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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-CV-01517-AA

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF NOVEMBER 21, 2018 COURT ORDERED STAY OF PROCEEDINGS

INTRODUCTION

Plaintiffs seek reconsideration of the Court's order staying this case but they have not even attempted to meet the standard for that "extraordinary remedy." Instead they have used their motion as an opportunity to direct this Court's attention to two new government reports on climate change. Neither report justifies the Court's resort to the "disfavored" relief of reconsideration because neither is material to the Court's decision to stay this case pending a ruling by the Ninth Circuit on Defendants' Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) ("Defendants' Petition"). This Court should decline Plaintiffs' invitation to rush to lift the stay of pretrial proceedings before the Ninth Circuit resolves Defendants' Petition. The Court's decision to stay this case reflects concerns of judicial comity and economy that should not be cast aside to accommodate Plaintiffs' rush to the courthouse.

Equally important, Plaintiffs' portrayal of the status of discovery in this case and the potential harm flowing from the Court's stay is misleading. Significant pretrial work remains in this case, including up to fifteen additional depositions. Proceeding with that work when the entire case may soon be on appeal is a waste of both the parties' and the Court's resources. Moreover, Plaintiffs' claims of irreparable harm from emissions during the time it takes the Ninth Circuit to consider Defendants' Petition are not credible when their harms flow from decades of emissions, Plaintiffs waited years to bring this case, and they anticipate months of trial before even beginning to litigate a possible remedy.

Rather than rushing to restart discovery and motion practice before the Ninth Circuit rules on Defendants' Petition—only to have that discovery and motion practice likely again put on hold by the Ninth Circuit if the court accepts the appeal—this Court should stand by its

decision to stay this case and allow the appellate court to reach a decision without the distraction and confusion of a shifting status quo.

LEGAL STANDARD

"Reconsideration is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Am. Rivers v. NOAA Fisheries*, No. CV-04-00061-RE, 2006 WL 1983178, at *2 (D. Or. July 14, 2006) (quoting *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). "Motions for reconsideration . . . are generally disfavored, and may not be used to present new arguments or evidence that could have been raised earlier." *Id.* Courts may grant motions for reconsideration of interlocutory orders if:

> (1) there are material differences in fact or law from that presented to the court and, at the time of the court's decision, the party moving for reconsideration could not have known the factual or legal differences through reasonable diligence;
>
> (2) there are new material facts that happened after the Court's decision;
>
> (3) there has been a change in law that was decided or enacted after the court's decision; or
>
> (4) the movant makes a convincing showing that the court failed to consider material facts that were presented to the court before the court's decision.

Id. (citations omitted); *see also Santoro v. OCWEN Loan Servicing, LLC*, 6:14-cv-00522-TC, 2017 WL 6501860, at *3 (D. Or. Dec. 18, 2017) (citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)); *Stockamp & Assocs., Inc. v. Accretive Health*, No. CV 04-1443-BR, 2005 WL 425456, at *7 (D. Or. Feb. 18, 2005).

ARGUMENT

Reconsideration of the stay of pretrial proceedings is not warranted. None of the four situations in which reconsideration is appropriate exist here and lifting the stay for the short time before the Ninth Circuit rules on Defendants' petition for interlocutory review would not aid in

the efficient resolution of this case. The Court should decline Plaintiffs' invitation to race the Ninth Circuit to a decision before the appellate court potentially divests this Court of jurisdiction, and instead allow the Ninth Circuit the opportunity to decide the pending Petition without further distraction.

I. Plaintiffs' Request For Expedited Consideration Should Be Denied

Plaintiffs request expedited consideration of their reconsideration motion, purportedly on the grounds "of the urgency" of the climate change situation. Pls.' Mot. for Recons. of Nov. 21, 2018 Ct. Ordered Stay of Proceedings 2, ECF No. 446 ("Pls.' Mot."). This request should be denied because Plaintiffs failed to confer with Defendants regarding expedited consideration as required by the Local Rules. L.R. 7-1(g); Ex. A (email from Julia Olson to counsel for Defendants regarding stay motion). The Court "may deny any motion that fails to meet this . . . requirement." L.R. 7-1(a)(3).

In addition, Plaintiffs' request for expedited consideration is a clear invitation for this Court to try to race the Ninth Circuit by lifting the stay before the Ninth Circuit rules on Defendants' § 1292(b) Petition. *See* Pls.' Mot. 2. Interests of judicial comity counsel against such an action. Moreover, there is little to be gained from rushing to lift the stay given the likelihood that the appellate court would stay this litigation if it decides to accept the appeal. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("[A] notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *City of Los Angeles. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) ("[T]he filing of a notice of interlocutory appeal divests the district court of jurisdiction over the particular issues involved in that appeal" and "a notice of appeal for an interlocutory order is deemed to be filed upon the

issuance of an order by a court of appeals permitting an appellant to bring an interlocutory appeal." (citing Fed. R. App. P. 5(d)(2)). The more reasonable approach is for this Court to decide—and deny—Plaintiffs' motion in the normal course.

II. Reconsideration of the Stay Is Not Warranted

Although Plaintiffs all but ignore it in their motion, the applicable standard of review here is the standard for reconsideration of an interlocutory order, not the standard for obtaining a stay in the first instance. *Compare* Pls.' Mot. 3-4 (Plaintiffs' motion failing to mention requirements for reconsideration) *with* ECF No. 428 at 11-12 (Plaintiffs' response in opposition to Defendants' motion for reconsideration setting out requirements for reconsideration). None of the four situations in which reconsideration is appropriate exist here. There has been no intervening change in the law, and Plaintiffs' attempt to generate an intervening change in the facts by pointing to two reports released by the government after this Court issued its stay order on November 21, 2018 fails.

Facts that occurred after the Court issued an order justify reconsideration only if they are "material" to that order. *Am. Rivers*, 2006 WL 1983178, at *2. The two government reports cited by Plaintiffs (the Fourth National Climate Assessment and the Second State of the Carbon Cycle Report) are not material to the decision at issue here: the Court's order staying proceedings pending the Ninth Circuit's decision on whether to accept appeal under § 1292(b). The Court stayed proceedings to maintain the status quo while the Ninth Circuit decides whether to accept an appeal. Nov. 21, 2018 Order 6, ECF No. 444. That situation remains the same as it was on the day the Court issued its order, and nothing in the two new reports provides a reason for stepping on the toes of the Ninth Circuit by reopening pretrial proceedings before the Ninth Circuit has completed its evaluation of the issues and determined whether to accept the appeal.

Plaintiffs' implicit suggestion that these two new reports suddenly and fundamentally change the facts regarding climate change that were already before the Court—and therefore warrant immediate action—is misleading. Plaintiffs have claimed that their injuries are imminent and irreparable throughout this litigation. *See, e.g.*, Pls.' Resp. in Opp'n to Defs.' Mot. to Stay 32-34 of 178, ECF No. 317 (July 13, 2018); Pls.' Resp. in Opp'n to Defs.' Mot. to Stay 7-8, ECF No. 364 (Oct. 11, 2018); Pls.' Resp. in Opp'n to Defs.' Mot. to Stay 13, ECF No. 429 (Nov. 9, 2018); Pls.' Notice of Filing Answer to Writ of Mandamus 21-22, ECF No. 439. Indeed, Plaintiffs themselves concede that these two new reports merely confirm "the evidence already before this Court that illustrates how Plaintiffs would be substantially injured by a stay." Pls.' Mot. 11. On November 19, 2018, Plaintiffs told the Ninth Circuit that "[t]he best available climate science further illustrates that even a modest delay in resolution of Plaintiffs' claims will substantially worsen Plaintiffs' injuries." ECF No. 439 at 21. In their reconsideration motion, Plaintiffs repeat this claim verbatim. Pls.' Mot. 10. It is clear that the intervening publication of two government reports have not altered Plaintiffs' position on the likelihood or imminence of their injuries, or their position on the content of the "best available science." This is unsurprising because neither the Fourth National Climate Change Assessment nor the Second State of the Carbon Cycle Report are new research; rather, both "synthesize" existing information and research. Fourth Nat'l Climate Change Assessment, App'x 2[1]; Second State of the Carbon Cycle Report, Exec. Summ. 22[2].[3]

[1] Available at https://nca2018.globalchange.gov/chapter/appendix-2/.

[2] Available at https://carbon2018.globalchange.gov/downloads/SOCCR2_Executive_Summary.pdf.

[3] For this reason, most of the statements from the Fourth National Climate Assessment and Second State of the Carbon Cycle Report that Plaintiffs quote, *see* Pls.' Mot. 11-16, are supported by citations to documents produced in 2017 and earlier and which have already been

Because the material facts have not changed since this Court issued its decision, Plaintiffs' use of their motion, and the issuance of these two new reports, to flesh out arguments already made in their prior response to Defendants' motion for a stay pending a Ninth Circuit decision is improper. *See* ECF No. 429. A motion for reconsideration may not "present new arguments or evidence that could have been raised earlier." *Am. Rivers*, 2006 WL 1983178, at *2. Although these two specific reports were issued after the Court's stay decision, the points contained within them and reiterated by Plaintiffs in their reconsideration motion are not new. Plaintiffs had the opportunity to present their claims of harm in opposition to Defendants' stay motion. ECF No. 429 at 12-13. They should not be permitted to bolster those arguments after the fact in the form of a motion for reconsideration.

Plaintiffs also suggest that reconsideration is appropriate because this Court erred by failing to perform the proper analysis to support its stay decision. Pls.' Mot. 4. But the Court's alleged failure to adequately document its legal analysis is not a factor justifying reconsideration. *See Am. Rivers*, 2006 WL 1983178, at *2. In any event, as Plaintiffs' acknowledge, the implementation of a stay is discretionary and there is no requirement that the Court rely on a specific set of factors to justify a stay. *See* Pls.' Mot. 4; *Consumer Cellular, Inc. v. ConsumerAffairs.com*, 3:15-CV-1908-PK, 2016 WL 7238919, at *2 (D. Or. Sept. 26, 2016). Staying the proceedings was a proper exercise of this Court's discretion because, as explained below, allowing pretrial proceedings to go forward when the entire case could soon be on appeal would only waste resources.

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provided to this Court. One example of such a citation is the Climate Science Special Report, which is Volume I of the Fourth National Climate Assessment and which was released in November 2017 and was provided by Plaintiffs to the Court as Exhibit 309 to Plaintiffs' Second Motion in Limine for Judicial Notice. ECF No. 341-309.

In sum, Plaintiffs have not even attempted to demonstrate that the any of the limited number of situations justifying the "extraordinary" remedy of reconsideration is present here. Nor could they. There have been no material developments in law or fact since the Court's November 21 order that would justify reconsideration of the stay pending a decision from the Ninth Circuit.

III. Plaintiffs Misrepresent the Status of Pretrial Proceedings and the Balance of Hardships

The Court need not consider the merits of Plaintiffs' arguments for lifting the stay since they do not satisfy the requirements for reconsideration in the first instance. However, even if the Court were to consider those arguments, none is persuasive.

"When considering whether to exercise their discretion to stay proceedings, the district courts should consider 'the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.'" *Consumer Cellular*, 2016 WL 7238919, at *2 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). All of these factors weigh in favor of a stay of pretrial proceedings.

First, re-opening pretrial proceedings while the Ninth Circuit is in the midst of deciding whether to accept the petition to appeal threatens judicial comity. The stay currently in place maintains the status quo while the Ninth Circuit considers Defendants' § 1292(b) Petition. Lifting the stay would change the status of discovery as set forth in the joint status report filed in the Ninth Circuit, Ex. 1, Decl. of Julia A. Olson in Supp. of Pls.' Mot. for Recons. 7-18 of 35, ECF No. 447, and "complicat[e] [the] issues" by requiring that court to act against a shifting backdrop. *Consumer Cellular*, 2016 WL 7238919, at *2. It is in the interest of judicial comity

to allow the Ninth Circuit to complete its review of the Petition without changing the status quo midstream.

Second, moving forward with pretrial proceedings while the Ninth Circuit is considering a § 1292(b) petition that could potentially result in the dismissal of this entire case is a waste of the parties' and the Court's resources. *See Finder v. Leprino Foods Co.*, No. 1:13-cv-02059-AWI-BAM, 2017 WL 1355104, at *4 (E.D. Cal. Jan. 20, 2017) ("[F]orcing a party to conduct substantial, unrecoverable, and wasteful discovery and pretrial motions practice on matters that could be mooted by a pending appeal may amount to hardship or inequity sufficient to justify a stay." (internal quotations omitted)). Plaintiffs claim that the remaining discovery and pretrial proceedings in this case are "extremely limited" and consist of only three expert depositions, five Plaintiff depositions, and the "completion of the briefing on the pending pretrial motions." Pls.' Mot. 7. In fact, as explained in the parties' joint report on the status of discovery to the Ninth Circuit, Defendants also intend to depose Plaintiffs' seven belatedly disclosed "fact" witnesses if they are not excluded by the Court. ECF No. 447 at 10 of 35. Thus, there remain fifteen potential depositions which would require travel across the country, possibly including Florida, Alaska, and Hawaii, where three Plaintiffs who have yet to be deposed reside. *Id.* In addition, both parties intend to provide supplemental responses to certain interrogatories, *id.* at 11 of 35; Plaintiffs intend to file an additional motion for judicial notice "of facts within approximately 20 authenticated government documents," *id.* at 15 of 35; and both parties intend to meet and confer regarding objections to exhibits, which number in the thousands, *id.* at 16 of 35. Requiring the parties to invest substantial resources in discovery and pretrial practice that could be mooted by the appeal is wasteful and inefficient. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger,

C.J., in chambers) (When "the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted." (internal quotations & citation omitted)).

Moreover, as previously explained by Defendants, the very process of discovery and pretrial proceedings in this case is fundamentally contrary to the Administrative Procedure Act ("APA") and the separation of powers, and the equitable power of an Article III court. *See, e.g.*, Defs.' Mot. to Stay 3-4, ECF No. 419. For example, the APA limits judicial review to the administrative record of action taken within the scope of an agency's authority. 5 U.S.C. § 706. Should the Ninth Circuit find that Plaintiffs' claims must be brought under the APA, all discovery in this case will have been in violation of that statute.[4]

Third, Plaintiffs will not suffer irreparable harm in the limited time necessary for the Ninth Circuit to decide whether to accept the appeal. Plaintiffs have not pointed to a single concrete event that will occur during the time necessary for the Ninth Circuit to consider the § 1292(b) Petition and that will irreparably harm them. Plaintiffs' alleged injuries stem from the cumulative effect of decades of CO_2 emissions by every country in the world. They cannot credibly claim that emissions by the United States during the weeks or months necessary for the Ninth Circuit to consider Defendants' Petition will cause them irreparable harm. This is especially true given that they waited years before bringing suit[5] and the trial they seek would

[4] This is one reason this case differs from *Texas v. United States* and *Department of Commerce v. U.S. District Court for the Southern District of New York*. *See* Pls.' Mot. 19. In *Texas*, the Court decided a preliminary injunction within the purview of the APA; it did not conduct a trial or allow discovery in violation of that statute. 787 F.3d 733, 767 (5th Cir. 2015). In *Department of Commerce*, the Solicitor General noted that "the Court still could order effective relief" even if the district court issued a final judgment. Ex. 2, ECF No. 447 at 22 of 35. The same is not true here. If the Ninth Circuit agrees with Defendants, any and all discovery completed in this case would be in violation of the APA and there is no way to remedy that violation after-the-fact.

[5] Plaintiffs make light of this point in their response to Defendants' stay motion but offer no real rebuttal. *See* ECF No. 429 at 12. Plaintiffs have yet to explain why a few months of emissions in 2018 are irreparable as compared to the years of emissions that have already occurred during

itself last months, with 8-10 weeks spent on the liability phase alone and with most of that time spent on the testimony of Plaintiffs' witnesses and the presentation of their exhibits.[6] App. A, Br. for Resp'ts in Opp'n to Pet. for Writ of Mandamus 72 of 73, ECF No. 441-1; Defs.' Notice of Errata to their Mot. to Strike Pls.' Trial Exhibit List 2, ECF No. 426. Indeed, even if this case were to proceed directly to trial, Plaintiffs themselves would not expect a decision on remedy until September 2019 at the earliest. ECF No. 447 at 35 of 35. That timing does not support their alleged urgency.

Fourth, Plaintiffs' fear that "months of delay" will require them to supplement their expert reports and trial exhibits, Pls.' Mot. 20-21, is not a significant hardship that should have any bearing on the stay. Plaintiffs have every right to decide how to litigate their case but their

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their lifetimes before filing this lawsuit. The suggestion that Youth Plaintiffs could not have brought suit earlier due to their ages is not credible. *Id.* The Youth Plaintiffs ranged in age from 8 to 19 at the start of this lawsuit. *Id.* Many, if not all, of them could have brought suit years earlier; in fact, counsel for Plaintiffs filed other lawsuits concerning climate change on behalf of youth plaintiffs, some of whom are also plaintiffs in this case, as early as 2011. *See, e.g., Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012) (filed in 2011); *Svitak v. State*, 178 Wash. App. 1020 (Wash. Ct. App. 2013) (filed in 2011); *Martinez v. Colo. Oil & Gas Conservation Comm'n*, No. 16CA0564, 2017 WL 1089556 (Colo. Ct. App. Mar. 23, 2017) (filed in 2013 by Plaintiff Xiuhtezcatl M., among others); *Foster v. Wash. Dep't of Ecology*, 200 Wash. App. 1035 (Wash. Ct. App. 2017) (filed in 2014 by Plaintiff Aji P., among others). In addition, this excuse clearly does not apply to Plaintiff James Hansen, who represents future generations and has been espousing the dangers of climate change for decades, or Plaintiff Earth Guardians, an organization that has existed in its current form since 1997. *See* https://www.earthguardians.org/story/.

[6] In their reconsideration motion, Plaintiffs threaten to move for a preliminary injunction if this Court does not lift the stay. Pls.' Mot. 2, 23-24. Such a motion is not before the Court and is irrelevant to its consideration of the instant motion; a threat of a future motion is not a ground for reconsideration. *See Am. Rivers*, 2006 WL 1983178, at *2. In any event, the same considerations regarding the lack of imminent and irreparable harm relevant to Plaintiffs' request to lift the stay would bear on any preliminary injunction motion. In addition, the circumstances that led this Court to discourage such a motion in the first instance—including the challenges of crafting an appropriate remedy—remain. *See* Pls.' Mot. 5.

decisions regarding whether and when to supplement expert reports and trial exhibits are not irreparable harms; at best, they are self-inflicted inconveniences.

Fifth, Plaintiffs allege that their "claims of infringement of well-established fundamental rights or of discrimination" will survive regardless of the outcome of an interlocutory appeal, thereby justifying continued work on pretrial proceedings. Pls.' Mot. 21-22, n.26. This is simply false. As an initial matter, there are three threshold issues that, if resolved in the government's favor, would each bar consideration of the merits of any of Plaintiffs' claims: standing, Article III justiciability and constitutional separation of powers, and whether the claims can move forward outside of the APA. *See* Nov. 10, 2016 Opinion and Order 18-28, ECF No. 83; Oct. 15, 2018 Opinion and Order 19-48, ECF No. 369; Defs.' Mot. to Dismiss 7-19, ECF No. 27; Defs.' Mot. for J. on the Pleadings, ECF No. 195; Defs.' Mot. for Summ. J. 6-24, ECF No. 207. These issues alone justify an interlocutory appeal.

As to the merits, Plaintiffs are wrong that Defendants' arguments and the Court's orders have left certain constitutional claims outside of the potential interlocutory appeal. Defendants moved to dismiss and for summary judgment on *all* of Plaintiffs' claims, including all of their constitutional claims alleging infringement of fundamental rights and discrimination. ECF No. 27 at 1, 19-27 (moving "for dismissal of the action with prejudice" and arguing that "Plaintiffs fail to state a claim under the Constitution"); ECF No. 207 at 1, 24-27 (moving for summary judgment "on each of the four claims" in the First Amended Complaint and arguing that Plaintiffs' constitutional claims fail as a matter of law). In response to those motions, Plaintiffs elaborated on their due process and equal protection claims, alleging violations of their "enumerated" rights in addition to the unenumerated right to a stable climate as well as "systemic government discrimination" with respect to Plaintiffs' exercise of their fundamental

rights and "government discrimination against Plaintiffs as a class of children" subject to heightened scrutiny. *See* Mem. of Pls.' in Opp'n to Defs.' Mot. to Dismiss 10, ECF No. 41 (alleging violation of "enumerated" rights including "the right not to have their lives and personal security irreversibly damaged by their government; to not have their property (both public and private) irreversibly threatened with destruction; to not be denied equal rights to education, to bear children, to travel, to meaningful suffrage, and to raise families, all of which are threatened by climate change."); *Compare* Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. 52-53, ECF No. 255 (arguing Defendants failed to seek summary judgment on three Fifth Amendment claims including the alleged infringement of enumerated rights, "systemic government discrimination" with respect to Plaintiffs' exercise of their fundamental rights, and "government discrimination against Plaintiffs as a class of children" subject to heightened scrutiny) *with* ECF No. 315 at 38-39 (Defendants' reply in support of motion for summary judgment arguing that Defendants seek summary judgment on all Fifth Amendment claims).

In spite of Plaintiffs' articulation of these additional claims, this Court recognized only four potential claims: (1) a due process claim based on a previously unrecognized fundamental right to a "climate system capable of sustaining human life," ECF No. 83 at 32; ECF No. 369 at 48-49; (2) a "danger-creation due process claim," ECF No. 83 at 36; ECF No. 369 at 49-54; (3) a claim under a federal public trust doctrine that is "properly categorized" as a substantive due process claim," ECF No. 83 at 37, 51; ECF No. 369 at 54-55; and (4) an equal protection claim based on the same fundamental right to "a climate system capable of sustaining human life," ECF No. 369 at 58. The Court's decision not to credit Plaintiffs' additional arguments at either stage does not change the fact that the arguments were before the Court. *See* ECF No. 369 at 48-59 (specifically addressing Plaintiffs' "remaining claims" in summary judgment order). While

Plaintiffs are free to argue in the appeal (if the Ninth Circuit accepts the government's appeal) that the Court should have also recognized their "claims of infringement of well-established fundamental rights or of discrimination," Pls.' Mot. 21, they are wrong that the merits of those claims would not be before the court of appeals. The Court has certified this entire case for interlocutory appeal, which includes the entirety of its orders on all three of Defendants' dispositive motions as well as any issues "material" to those orders. ECF No. 444 at 6; *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("[T]he appellate court may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." (citation and internal quotation marks omitted)); *In re Cinematronics, Inc. v. Elec. Sports Research*, 916 F.2d 1444, 1449 (9th Cir. 1990) (In § 1292(b) interlocutory appeal, the appellate court "may address those issues *material* to the order from which appeal has been taken."); *Bassidji v. Goe*, 413 F.3d 928, 935-36 (9th Cir. 2005) (after district court certified its order denying motion to dismiss for interlocutory appeal, Ninth Circuit found that any issue material to defenses raised in motion to dismiss is "fairly included" within the certified order).

Finally, even if there was a chance that one of Plaintiffs' claims could survive interlocutory appeal, "resolution of the issues now pending before the Ninth Circuit will dramatically simplify the questions of law and potentially the questions of proof now pending before the court." *Finder*, 2017 WL 1355104, at *4. There is no benefit to wasting resources on claims that could fundamentally change as a result of appeal. *See Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) ("[A] resolution of the interlocutory appeal regarding the third cause of action in favor of Defendants would alter the direction of the current proceedings, and might prompt the filing of an amended complaint. It

would be a waste of judicial and party resources to proceed with the other claims while the appeal is pending.").

Plaintiffs' exhortation that this Court "must lift the stay if it finds Defendants have failed to show a shred of evidence of cognizable harm," Pls.' Mot. 23, misunderstands the discretionary nature of a stay as well as the concerns for judicial comity and economy that underlie the stay. As this Court already recognized, the orderly course of justice requires maintaining the status quo while the Ninth Circuit considers the § 1292(b) Petition. Plaintiffs' allegations of irreparable harm stemming from weeks or months of additional emissions—when the cumulative emissions causing their harms have been decades, if not centuries, in the making and they themselves seek a months-long trial—are far outweighed by concerns of judicial comity and wasting the Court's and parties' resources on issues that may soon be decided on appeal.

CONCLUSION

This Court did not reach its decision to stay this case lightly. ECF No. 444 at 6. That decision should not be set aside absent a strong showing that the legal standard for the "extraordinary remedy" of reconsideration is met. Because Plaintiffs have made no attempt to even identify, let alone meet, the applicable standard and instead use their motion to repeat the same allegations and grievances that they have aired throughout this case, their motion must be denied.

Dated: December 17, 2018

Respectfully submitted,

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Exhibit A

From: Julia Olson
To: Duffy, Sean C. (ENRD); Piropato, Marissa (ENRD); Singer, Frank (ENRD); Boronow, Clare (ENRD); Norman, Erika (ENRD)
Cc: Phil Gregory; Andrea Rodgers
Subject: Your position requested on a motion in Juliana
Date: Tuesday, December 4, 2018 5:05:29 PM

Counsel,

Plaintiffs intend to file a motion for reconsideration of the District Court's November 21 order staying proceedings. We are not seeking the Court's reconsideration of the certification decision in that same order. We intend to file tomorrow morning. Please let us know your position on this motion.

Regards,

Julia

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