

Case No. 18-36082

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Plaintiffs-Appellees,

v.

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

On Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)

**RESPONSE OF PLAINTIFFS-APPELLEES TO THE REQUEST OF
DEFENDANTS-APPELLANTS TO POSTPONE THEIR OBLIGATION TO
RESPOND TO MOTION TO EXPEDITE APPEAL**

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I. INTRODUCTION

In Defendants' request to postpone their obligation to respond to Plaintiffs' motion to expedite this interlocutory appeal, Defendants disregard their ongoing duty to represent their clients as well as to perform functions necessary and essential to the efficient resolution of cases. *See In re: Court Operations During Lapse in Appropriation or Continuing Resolution* (9th Cir. Dec. 21, 2018) (Chief Judge's Order Continuing Operations in the Event of a Shutdown); *see also* December 28, 2018 Announcement re: Operation of the United States Court of Appeals for the Ninth Circuit, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000969. Given the importance of this case and the irreparable and ongoing harm to Plaintiffs, the partial government shutdown should not result in any further delays. If Defendants have the capability to submit the mediation questionnaire in this case, they should be required to respond to Plaintiffs' motion in accordance with Circuit Rules. Defendants should not be allowed to simply pick and choose the various aspects of the litigation in which they participate during the partial government shutdown.

II. ARGUMENT

A. Defendants Mischaracterize the Effect of the Government Shutdown

The Department of Justice’s FY 2019 Contingency Plan (“DOJ Plan”) covers the Department’s operations during a lapse in appropriations. The DOJ Plan states: “With respect to litigation, the Department’s plan assumes that the Judicial Branch will continue to operate through the furlough.” DOJ Plan, Declaration of Philip L. Gregory in Support of Response of Plaintiffs-Appellees to the Request of Defendants-Appellants to Postpone Their Obligation to Respond to Motion to Expedite Appeal (“Gregory Decl.”), ¶ 2, Ex. 1 at 3. As Plaintiffs have articulated in multiple briefs filed in this case, additional delay in this case “would compromise to a significant degree the safety of human life or the protection of property.” *Id.*; *see, e.g.*, Ct. App. IV Doc. 5 at 20-22; Ct. App. V Doc. 6-1 at 10-21; Ct. App. VI Doc. 3-1 at 11-14.¹ Even if Defendants contested the harms at issue in this case, a position for which they have offered no evidence, the proceedings in this case are not automatically postponed because of the partial government shutdown.

¹ Plaintiffs reference the docket for Defendants’ Fourth Petition, *In re United States*, No. 18-73014 (9th Cir.), as “Ct. App. IV Doc.”; the docket for Defendants’ Fifth Petition, *Juliana v. United States*, 18-80176 (9th Cir.), as “Ct. App. V Doc.”; and the docket for the instant proceedings under 28 U.S.C. § 1292(b) as “Ct. App. VI Doc.”

Rather, if this Court denies Defendants' request for a postponement, counsel for Defendants, by statute and through the DOJ's Plan, would be legally authorized and mandated to continue operations during the pendency of this case. Moreover, in their request to postpone, counsel for Defendants have provided no evidence that they are individually furloughed employees subject to the shutdown. *See* Ct. App. VI Doc. 4; DOJ Plan, Gregory Decl. Ex. 1 at 12, Table 2. Indeed, counsel for Defendants timely completed and filed the required mediation questionnaire in this case on January 3, 2019. Ct. App. VI Doc. 5. The DOJ Plan even indicates that the vast majority of DOJ's employees are excepted from the furlough. DOJ Plan, Gregory Decl. Ex. 1 at 12, Table 2.

Under 31 U.S.C. § 1342, “[a]n officer or employee of the United States Government . . . may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” Under the DOJ Plan, there are numerous circumstances in which the Department of Justice must continue operations during an appropriations lapse notwithstanding Section 1342. Specifically, the Department must continue the following categories of activities:

1. Those funded by a source that has not lapsed, such as permanent indefinite appropriations and carryover of no-year funds

appropriated in a prior year;

2. Those for which there is an express authority to continue during an appropriations lapse;
3. Those for which authority to continue during an appropriations lapse arises by necessary implication;
4. Those related to the discharge of the President's constitutional duties and powers; and
5. Those related to "emergencies involving the safety of human life or the protection of property," i.e. where there is a reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question.

DOJ Plan, Gregory Decl. Ex. 1 at 1.

While Department of Justice civil litigators may request a postponement, under the second category of activities mandated to continue during an appropriations lapse, "[i]f a court denies such a request and orders a case to continue, the Government will comply with the court's order, which would constitute express legal authorization for the activity to continue." *Id.* at 3 (emphasis added); *see also id.* at 7 ("If a court denies a litigator's request to postpone a case and orders it to continue, the litigation will become an excepted activity that can continue during the lapse."). This Court should deny Defendants' request to further delay this case. As discussed above, their conduct in filing the mediation

questionnaire illustrates that they have the capacity to respond to Plaintiffs' straightforward Motion to Expedite the Appeal.

Under the DOJ Plan, the Department of Justice is also mandated to continue activities “where there is a reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question.” *Id.* at 1. In the instant matter, there is tremendous emergent harm to the safety of human life and property from Defendants' ongoing, systemic actions in creating such harms. In its order on summary judgment, the district court here found that, “[r]eviewing the summary judgment record, plaintiffs have offered expert testimony on the catastrophic harms of climate change They also submitted evidence, in the form of expert declarations and government documents, supporting their argument that the federal defendants' actions have led to these changes and are linked to the harms alleged by plaintiffs.” *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 4997032, at *27 (D. Or. Oct. 15, 2018). The district court also found “Plaintiffs have filed sworn declarations attesting to a broad range of personal injuries caused by human induced climate change.” *Id.* at *17. Finally, the district court noted that Defendants offered no evidence countering these “catastrophic harms.” *Id.* at *27.

The overwhelming evidence before this Court, which is uncontested by Defendants, shows that Plaintiffs, young American citizens, will suffer substantial harm from *any* further delay in resolving their claims. *See, e.g.*, Ct. App. IV Doc. 5 at 20-22; Ct. App. V Doc. 6-1 at 10-21; Ct. App. VI Doc. 3-1 at 11-14. Defendants' request to postpone their response to Plaintiffs' Motion should be denied.

B. Other Courts Have Required The Department of Justice To Participate In Litigation During The Shutdown

Several courts across our Nation have already determined, in their discretion, that the Department of Justice must continue representation of their clients despite the partial government shutdown. For example, in the District of Columbia, U.S. District Judge Randolph Moss denied the government's request to delay deadlines in a case challenging the administration's new restrictions on asylum seekers. *O.A. v. Trump*, No. 1:18-cv-02718-RDM (D.D.C. Dec. 27, 2018), Gregory Decl. ¶ 3, Ex. 2. In a minute order, Judge Moss ruled, in part: "Although the Court is mindful of the current lapse in appropriations, where there is 'some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property,' government functions may continue. 43 Op. Att'y Gen. 293 (January 16, 1981). Plaintiffs allege that this is just such a case." *Id.*

In the District of Maryland, Chief U.S. District Judge James Bredar issued an order denying a "consent motion requesting a continuance of all dates and deadlines

in this matter pending resolution of a funding dispute involving the executive and legislative branches of the Federal Government.” *United States v. Baltimore Police Dep’t*, No. 1:17-cv-00099-JKB (D. Md. Dec. 26, 2018), Gregory Decl. ¶ 4, Ex. 3. Judge Bredder referred to the government shutdown as a “financial matter [that] is a dispute internal to one party, the Federal Government” and directed Department of Justice attorneys “to find the means by which to continue their participation in this litigation on a timely basis regardless of their client’s internal issues.” *Id.* The district court concluded its order by stating: “Deeply serious matters involving the safety and well-being of the citizens of Baltimore are at issue in this case, and the Court is determined that implementation of the previously entered consent decree will not be impaired or delayed by this sort of collateral issue that is internal to one party.” *Id.*

In the District of Columbia, in a minute order, U.S. District Judge Richard Leon denied the government’s motion to stay an upcoming hearing in light of the lapse of appropriations and reaffirmed that the hearing “shall take place as scheduled on January 3, 2019.” *Corsi v. Mueller*, No. 1:18-cv-02885-RJL (D.D.C. Dec. 27, 2018), Gregory Decl. ¶ 5, Ex. 4.

Similarly, this Court would be well within its discretion to order counsel for Defendants to respond to Plaintiffs’ Motion to Expedite the Appeal in accordance with the Circuit Rules.

III. CONCLUSION

In light of the irreparable harm to Plaintiffs in further delay, the clear language in the DOJ Plan, and Defendants' own participation in this case during the partial government shutdown, Plaintiffs respectfully request that this Court deny Defendants' request to postpone their obligation to respond to Plaintiffs' Motion to Expedite the Appeal.

DATED this 4th day of January, 2019, at Redwood City, CA.

Respectfully submitted,

s/ Philip L. Gregory

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CERTIFICATE OF COMPLIANCE

I certify that this Response contains 1,612 words, excluding the portions exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f), which is under the limit of 5,600 words established by Circuit Rules 27-1(1)(d) and 32-3(2). The Motion's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

s/ Philip L. Gregory _____
Philip L. Gregory