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Attorneys for Plaintiffs

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' RESPONSE IN OPPOSITION TO DEFENDANTS' OBJECTIONS TO ORDER DENYING MOTION FOR A PROTECTIVE ORDER AND STAY OF DISCOVERY

INTRODUCTION

Judge Coffin's Order (ECF No. 212) correctly denied Defendants' motion for a protective order and a stay of all discovery. ECF No. 196. As Judge Coffin recognized, Defendants are improperly attempting to turn this constitutional case into one under the Administrative Procedure Act ("APA"). Yet the Amended Complaint does not contain a claim under the APA. Further, Judge Coffin appropriately determined that the APA is not Plaintiffs' "sole avenue of relief . . . for the asserted violations of their constitutional rights." ECF No. 212 at 2. Finally, Judge Coffin concluded this Court "has already rejected this very argument." *Id*.

Even the Ninth Circuit has addressed this issue and decided against Defendants. As the Ninth Circuit stated: "In this petition for a writ of mandamus, the defendants ask us to direct the district court to dismiss a case seeking various environmental remedies. The defendants argue that allowing the case to proceed will result in burdensome discovery obligations on the federal government that will threaten the separation of powers." *United States v. U.S. Dist. Court for Dist. Of Or*., 884 F.3d 830, 833 (9th Cir. 2018). The Ninth Circuit went on to note:

> The defendants' argument fails because the district court has not issued a single discovery order, nor have the plaintiffs filed a single motion seeking to compel discovery. Rather, the parties have employed the usual meet-and-confer process of resolving discovery disputes. See Fed. R. Civ. P. 37(a)(1). Indeed, both sides have submitted declarations attesting that they have thus far resolved a number of discovery disputes without either side asking the district court for an order. Indeed, the plaintiffs have withdrawn a number of requests for production. The defendants rely on informal communications as to the scope of discovery—in particular, the plaintiffs' litigation hold and demand letter—but the plaintiffs have clarified that these communications were not discovery requests.

Id. at 834.

The situation described by the Ninth Circuit has continued since the stay was lifted on March 7. While the parties have been engaging in discovery in this case for 17 months, this is the first time Defendants have sought a protective order, one to halt *all discovery*. This strategy is

contrary to Defendants' prior position on discovery. In addition to the discovery Plaintiffs have already conducted, Defendants initially and repeatedly stated their intent to engage in discovery, specifically, to depose all 21 Plaintiffs, to take depositions of Plaintiffs' experts, and to serve Requests for Admissions. Over the past 17 months, Defendants proffered two federal government witnesses for deposition, responded to Plaintiffs' Requests for Admissions and Requests for Production of Documents, stipulated to a protective order to govern confidential materials produced in discovery, and requested *and obtained* Plaintiffs' list of experts and expert reports, all without reserving their objections that no discovery should proceed. The parties have been meeting and conferring to narrow and facilitate discovery for 15 months. At no point did Defendants object on the bases argued in their Motion for Protective Order.

Defendants' original Motion "focuses on the propriety of discovery generally." ECF No. 196, at 7, n.2. As a result, to uphold Judge Coffin's Order, this Court does not need to address specific discovery requests. Further, Defendants' recycled argument that Plaintiffs' case should be dismissed and, therefore, no discovery conducted has certainly been decided by this Court and the Ninth Circuit. These Objections present no new evidence to justify a protective order under Fed. R. Civ. P. 26(c)(1) and is another attempt under another name to avoid trial. Notably, by these Objections, Defendants *still* do not seek a protective order over any specific discovery requests that they find objectionable: "Defendants—the President of the United States and eight federal agencies and officials—*will very soon* be subjected to discovery . . . ." ECF No. 215 at 5 (emphasis added.) There is no suggestion the Ninth Circuit anticipated that Defendants would seek to stay *all* discovery when it said that Defendants "may seek protective orders, as appropriate, under Federal Rule of Civil Procedure 26(c)." *In re United States*, 884 F.3d at 835. In response to Defendants' arguments "that allowing the case to proceed will result in

burdensome discovery obligations on the federal government," at a time when Plaintiffs had propounded much broader discovery than is currently outstanding, the Ninth Circuit clearly determined Plaintiffs' case could proceed to trial, anticipating discovery would narrow the issues in dispute. *Id.* at 831, 833, 837-838. The entire passage from the Ninth Circuit's decision, from which Defendants cherry-pick to justify their motion for a broad protective order, actually reads:

> ***If a specific discovery dispute arises***, the defendants can challenge that ***specific discovery request*** on the basis of privilege or relevance. *See McDaniel v. U.S. Dist. Ct.*, 127 F.3d 886, 888–89 (9th Cir. 1997) (per curiam) (holding that mandamus "is not the State's only adequate means of relief" from burdensome discovery because, "as discovery proceeds, the State is not foreclosed from making routine challenges to specific discovery requests on the basis of privilege or relevance"). In addition, the defendants can seek protective orders, as appropriate, under Federal Rule of Civil Procedure 26(c). . . .
>
> The defendants will have ample remedies if they believe ***a specific discovery request*** from the plaintiffs is too broad or burdensome.

In re United States, 884 F.3d at 835 (emphasis added).

Defendants' request for a stay of all discovery fails to meet the Ninth Circuit standard for a stay. Once again, Defendants ignore the irreparable constitutional harm Plaintiffs continue to suffer, which worsens by each day of delay. Plaintiffs' experts and testimony from federal witnesses refer to the harm Plaintiffs are suffering as "dangerous." Defendants do not (and cannot) plausibly argue that having to engage in the limited discovery Plaintiffs seek could ever outweigh Plaintiffs' harm of further delay, which endangers their lives and liberties. Defendants' motion is particularly misplaced as Plaintiffs have assured Defendants they are not conducting discovery against the President or the Members of the President's Cabinet, which the Ninth Circuit noted as a factor against finding that the President was unreasonably burdened by the case. *Id.* at 836 ("Nor has any formal discovery been sought against the President.").

As this Court found in denying Defendants' request for a stay of discovery pending resolution of these Objections, Defendants have provided no evidence or explanation as to the "irreparable harm" they will suffer in the absence of a stay. ECF No. 238. This Court found no "irreparable harm likely under the circumstances." *Id*. As to Defendants' argument on "balance of hardships," this Court also determined Defendants' "concerns would seem to be better addressed by specific objections to specific discovery requests, rather than by a blanket stay of all discovery pending this Court's review of the Government's objections." *Id*. Defendants' objections to all discovery should be similarly found without merit.

Finally, Defendants' Objections ask this Court to stay all discovery before the underlying Rule 12(c) Motion has been determined. Until this Court issues its decision on the Rule 12(c) Motion, the parties should proceed with full discovery and pre-trial preparations, in accordance with the Court's existing scheduling orders. Judge Coffin's Order should be adopted as it is not clearly erroneous and not contrary to law. Finally, this Court's order as to these Objections and Defendants' Motion should not be certified for interlocutory appeal under U.S.C. § 1292(b).

STANDARD OF REVIEW

Where a magistrate judge hears a discovery motion, as in this case, he is authorized to resolve such matter subject to district court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); see also Fed. R. Civ. P. 72(a). A magistrate judge's discovery order under 28 U.S.C. § 636(b)(1)(A) is not subject to *de novo* review, and the reviewing court "may not simply substitute its judgment for that of the deciding court." *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) (Discovery sanctions are nondispositive pretrial matters that are reviewed for clear error). The magistrate judge's ruling is "clearly erroneous" only if, after reviewing the entire record, the district court is "left with the

definite and firm conviction that a mistake has been committed." *United States v. Silverman*, 861 F.2d 571, 576–77 (9th Cir.1988) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). A decision is "contrary to law" if it applies an incorrect legal standard or fails to consider an element of the applicable standard. *See Lovell v. United Airlines, Inc.*, 728 F.Supp.2d 1096, 1100 (D. Haw. 2010). This standard is "extremely deferential," and parties seeking to overturn the magistrate's discovery ruling "bear a heavy burden." *See Dochniak v. Dominium Management Services, Inc.*, 240 F.R.D. 451, 452 (D. Minn. 2006); *Citicorp. v. Interbank Card Ass'n*, 87 F.R.D. 43, 46 (S.D.N.Y. 1980).

As to the underlying Motion, Defendants must show "good cause" for a protective order with evidence that they will be subject to "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). When seeking a protective order, "the burden of proof remains with the party seeking protection." *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (quotations and alterations omitted). Defendants' burden of showing why all discovery should be denied is a heavy one requiring a strong showing. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (1975). The discovery standard for an APA case, Def. Mot. 12-13, does not apply here because, as Judge Coffin has recognized, "[t]here's no APA claim in the case that's been filed by the plaintiffs" and "it's not an APA case as we speak."[1] Declaration of Julia A. Olson ("Olson Decl.") at ¶ 9 (May 10, 2018 Case Management Conference Transcript at 15:19-21; 16:4).

[1] Plaintiffs' discovery addresses issues such as Article III standing, including Requests for Admissions, Rule 30(b)(6) deposition notices, and expert testimony. The law is clear, and Defendants have conceded, that discovery is appropriate for purposes of establishing jurisdiction, such as standing, so even if Defendants could re-plead Plaintiffs' case for them, this motion for a protective order to stop all discovery would still be unfounded. *See* April 12, 2018 CMC Transcript at 33 (Mr. Duffy: "And I would just add this as an example of one of the exceptions to the administrative record rule where we are probing to find out if the plaintiffs have standing in

Defendants provide the wrong standard of review on "staying proceedings," when the stay they request is one of *discovery*. To be granted a stay of all discovery, Defendants must convince the Court that Plaintiffs are unable to state a claim for relief. *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). A stay of all discovery prior to a district court resolving a Rule 12(b) motion to dismiss is different than a stay of discovery *after* the District Court and the Ninth Circuit have ruled the Amended Complaint states a viable claim for relief. *See Rutman Wine Co. v. E&J Gallo Winery*, 829 F.2d 729 (9th Cir. 1987); *In re United States*, 138 S. Ct. 443, 444 (2017) (per curiam) (Ordering district court to decide the Rule 12(b) motion to dismiss before ordering an expansion of the administrative record in an Administrative Procedure Act case).

As this Court just determined in denying Defendants' request for a stay pending a decision on these Objections (ECF No. 216): "[I]n order to stay discovery pending resolution of objections to a discovery order, the movant must show that (1) it is likely it will succeed on the merits of the appeal, (2) it will suffer irreparable injury in the absence of a stay, (3) other parties will not be substantially injured by a stay, and (4) the stay will not harm public interest. *See NML Capital, Ltd. v. Republic of Argentina*, No. 2:14-cv- 492-RFB-VCF, 2015 WL 3489684, at *4 (D. Nev. June 3, 2015)."

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this case. In any event, we have agreed to go forward over the summer. The proposals that plaintiffs have are fine."). Furthermore, "discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498 v. SDC Inv., Inc*., 788 F.2d 535, 540 (9th Cir.1986); *See Wells Fargo & Co. v. Wells Fargo Express Co*., 556 F.2d 406, 430 n. 24 (9th Cir.1977) (District court abused discretion in refusing discovery on jurisdictional issue); *see also Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) (Remanding to permit "jurisdictional discovery" when allegations indicated its likely utility); *Edmond v. United States Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1992) (Finding abuse of discretion when district court denied jurisdictional discovery in light of allegations suggesting jurisdiction did exist).

ARGUMENT[2]

Defendants have not met their heavy burden of making a strong showing that *any*, let alone *all*, discovery will be an undue burden, thereby meeting the "good cause" standard for a protective order. In fact, Defendants present *no supporting evidence* of any burden. For example, Plaintiffs served narrowly tailored Requests for Admissions ("RFAs"), with footnoted citations to the government source of the fact sought for admission. Conducting eight depositions of Defendants' Rule 30(b)(6) witnesses as to four narrow topics is not unduly burdensome. Engaging in expert witness depositions and responding to limited contention interrogatories is not unduly burdensome and is a routine part of litigation of this nature.

Previously, Defendants had primarily complained about the burden of allegedly broad Requests for Production of Documents, which Plaintiffs have completely withdrawn and do not intend to re-serve. Thereafter, Plaintiffs reviewed the pending RFAs and Rule 30(b)(6) deposition notices in light of the direction provided at the June 6, 2018 Status Conference regarding discovery and the meet and confer with Defendants on June 5, 2018. Plaintiffs then requested to meet and confer with Defendants regarding the outstanding discovery to determine a path forward that best addresses the needs and concerns of both parties. Plaintiffs are also following the advice of the Court "to see if you can resolve many of these things with another meet and confer." ECF No. 235, Olson Decl. at ¶ 3. Plaintiffs expect that the parties can come to an agreement that will eliminate the need for the Court to rule on Defendants' Separate Motion for a Protective Order as to these RFAs and Rule 30(b)(6) deposition notices. *Id.*; ECF No. 217.

[2] Plaintiffs incorporate by reference the arguments and supporting materials from Plaintiffs' Response in Opposition for Defendants' Motion for a Protective Order and for a Stay of All Discovery, Declaration of Julia A. Olson in Support of Plaintiffs' Response, and Plaintiffs' Response in Opposition to Defendants' Motion to Stay Discovery Pending Resolution of Objections. ECF Nos. 208, 208-1, 209, 209-1, 209-2, 222.

Further, Defendants mistakenly equate the procedural posture of this case with the Supreme Court's issuance of a stay in the DACA Cases. Defendants claim the Supreme Court issued its stay there in order for the district court to resolve "the government's dispositive motion," citing *In re United States*, 138 S. Ct. at 445. However, the "dispositive motion" in the DACA Cases was the government's Motion to Dismiss, a motion already decided in the instant case. As the Supreme Court characterized the procedural posture in the DACA Cases:

> On November 19, three days after the Court of Appeals issued its opinion, respondents moved the District Court to stay its order requiring completion of the administrative record until after the District Court resolved *the Government's motion to dismiss* and respondents' motion for a preliminary injunction. See Motion to Stay in No. 17–cv–5211 (Nov. 19, 2017), Doc. 190.

Id. (Emphasis added.) This Court has already ruled on Defendants' Motion to Dismiss (ECF No. 85) over a year ago and the Ninth Circuit denied Defendants' Petition for a Writ of Mandamus as to that same Order. Thus, the procedural posture of the DACA Cases is completely different.

Defendants also failed to meet their burden of convincing the Court that Plaintiffs are unable to state a claim for relief. This Court denied Defendants' Rule 12(b) Motion, and thus, consistent with *In re United States*, 138 S. Ct. at 444, Plaintiffs have begun to prepare the full evidentiary record for trial, which is proceeding under the Federal Rules of Civil Procedure, not the APA. In the following sections, Plaintiffs respond to Defendants' convoluted arguments, noting that they do not track the standard set by the Ninth Circuit for reviewing similar motions.

I. Plaintiffs' Claims are Not APA Claims and there is No Administrative Record in this Case; Discovery is Appropriate Under the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Defendants have not met their burden to show good cause why a protective order is required at this late stage in the proceedings. Their entire argument hinges on their assertion that Plaintiffs should have pled their case as an APA case and should thereby be bound by the

discovery rules in an APA case, the issue argued in Defendants' Motion for Judgment on the Pleadings, now also being briefed. However, this is not an APA case and the APA does not govern here. This Court, as affirmed by the Ninth Circuit under the "no clear error" standard of review, already held that Plaintiffs' Fifth Amendment claims can proceed to trial as pled under 28 U.S.C. § 1331. In the context of Plaintiffs' claim under the Federal Public Trust Doctrine, the Court ruled, "it is the Fifth Amendment that provides the right of action." *Juliana v. U.S.*, 217 F.Supp.3d 1224, 1261 (D. Or. 2016). Moreover, Ninth Circuit precedent is also dispositive on this issue. *See Navajo Nation v. Dept. of the Interior,* 876 F.3d 1144, 1170 (9th Cir. 2017) ("Claims not grounded in the APA, like the constitutional claims in *Presbyterian Church* and *VCS I,* "do[ ] not depend on the cause of action found in the first sentence of § 702" and thus "§ 704's limitation does not apply to them."); *The Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 524 (9th Cir. 1989) (28 U.S.C. § 1331 gives the court subject matter jurisdiction to hear "claims aris[ing] out of the Constitution"); *see also Franklin v. Massachusetts,* 505 U.S. 788, 796-801, 803-806 (1992) (In a case "rais[ing] claims under both the APA and the Constitution," the Court reached the merits of plaintiffs' constitutional claims separately from its analysis of the plaintiffs' APA claims, which the Court found were not viable for lack of "final agency action."); *see also Ogden v. United States*, 758 F.2d 1168, 1175, 1985 (7th Cir. 1985) (Holding that Plaintiffs' First Amendment claim for injunctive relief may proceed under the Constitution).

Notwithstanding Defendant's efforts to repackage the same basic legal argument in a motion with a new title, they already made these arguments in this Court and in their Writ Petition, both of which were denied. As this Court stated in the May 10, 2018 Status Conference:

> The defendant cannot draft the complaint for the plaintiffs in the way that the defendant prefers it to be drafted. So when you say, "This is an APA case," it's not. There's no APA claim in the case that's been filed by the plaintiffs.

> So when you say that under the APA no discovery should be permitted, that essentially flips your role in the case to where you, as the defendant, are telling the plaintiff that you actually have an APA claim, and so we are not going to make any efforts to grant you discovery because you're not entitled to it under the APA, but it's not an APA case as we speak.
>
> It is a case wherein the plaintiffs are asserting that their constitutional rights are being violated by government action and inaction, as we described in the earlier rulings. That's the case that's before us and that does permit discovery and that hasn't been changed as we speak.

(Status Conference Hearing Transcript, 15-16 (May 10, 2018)). Excerpts from the pleadings and court orders further illustrate how extensively this issue has been argued and decided:

1. March 9, 2016 Transcript, ECF No. 67 at 17: 18-22 (Defendants arguing: "Here, the plaintiffs did not invoke any statutory right to sue. They certainly could, this could be an administrative – this could be an APA case, Clean Air Act case. There's a lot of statutes that permit private rights of action.")
2. ECF No. 74, Fed. Def's Objections to Findings and Rec. of Mag. Judge, at 15 (Defendants arguing: "Any action that lies against the federal agencies would need to be brought pursuant to a statute, such as the Administrative Procedure Act ("APA"), that provides a right of action against federal agencies.").
3. Sept. 13, 2016 Transcript, ECF No. 82 at 67: 11-17 (Defendants arguing: "This is different. Here, we have a case where Congress has already acted. And Congress has provided Plaintiffs' with a remedy in this case . . . through the Administrative Procedure Act, to the extent plaintiffs are challenging actions of federal agencies . . . .").
4. November 10, 2016 Order Denying Defendants' Motion to Dismiss, ECF No. 83 at 13 (The Court concluding: "Finally, defendants and intervenors contend that plaintiff's failure to identify violations of precise statutory or regulatory provisions leaves this court without any legal standard by which to judge plaintiffs' claims. Plaintiffs could have

brought a lawsuit predicated on technical regulatory violations, but they chose a different path. As masters of their complaint, they have elected to assert constitutional rather than statutory claims. Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards.").

5. ECF No. 120-1, Def.'s Mem. ISO Mot. To Certify Order for Interlocutory Appeal, at 14 (Defendants arguing: "Indeed, Plaintiffs do not even invoke the Court's jurisdiction under the Administrative Procedure Act ("APA") to bring this suit, since they do not challenge discrete final agency action . . . ."); *Id.* at 16 (Defendants arguing: "The Court presumed that Plaintiffs could bring a due process claim . . . apparently inferring a private cause of action in the Constitution itself.").
6. ECF No. 133, Pl's Opp. To Def's Motion to Certify, at 16.
7. ECF No. 139, Def's Reply ISO Mot. To Certify, at 22 (Defendants arguing: "Plaintiffs have deliberately chosen not to bring any claims pursuant to the APA.").
8. ECF No. 146, Findings & Recommendations (Rejecting Defendants' arguments and recommending denial of Defendants' Motion to Certify for Interlocutory Appeal).
9. ECF No. 172 (Order rejecting Defendants' arguments and denying Defendants' Motion to Certify for Interlocutory Appeal).
10. ECF No. 177-1, Petition for Writ of Mandamus, at 26-28 (Defendants arguing:

> Neither plaintiffs nor the district court identified a cause of action authorizing suits against federal agencies or the President for declaratory and injunctive relief related to this alleged right. When the district court asserted that "the Fifth Amendment * * * provides the right of action" for both the due process and the public trust claims, it cited only cases upholding a cause of action for damages against federal officers for violations of constitutional rights. Dkt. 83 at 51, citing *Davis v. Passman*, 442 U.S. 228, 245 (1979), and *Carlson v. Green*, 446 U.S. 14, 18 (1980).

> While the Supreme Court has in limited circumstances implied causes of action against individual federal officers in their personal capacities, in order to vindicate clearly- established constitutional rights, it has emphasized that such implication should be sparing, and that "such power is to be exercised in the light of relevant policy determinations made by the Congress," and only where no other alternative form of relief is available. *Bush v. Lucas*, 462 U.S. 367, 373-744 (1983); *see also Davis*, 442 U.S. at 245.
>
> No court has ever recognized an implied Fifth Amendment cause of action directly against the federal government itself that would allow plaintiffs to seek, through injunctive and declaratory relief, a fundamental re-ordering of national priorities to address an environmental problem. Any such implied cause of action would run contrary to the consistent refusal of Congress to authorize causes of action for programmatic challenges. As the district court recognized, Dkt. 83 at 52, plaintiffs could not have brought this broadly programmatic challenge under any statutorily-created causes of action such as the APA. *See Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 892–93 (1990) ("it is at least entirely certain that the flaws in the entire 'program' * * * referenced in the complaint, and presumably actions yet to be taken as well * * * cannot be laid before the courts for wholesale correction under the APA"); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("'respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made'") (quoting *Lujan*, 497 U.S. at 64-65).

11. *In re United States*, Answer of Real Parties in Interest to Petition for Writ of Mandamus, Dkt. 14-1 at 40-42, No. 17-71692 (9th Circuit August 28, 2017).

There is no need for the Court to revisit that issue. Significantly, Defendants cite no precedent where a plaintiff's cause of action is the Fifth Amendment and a protective order issued to stop all on-going discovery after the motion to dismiss stage of the proceedings.[3]

[3] The district court cases Defendants cite on page 12 of their brief are inapposite. Even though there were constitutional claims brought in varied ways, those cases challenged singular agency actions, not the aggregate, systemic, and unconstitutional conduct of multiple federal agencies and individual officials across the federal government. All but *Ketcham v. U.S. Nat'l Park Serv.,* 2016 WL 4268346, also involved APA challenges to final agency action. *Ketcham* was the only case involving a First Amendment claim, which the district court converted to an APA case because the constitutional claim did not appear viable. The reasoning in *Ketcham*, while not precedential here, is also not persuasive and is factually on opposite ends of the constitutional

Finally, while Defendants' arguments on pages 13-17 of their brief are also dependent on their false perception that this is an APA case, and therefore fail on that basis, they are also without merit. Defendants seek a protective order over all discovery, without introducing a single discovery request that is objectionable, let alone presenting actual evidence of undue burden. As Judge Coffin properly determined, if Plaintiffs serve discovery requests that are privileged or objectionable, Defendants may object to the discovery on a case-by-case basis. ECF No. 212 at 3. This Court made a similar determination: Defendants' "concerns would seem to be better addressed by specific objections to specific discovery requests, rather than by a blanket stay of all discovery . . . ." ECF No. 238.

Defendants have failed to produce evidence of any burden or harm in engaging in routine discovery by admitting to the authenticity of documents, as well as affirm facts and data Defendants have already stated in their own documents and on their own websites. Judge Coffin's Order should be affirmed.

II. The Separation of Powers Doctrine Does Not Bar Discovery, But Requires Development of a Full Factual Record for Trial and the Timely Resolution of Plaintiffs' Constitutional Claims.

Defendants have 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 underlying Plaintiffs' claims.[4] *See, e.g. SEC v. Hemp, Inc.*, 2018 WL 1220566 (D.

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spectrum. The issue of whether a constitutional claim brought in the context of a singular final agency action against one federal agency, which is also subject to review under the APA, must only be reviewed pursuant to the administrative record review provisions of the APA is not at issue in this litigation. Defendants will have to take that issue up in a different matter. This Court should decline to address an issue that is not relevant to these proceedings.

[4] *See, e.g.* Dep't of Energy Office of Efficiency & Renewable Energy, Vehicle Technologies Office Fact of the Week #1022 ("March 26, 2018: U.S. Crude Oil Exports Skyrocketed in 2016 and 2017"); Exec. Order 13783, 82 Fed. Reg. 16093 (March 28, 2017) (Directing rollback of Clean Power Plan, rescinding moratorium on coal mining on federal lands, and rescinding six

Nev. March 8, 2018) (Finding excessive delay when motion was filed "almost an entire year after [Defendants] answered the complaint . . . ."). In order to avoid further delay, prejudice, and injury to Plaintiffs, this Court should not stay any discovery until it determines Defendants' Motion for Judgment on the Pleadings regarding separation of powers on July 18.

Obama administration executive orders aimed at curbing climate change and regulating emissions, including inclusion of climate change impacts in environmental reviews); Exec. Order 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (Expediting environmental reviews and approvals for infrastructure projects"); Exec. Order 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (Ordering a review of the "Waters of the United States" Rule); Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (Jan. 24, 2017), available at https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline (Encouraging approval of Dakota Access Pipeline); Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), available at https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline; Media Note: Issuance of Presidential Permit to TransCanada for Keystone XL Pipeline (March 24, 2017), available at https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm; Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16,576 (Apr. 5, 2017); Exec. Order 13792, 82 FR 20429 (April 26, 2017) (Ordering review of previous monument designations under Antiquities Act); Exec. Order 13795, 82 FR 20815 (April 28, 2017) (Reversing moratorium on offshore drilling, opening outer continental shelf to fossil fuel exploration, and ordering implementation of "America First Energy Strategy"); Valerie Volvcovici, "U.S. Submits Formal Notice of Withdrawal from Paris Climate Pact," Reuters (August 4, 2017), available at https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBN1AK2FM; Press Release, U.S. EPA, *EPA, DOT Open Comment Period on Reconsideration of GHG Standards for Cars and Light Trucks,* Aug. 10, 2017, https://www.epa.gov/newsreleases/epa-dot-open-comment-period-reconsideration-ghg-standards-cars-and-light-trucks; Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, N.Y. Times, Jan. 4, 2018, https://www.nytimes.com/2018/01/04/climate/trump-offshore-drilling.html?emc=edit_na_20180104&nl=breaking-news&nlid=65971131&ref=cta; Timothy Cama, *Trump admin proposes repealing most of Obama methane leak rule*, The Hill, Feb. 12, 2018, http://thehill.com/policy/energy-environment/373496-trump-admin-proposes-repealing-most-of-obama-methane-leak-rule; https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/; Jacqueline Thomsen, *Trump Admin Kills NASA Project Monitoring Greenhouse Gas Emissions*, The Hill, May 10, 2018; Michael Greshko, et al. *A Running List of How Trump is Changing the Environment*, National Geographic, May 11, 2018, https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/.

Responding to discovery is a normal part of litigation and does not constitute irreparable harm, let alone undue burden or prejudice that cannot be corrected on appeal. *See Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (citing *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938)); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Defendants have not established *any* undue burden to the separation of powers in allowing discovery to proceed. Plaintiffs are not conducting and will not conduct any discovery targeted at the President.[5] Further, as this Court has recognized, it is premature to determine whether the Court will face any difficulties in fashioning relief so as to avoid separation of powers concerns. ECF No. 83 at 17 ("[S]peculation about the difficulty of crafting a remedy could not support dismissal at this early stage.") (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see also*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.") (citing *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 16 (1971)). Finally, in reviewing the Petition for Writ of Mandamus, the Ninth Circuit rejected the argument of prejudice by engaging in discovery: "To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur

[5] The President is, and historically has been, a named party in suit after suit challenging official Presidential actions on statutory and constitutional grounds, even if no relief is ultimately ordered. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) ("[T[he President's actions may still be reviewed for constitutionality" in case declining to issue relief against the President); *Clinton v. City of New York*, 524 U.S. 417 (1998) (Affirming declaratory relief that President's use of line-item veto was unconstitutional); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (Upholding injunctive relief in constitutional challenge to official Presidential action); *Karnoski v. Trump*, No. C17-1297-MJP (W.D. Wash. April 13, 2018) (Denying dismissal of President in constitutional challenge of transgender military ban).

burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them." *In re United States*, 884 F.3d at 836.

Defendants mischaracterize Plaintiffs' request for relief by suggesting that Plaintiffs seek a remedy "*without regard to the agencies' existing statutory authorities.*" ECF No. 215 at 21. Plaintiffs are well aware of the agency defendants' existing statutory authorities and the systemic, aggregate manner in which they have used their authorities to infringe the rights of these young Plaintiffs and, conversely, how such authorities could be lawfully used to remediate the harm. As Plaintiffs have long argued, Defendants have discretion regarding how they come into constitutional compliance, within their constitutional and statutory authority, but whether they are infringing fundamental rights and whether they must come into compliance are issues that must be tried beginning October 29, 2018 with a fully developed factual record.

There is no precedent or supporting rationale for Defendants' contention that *all* discovery in a Fifth Amendment substantive due process case, which has made it past a motion to dismiss, is barred due to the Opinion Clause, the Recommendations Clause, or some generalized argument about separation of powers, which seems to hinge largely on Defendants' speculation about the remedy the Court might issue, a fact-intensive inquiry. Defendants have not produced any evidence that having to respond to narrow discovery requests threatens the opinions, recommendations, or other work of the federal government or the President. If there is specific discovery to which Defendants object on these bases, they may then object and the parties will meet and confer. Without any showing of undue burden, their Objections should fail.

III. Defendants Fail to Meet the High Standard for a Discovery Stay.

Defendants misstated the standard of review for their motion to stay discovery and, in their Objections, do not make the requisite showing that their Rule 12(c) Motion or Motion for

Protective Order are obviously meritorious. Although Defendants suggest that staying discovery is merely a question of balancing equities, the Ninth Circuit has held that a court may "stay discovery when it is *convinced* that the plaintiff will be unable to state a claim for relief." *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (emphasis added). Many district courts applying this "convinced" standard concluded that it demands even "more than an apparently meritorious" dispositive motion. *See, e.g., Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013); *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989); *Trzaska v. Int'l Game Tech.*, No. 2:10-CV-02268-JCM, 2011 WL 1233298, at *3 (D. Nev. Mar. 29, 2011) ("Generally, there must be *no question* in the court's mind that the dispositive motion will prevail, and therefore, discovery is a waste of effort."). Discovery stays are ordered when a dispositive motion is obviously meritorious, such as "where the complaint was utterly frivolous, or filed merely in order to conduct a 'fishing expedition' or for settlement value." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990).

Given the Ninth Circuit's requirement that the dispositive motion be obviously meritorious, Defendants are not entitled to a stay *even if* the relative harms tip in their favor, which they do not. In surviving Defendants' Motion to Dismiss and Petition for Writ of Mandamus, Plaintiffs' Amended Complaint is clearly not frivolous. Thus, Defendants are not entitled to their requested discovery stay. "The intention of a party to move for judgment on the pleadings is not ordinarily sufficient to justify a stay of discovery." *Id.* (citing 4 J.Moore, *Federal Practice* § 26.70[2] (2d ed. 1989)).

Even if the Court were to balance the equities, substantial prejudice to Plaintiffs militates against a discovery stay. *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (Citing lack of prejudice while upholding a district court's order staying discovery); *Hallett v. Morgan*, 296 F.3d

732, 751 (9th Cir. 2002). Defendants are disingenuous in claiming that "[a] stay of discovery will not prejudice Plaintiffs."[6] Defs.' Mot. at 23. Ironically, Defendants also undercut their argument about the undue burden of Plaintiffs' discovery by asserting that "only very modest discovery has occurred to date." *Id.* By Plaintiffs' standard, a significant amount of the discovery they intend to conduct has already been conducted, and if that is "very modest" in Defendants' view, then they surely will not suffer any prejudice in responding to it.

As a result of Defendants' maneuvers, trial has already been significantly delayed and discovery is well underway. Plaintiffs have invested substantial time in informal discovery[7] and have already served seventeen expert reports[8] and Requests for Admissions on Defendants, with citations to the source of the fact to streamline Defendants' verification process. Olson Decl., ¶ 4. Plaintiffs are complying with Defendants' request to Bates stamp and produce all sources relied upon by Plaintiffs' experts in their expert reports; and the parties will be scheduling and taking expert depositions beginning in July. Olson Decl., ¶¶ 5-8. At this stage, a stay of discovery will undercut Plaintiffs' hard work to prepare for trial on October 29, 2018, and Plaintiffs' reliance on Defendants' commitments to participate in discovery during their meet and confer process.

Furthermore, and most significantly, Plaintiffs would be irreparably prejudiced by any additional delay in this case. A stay of discovery would further delay trial and exacerbate the

[6] Plaintiffs find it remarkable that Defendants make this claim after having reviewed seventeen expert reports describing, in great detail, the harm currently being inflicted upon Plaintiffs.
[7] 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.
[8] 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 Court-ordered deadlines in this case. Several experts have also arranged and/or blocked off their schedules to ensure they are available for testimony during discovery and trial. Olson Decl., ¶ 3.

dangerous climate emergency that is already harming Plaintiffs. In their Objections, Defendants do not offer evidence to contest this point. The loss of constitutional freedoms is irreparable injury. Plaintiffs have alleged constitutional violations of their Substantive Due Process and Equal Protection rights. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, "the balance of equities favor[s] preventing the violation of a party's constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Plaintiffs' injuries are doubly irreparable because climate change causes environmental degradation that the Supreme Court has recognized as "severe and irreversible." *Massachusetts v. E.P.A.*, 549 U.S. 497, 521 (2007). These irreversible environmental impacts such as sea level rise, droughts, and wildfires are already injuring Plaintiffs, and any stay would necessarily extend and exacerbate them. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."); *Envtl. Def. v. Army Corps of Eng'rs*, No. 04-1575, 2006 WL 1992626, at *9-10 (D.D.C. Jul. 14, 2006) ("Because of the irremediable nature of many environmental claims, courts have been weary of even relatively modest environmental harm.").

Moreover, any discovery delay would undermine Plaintiffs' legal position by decreasing the feasibility of their proposed remedy. Nearly one-fifth of the atmospheric CO_2 released during any stay would still be in the atmosphere five hundred years from now. Declaration of Dr. James E. Hansen, ECF No. 7-1, ¶ 28. If injunctive relief is delayed much beyond 2020, Plaintiffs have alleged that it may be impossible to reach 350 ppm, the upper safe limit of CO_2 levels this century, until 2500 or later. Am. Compl. ¶ 258. Thus, every month of delay materially decreases

the likelihood that Defendants will be able to reduce emissions at a pace consistent with a 350 ppm pathway. In their Objections, Defendants do not offer evidence to contest this point.

Although the Court does not need to balance equities here because Defendants' motions are *not* "obviously meritorious," Defendants have also failed to produce evidence of harms that outweigh Plaintiffs' injuries. Defendants' alleged harm is the supposed expenditure of resources given discovery propounded by Plaintiffs to date. Yet the purpose of discovery is to frame the factual issues for trial. Even the Ninth Circuit determined discovery will narrow issues in dispute. *In re United States*, 884 F.3d at 835 ("The defendants will have ample remedies if they believe a specific discovery request from the plaintiffs is too broad or burdensome.").

CONCLUSION

The way to resolve discovery issues in this case is based on objections to specific discovery requests, not to preclude all discovery. Judge Coffin correctly determined that this is the procedure to be followed and his Order should be affirmed. His decision is neither contrary to law and not clearly erroneous. This Court should determine that Defendants' objections to the order are not properly taken and misstate the standards of review. Further, there is no reason for this Court to certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendants' Objections should be overruled in their entirety.

DATED this 15th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2018, I served PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' OBJECTIONS TO ORDER DENYING MOTION FOR A PROTECTIVE ORDER AND STAY OF DISCOVERY by the Electronic Court Filing (ECF) System on the following counsel for all parties.

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