be presented in opposition to summary judgment and at trial. Plaintiffs' Requests for Admission seek admissions of facts from government documents and sources that will conclusively prove the federal government is causing and contributing to Plaintiffs' constitutional injuries. For example, through Requests for Admissions, Plaintiffs seek verification of federal government data such as: the amount of coal Defendant Interior has

authorized to be extracted from federal lands (ECF No. 217-8, DOI RFA10); coal produced on federal lands is responsible for approximately 10% of U.S. GHG emissions (DOI RFA22); and the U.S. Forest Service has been studying climate change and ecosystem response since the 1980s (ECF No. 217-7, USDA RFA24). Olson Decl. ¶¶ 17-18**.** These are just examples of the relevant factual information Plaintiffs seek to establish through discovery both for trial and in opposition to Defendants' Motion for Summary Judgment. Furthermore, the expert report of James Gustave Speth has not been finalized, which will provide expert opinion and material facts relevant to causation and redressability. Olson Decl. ¶ 15.

C. The information Plaintiffs seek would preclude Defendants' Motion for Summary Judgment.

At this juncture, an evidentiary inquiry is needed to consider Defendants' Motion for Summary Judgment, as Defendants have denied a significant number of Plaintiffs' allegations. Through Requests for Admissions, contention interrogatories, depositions, and expert discovery, Plaintiffs are in the process of obtaining information that is critical to support Plaintiffs' opposition to Defendants' Motion and would preclude summary judgment. Olson Decl. ¶¶ 11, 14, 19. Further, Defendants now claim that they may not dispute all of Plaintiffs' expert reports. ECF No. 218, at 13 ("A second issue that Defendants have identified is that several of the reports do not address any material issues that are disputed in this case and are therefore unnecessary for trial.").[9] If Plaintiffs do not know what facts Defendants are going to admit or contest, an adequate resolution of the issues raised on summary judgment cannot be reached.

As discussed above, the issues in Defendants' Motion and discovery sought by the Plaintiffs raise questions of fact disputed by Defendants in their Answer to the First Amended

[9] When asked to identify which expert reports contain information they will not dispute, Defendants refused to provide that information. Olson Decl. ¶ 15.

Complaint. Some denials by Defendants deal directly with all three elements of standing: injury-in-fact, causation, and redressability.

In their Motion for Summary Judgment, Defendants again assert Plaintiffs allege only generalized grievances, not particularized harm. A common response in Defendants' Answer in regard to the specific harms suffered by Youth Plaintiffs is that "Federal Defendants lack sufficient knowledge or information to form a belief about the truth of the allegations and on this basis deny them." Answer, ECF No. 98, ¶¶ 16-97.

Regarding the causation element, Defendants deny they have "continued a policy or practice of allowing the exploitation of fossil fuels." Answer ¶1. Defendants deny they caused climate change that contributed to variety of Plaintiffs' injuries. Answer ¶¶ 27-29, 31, 35, 37, 40-42, 46, 52, 54-55, 64-67, 77, 80, 86, 88-89. "Federal Defendants deny the allegation […] that climate destabilization is caused by Federal Defendants." Answer ¶ 32. Defendants deny that "DOE permits domestic energy production and interstate commerce of fossil fuels pursuant to authority granted by Congress under the Department of Energy Organization Act of 1977, 42 U.S.C. § 7112" and "aver that there is no direct federal regulation of domestic energy production." Answer ¶ 105, citing First Amended Complaint ("FAC"), ECF No. 7, ¶ 105.

Regarding the redressability element of standing, Defendants deny "[t]he current policies, plans, and practices of the Federal Government will not achieve even a proportionate share of the fossil fuel emission reductions that must occur within this century." Answer ¶ 11, citing FAC ¶ 11. Defendants deny that "[e]ither directly or through the control of the Federal Government, Defendants authorize the combustion of all fossil fuels in the U.S., including coal, oil, and gas." Answer ¶ 185, citing FAC ¶ 185. Defendants deny that "[a]tmospheric CO_2 levels greater than 350 ppm cause this energy imbalance," and aver that atmospheric CO_2 concentrations over 280

ppm have led to an energy imbalance compared to the pre-industrial era. Answer ¶ 203, citing FAC ¶ 203.

Defendants' separation of powers argument also raises questions of fact that would benefit by a more fully developed factual record. At the motion to dismiss stage, the Court rejected Defendants' claims that there is no remedy the Court can fashion without violating the separation of powers. Order Denying Motion to Dismiss, ECF No. 83, at 17. Now, Plaintiffs are entitled to pursue discovery to establish that, based on Defendants' own records, there exists a remedy that can be implemented that will not violate separation of powers principles. Defendants have never conceded that such a remedy is possible and thus this issue necessarily implicates questions of fact.[10]

The information Plaintiffs seek through discovery is needed to oppose Defendants' Motion for Summary Judgment and would preclude summary judgment for Defendants. This Court should exercise its discretion and authority under Rule 56(d) to defer briefing and hearing on Defendants' Motion for Summary Judgment until after the conclusion of discovery and in conjunction with trial.

III. In the Alternative, the Court Should Defer Consideration of Defendants' Motion for Summary Judgment until After Discovery is Completed

If the Court does not defer consideration Defendants' Motion for Summary Judgment until trial, Plaintiffs request, in the alternative, an extension of time to respond to Defendants'

[10] Defendants' remaining issues similarly raise questions of fact, many of which were outlined in this Court's order rejecting Defendants' Motion to Dismiss. ECF No. 83. For example as to Plaintiffs' state-created danger claim, the Court laid out the elements that Plaintiffs must prove, all of which include facts that have been disputed by Defendants: "(1) the government's acts created the danger to the plaintiff; (2) the government *knew* its acts caused that danger; and (3) the government with *deliberate indifference* failed to act to prevent the alleged harm." Order Denying Motion to Dismiss, ECF No. 83, at 36.

Motion for Summary Judgment until after discovery is completed. In order to oppose Defendants' Motion for Summary Judgment, declarations from Plaintiffs' expert witnesses and the Youth Plaintiffs themselves would need to be submitted. Many of the expert witnesses are presently unavailable due to work or travel and are certainly unable to prepare those declarations within the current time frame. Olson Decl. ¶¶ 3, 20. The expert witnesses have busy schedules and have made arrangements to be available for depositions and trial but adding a declaration on top of that work will be impracticable and will take away from Plaintiffs' ability to fully prepare their witnesses for deposition and trial. Olson Decl. ¶¶ 3, 20. Preparing declarations for the Youth Plaintiffs is a time-consuming process and is also unrealistic to accomplish given the current schedule. Olson Decl. ¶ 21.

Counsel for Plaintiffs are spending an extensive amount of time on discovery, experts, motion practice, and other pre-trial matters in this case, including responding to the numerous motions and objections filed by Defendants this past month. Olson Decl. ¶¶ 5, 21-25, 27-32; Decl. of Philip L. Gregory in Support of Plaintiffs' Motion to Defer Consideration of Defendants' Motion for Summary Judgment ("Gregory Decl."), ¶¶ 2-6; Decl. of Andrea K. Rodgers in Support of Plaintiffs' Motion to Defer Consideration of Defendants' Motion for Summary Judgment ("Rodgers Decl.), ¶¶ 2, 6. Counsel for Plaintiffs, in their active and diligent prosecution of Plaintiffs' claims, have numerous engagements, travel considerations, and other matters, presenting further challenges to securing adequate time for the preparation and drafting of Plaintiffs' opposition to Defendants' Motion for Summary Judgment. Olson Decl. ¶¶ 24, 26, 33-34; Gregory Decl. ¶¶ 2, 7-9; Rodgers Decl. ¶¶ 2-5, 7.

CONCLUSION & PRAYER FOR RELIEF

For the reasons stated above, Plaintiffs respectfully request that the Court defer briefing and hearing on Defendants' Motion for Summary Judgment until after the conclusion of discovery and in conjunction with trial. In the alternative, Plaintiffs request an extension of the briefing schedule on Defendants' Motion for Summary Judgment until after discovery is completed.

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