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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION**

KELSEY CASCADIA ROSE JULIANA, *et al.*,

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

Plaintiffs,

**DEFENDANTS' MOTION FOR A
STAY PENDING A PETITION FOR
A WRIT OF MANDAMUS**

v.

Expedited Hearing Requested

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

Defendants hereby move for a stay of all discovery and trial pending resolution of the mandamus petition that Defendants are concurrently filing in the Ninth Circuit. Defendants have conferred with Plaintiffs regarding this motion and Plaintiffs have indicated they oppose the requested stay. Plaintiffs also oppose Defendants' request for an expedited hearing on this motion.

INTRODUCTION

Given the numerous statutory and constitutional impediments to discovery against the government in this case—and the potential for ending the litigation through dispositive motions—the government previously moved for a protective order against all discovery and a stay of discovery pending resolution of the government's dispositive motions. ECF No. 196. Magistrate Judge Coffin denied that motion, erroneously construing this Court's prior orders as rejecting arguments the government had not previously made and denying the government's request for a stay without any explanation. ECF No. 212. On June 29, 2018, this Court summarily affirmed Magistrate Judge Coffin's order on the basis that "the order is not clearly erroneous or contrary to law." ECF No. 300. Without a stay, the government now faces discovery that is unlawful and unnecessary for the reasons articulated in its pending objections and its pending dispositive motions.

There is no justification for subjecting the government to discovery that the government submits is unlawful and unnecessary before ruling on the pending motions that would eliminate the occasion for such discovery. Because this Court has declined to grant such relief, the government intends to seek mandamus relief—including dismissal of the litigation—from the Ninth Circuit. Because mandamus relief could end the litigation, the government respectfully requests the Court to enter a stay of all further discovery and trial pending resolution of the mandamus petition, as the

Ninth Circuit did when considering the government's prior mandamus petition in this case. *See United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018).

RELEVANT BACKGROUND

The Court is familiar with the background and procedural history of this case. As relevant here, Plaintiffs brought this action against President Obama (for whom President Trump was later substituted), the Executive Office of the President, and eight federal agencies for allegedly violating their rights under the Constitution and purported federal public trust law. Am. Compl., ECF No. 7. Plaintiffs ask this Court to, *inter alia*, order Defendants to “prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂.” *Id.*, Prayer for Relief ¶ 7. Defendants moved to dismiss Plaintiffs’ claims on several grounds, including lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim on a public trust theory. ECF No. 27. This Court denied that motion, and declined to certify its order for interlocutory appeal. ECF Nos. 68, 83, 172.

Defendants petitioned the Ninth Circuit for a writ of mandamus. The court of appeals stayed the litigation for seven-and-a-half months, but ultimately denied the petition without prejudice. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018). Specifically, the court “decline[d] to exercise [its] discretion to grant mandamus relief at [that] stage of the litigation,” in part because no discovery requests had yet been filed. *Id.* at 835, 838. The court explained, however, 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 838. The court also reiterated that Defendants could continue to “raise and litigate any legal objections they have,” including by “seek[ing] protective orders,” moving to “dismiss the President as a

party,” and seeking “summary judgment on the claims.” *Id.* at 835-38. The court added that Defendants remain free to “seek[] mandamus in the future.” *Id.* at 838.

The government has now moved for each of the forms of relief contemplated by the Ninth Circuit, as well as a stay of discovery pending resolution of those motions. ECF Nos. 195 (Motion for Judgment on the Pleadings), 196 (Motion for a Protective Order and Stay of Discovery), 207 (Motion for Summary Judgment). Neither of the dispositive motions has yet been resolved by this Court. Magistrate Judge Coffin, however, denied the motion for a protective order and for a stay of discovery pending resolution of the government’s dispositive motions. ECF No. 212. On June 29, 2018, this Court summarily affirmed. ECF No. 300.

ARGUMENT

Given the impending discovery obligations, the rapidly approaching trial date, and this Court’s decision not to grant a protective order from discovery or even stay such discovery pending resolution of the dispositive motions, the government has little choice but to seek further review—including dismissal of the litigation—by filing a petition for a writ of mandamus in the Ninth Circuit. *See* ECF No. 215 at 4. Because the favorable resolution of such a petition would end the case, all further discovery and trial should be stayed pending the Ninth Circuit’s disposition of the petition, as the Ninth Circuit ordered when the government previously petitioned for mandamus in this case. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 834. The government therefore respectfully requests that this Court postpone all further discovery and trial pending resolution of a petition for a writ of mandamus.¹

¹ Although Fed. R. App. P. 8(a)(1) does not expressly refer to a stay pending review of a petition for a writ of mandamus under Fed. R. App. P. 21, Defendants nevertheless believe it appropriate to ask this Court for a stay before asking the court of appeals to enter a stay pending disposition of the government’s mandamus petition.

Whether to issue a stay is “an exercise of judicial discretion . . . to be guided by sound legal principles,” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (internal citations omitted), based on the following factors: (1) the applicant’s likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). Each of these factors weighs in favor of a stay of the litigation pending resolution of a petition for a writ of mandamus.

With respect to the first factor, the arguments set out in the government’s previous mandamus petition and its dispositive motions show that Defendants have a strong likelihood of success in obtaining mandamus to prevent the unprecedented trial and remedy, and related discovery, sought by Plaintiffs in this case. ECF Nos. 177-1, 195, 207. Although the Ninth Circuit denied the government’s prior mandamus petition, the court of appeals made clear that Defendants could seek mandamus again after attempting to narrow or dismiss Plaintiffs’ claims through specified procedural steps, including moving to dismiss the President, seeking protective orders, and seeking summary judgment on the claims. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 835-38. Given that the government has taken all of the procedural steps contemplated by the Ninth Circuit, *see id.*, but now faces imminent harm without any action by Plaintiffs or this Court to narrow or dismiss Plaintiffs’ claims, the government is likely to obtain mandamus relief from the court of appeals.

The other stay factors are readily satisfied, as indicated by the Ninth Circuit’s entry of a stay pending resolution of the government’s prior mandamus petition. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 834. Indeed, as the government explained in its objections to the magistrate judge’s denial of a protective order, the discovery and trial currently contemplated

in this case are categorically improper and unlawful because (1) Plaintiffs' claims are fundamentally challenges to agency action or inaction subject to record review under the Administrative Procedure Act ("APA"), (2) requiring agencies to take positions on substantive policy issues through discovery and district court litigation would contravene the procedural requirements imposed by the APA for agency decisionmaking, and (3) directing agency officials to provide an assessment of substantive policy questions and potential responses would violate the separation of powers, in particular by invading the President's exclusive constitutional authority 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," U.S. Const. art. II, § 2, cl. 1, and to "recommend to" Congress for "Consideration such Measures as he shall judge necessary and expedient," U.S. Const. art. II, art. II, § 3. *See* ECF No. 215. At a minimum, the government has explained that, given the serious questions surrounding the lawfulness of these proceedings, further discovery and trial should be stayed pending resolution of the government's dispositive motions—which will soon be fully briefed and ripe for this Court's consideration.²

In the absence of a stay, however, the government will be subject to the very discovery that it contends is unlawful in its motion for a protective order, and that would be unnecessary if Plaintiffs' claims were rejected through either of the pending dispositive motions. There is no justification for subjecting a litigant to potentially unlawful discovery before ruling on pending motions that would eliminate the occasion for that discovery and would "clearly constitute[]

² The Court has set argument on the motion for judgment on the pleadings for July 18, 2018. ECF No. 214. The motion for summary judgment will be fully briefed by July 12, 2018. ECF No. 239. The government has requested that its motion for summary judgment be set for argument at the July 18 hearing. ECF No. 305. Plaintiffs oppose that request, *id.*, and the Court has not yet ruled on it.

severe prejudice that could not be remedied on appeal.” *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997). Considerations of judicial efficiency would preclude such an approach in an ordinary case. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). The impropriety of subjecting a party to potentially unlawful discovery challenged in pending motions is greatly heightened where, as here, the objections are raised by the government. *Cf. In re United States*, 138 S. Ct. 443, 444-45 (2017). Not only would subjecting the government to the potentially unlawful discovery at issue here entail a significant waste of public resources, it would also be contrary to (1) the requirements of the APA governing both agency consideration of legal, factual, and policy issues and judicial review of final agency action and inaction; and (2) the constitutional separation of powers. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004).

By contrast, a stay of the litigation during the pendency of the mandamus petition is not likely to appreciably harm Plaintiffs, who waited years to challenge the conduct that they allege is unconstitutional, and who are being harmed (if at all) only in tiny incremental amounts given the long-run nature of climate change. Finally, the public interest strongly favors a stay, because absent such relief the Executive Branch and its agencies (including the Executive Office of the President) would be subject to continued unlawful discovery and forced to divert substantial resources away from their essential function of “faithfully execut[ing]” the law. U.S. Const. art. II, § 3.

CONCLUSION

For the foregoing reasons, the Court should stay all further discovery and trial pending resolution of the government’s petition for a writ of mandamus.

Dated: July 5, 2018

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 5, 2018 I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

/s/ Clare Boronow
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