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 Appeal from the United States District Court
for the District of Oregon (No. 6:15-cv-01517-AA)

REPLY BRIEF OF PLAINTIFFS-APPELLEES IN SUPPORT OF URGENT MOTION FOR PRELIMINARY INJUNCTION

ACTION NECESSARY BY MARCH 19, 2019

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INTRODUCTION

Plaintiffs supported their Urgent Motion with substantial evidence in declarations from nationally renowned experts establishing why the requested prohibitory injunction is needed to prevent irreparable harm to Plaintiffs and protect the public interest. "[I]t is absolutely critical that substantial GHG emission reductions in the U.S. commence immediately to preserve the Plaintiffs' ability to seek their full remedy in this case." Williams Decl. ¶ 14. "There is only one effective way to stop future planetary heating, and to do it quickly. It is to swiftly transition away from burning fossil fuels and not invest in or continue to support development of these energy sources that are melting our planet's ice." Rignot Decl. ¶ 8.

In opposition, Defendants submitted ***no evidence*** either to contest Plaintiffs' evidence of irreparable harm, or to show any harm to Defendants or the public interest in granting the injunction pending appeal. Nor did Defendants ***object*** to Plaintiffs' evidence. Defendants continue their tactic of ignoring the evidence and proffering nothing to support their conclusory assertions, which run directly contrary to the abundant evidence before this Court. Defendants' approach is wholly insufficient for contesting facts in a preliminary injunction motion. *Rouser v. White*, 707 F.Supp.2d 1055, 1071 (E.D. Cal. 2010) (granted preliminary injunction, noting defendants "presented no evidence" of "adverse impact"); *Equalia, LLC v. Kushgo LLC*, 2017 WL 923922, at *2 (D. Nev. Mar. 8, 2017), *appeal dismissed,* 2017 WL

3631701 (Fed. Cir. Mar. 23, 2017) (denying stay of injunction, noting defendants presented no evidence as to irreparable harm, balance of equities, or public interest).

On this evidentiary record, this Court ought to find Plaintiffs and their experts have credibly demonstrated the likelihood of irreparable harm; an injunction will preserve as much of the *status quo* as possible; the public interest favors an injunction; and Defendants will suffer no consequent harm. The record also establishes Plaintiffs' likelihood of success on the merits. Two federal judges at the district court separately reviewed the complaint and rejected Defendants' motions for dismissal, judgment on the pleadings, and summary judgment, finding Plaintiffs stated viable claims for relief and proffered enough evidence to show material questions of fact to be resolved at trial. D. Ct. Docs. 68, 83, 369.[1] If Plaintiffs' evidence is not meaningfully contested at trial, as it is not contested for this motion, Plaintiffs will prevail. In order to maintain the *status quo* pending appeal and protect Plaintiffs from irreparable harms, including harms to their physical and psychological health and well-being, this Court should issue a prohibitory injunction[2] enjoining Defendants from authorizing ***new*** leases, permits, or other

[1] Plaintiffs refer to the District Court docket, *Juliana v. United States*, No. 6:15-cv0157-AA (D. Or.), as "D. Ct. Doc."; the docket for Defendants' Petition for Permission to Appeal ("Fifth Petition"), *Juliana v. United States*, No. 18-80176 (9th Cir.), as "Ct. App. V Doc."; the docket for Interlocutory Appeal, *Juliana v. United States*, No. 18-36082 (9th Cir.), as "Ct. App. VI Doc."

[2] Contrary to Defendants' arguments, Opposition Brief ("Opp.") 7, injunctive relief seeking to "prevent[] future constitutional violations" is "a classic form of

federal approvals for: (1) mining or extraction of coal on Federal Public Lands; (2) offshore oil and gas exploration, development, or extraction on the Outer Continental Shelf; and (3) development of new fossil fuel infrastructure.[3]

ARGUMENT

I. Defendants do not contest that Plaintiffs are likely to suffer irreparable harm

Plaintiffs made a significant evidentiary showing of imminent, irreparable harm. *See* Motion at 18-25; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555,

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prohibitory injunction." *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (collecting cases); *see Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). Defendants offer no evidence that Plaintiffs' requested relief would have a mandatory effect. The authorities cited by Defendants are inapposite. In *Stanley v. University of Southern California*, the plaintiff sought "an injunction compelling USC to install Coach Stanley as the head coach of the women's basketball team." 13 F.3d 1313, 1320 (9th Cir. 1994). *Anderson v. United States* involved both a mandatory injunction "ordering that Anderson be hired" and a prohibitory injunction "ordering the Air Force to hire no one other than Anderson." 612 F.2d 1112 (9th Cir. 1979). The order in *Martinez v. Matthews* mandated election of migrant workers to a board. 544 F.2d 1233, 1236 (5th Cir. 1976). *Communist Party of Indiana v. Whitcomb* concerned "a partial summary reversal of the District Court order entered on October 4, 1972." 409 U.S. 1235, 1235 (1972). In *Heckler v. Lopez*, Justice Rehnquist only stayed the mandatory component of an injunction, which "require[d] the Secretary [of Health and Human Services] immediately to reinstate benefits to the applicants who apply." 463 U.S. 1328, 1330 (1983). *Garcia v. Google, Inc.* addressed an injunction requiring Google to remove a video from a website, not prohibiting Google from uploading the video in the first place. 786 F.3d 733, 738-39 (9th Cir. 2015). Plaintiffs' requested relief does not resemble any of the mandatory injunctions sought in these cases since it seeks to enjoin unconstitutional government conduct that has not yet occurred.

[3] A "trial lite," Opp. 1, is unnecessary since the facts are uncontested. Plaintiffs' request for live witness testimony in support of the injunction is no longer needed.

560-61 (1992). Defendants' pronouncements regarding irreparable harm are cursory, built on platitudes rather than evidence, and do not establish whether "irreparable injury is likely in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Herb Reed Enterprises, LLC v. Florida Entm't Mgmt., Inc.* 736 F.3d 1239, 1250 (9th Cir. 2013).

Plaintiffs submitted overwhelming evidence proving that, absent urgent injunctive relief, Plaintiffs will suffer a multitude of irreparable harms. *See, e.g.,* Olson Decl. Exs. 2-5; Williams Decl. ¶¶ 14, 19-23; Jacobson Decl. ¶¶ 14-15; Hansen Decl. ¶¶ 9, 39-40, 43, 49, 55-56, 66; Hoegh-Guldberg Decl. ¶¶ 17-18, 21; Rignot Decl. Ex. 1, 8-9, 12, 16, 18-19; Running Decl. ¶¶ 13-14, 29, 36-37, 44-45; Trenberth Decl. ¶¶ 1, 4; Paulson Decl. ¶¶ 36, 39, 43; Erickson Decl. ¶¶ 24, 27, 29; Stiglitz Decl. ¶ 25; Nicholas Decl. ¶¶ 4, 9-10; Levi Decl. ¶¶ 4-8, 23-25; Journey Decl. ¶¶ 9-11, 13-14, 25-26; Aji Decl. ¶¶ 8-9, 13.

Defendants' proposition that our Nation is already in the "danger zone," so what is a little bit more danger, should be rejected. Opp. 19-20. This cavalier assertion ignores the evidence and diminishes the scope of admissions in Defendants' Answer. *See, e.g.,* D. Ct. Doc. 98 ¶¶ 1, 5, 202, 206, 213, 237. Defendants concede issuing a lease is the "first step" in oil and gas production, Opp. 20, and Plaintiffs *have* established that such leases, and the development of new fossil fuel infrastructure, lock in additional fossil fuel extraction and dangerous GHG

emissions, which further harms Plaintiffs. *See, e.g.,* Erickson Decl. ¶ 20 ("federal permitted, leased, or otherwise authorized exploration, development, and extraction of coal and oil increases global CO_2 emissions"); *id.* ¶¶ 12, 15-16, 22, 24-27; Williams Decl. ¶ 23; Jacobson Decl. ¶¶ 14-15; Stiglitz Decl. ¶ 28.

Without challenge, Plaintiffs' experts verify: "[e]very month of growing CO_2 accumulation in the atmosphere does more damage to the cryosphere and leads to more sea level rise and more commitment to raise sea level rapidly in decades to come." Rignot Decl. ¶ 9. "***We are running out of time. There is no other way to express this.***" *Id.* ¶ 12 (emphasis added). Expert testimony of Drs. Rignot, Hansen, Running, Hoegh-Guldberg, Jacobson, Williams, Van Susteren, and Paulson, along with Vice Admiral Gunn and Mr. Erickson, prove Defendants (without citating to evidence) erroneously state additional emissions "are plainly de minimis." Opp. 20.

Defendants do not refute Plaintiffs' evidence establishing irreparable harm to psychological health; instead, Defendants belittle Plaintiffs' grave psychological injuries. Opp. 22. Plaintiffs described their nightmares, emotional pain, depression, and other psychological harms due to Defendants' "institutional betrayal," harms validated by medical experts and worsening each passing day. *See, e.g.*, Aji Decl. ¶ 11; Levi Decl. ¶¶ 8, 24-25; Journey Decl. ¶ 25; Nicholas Decl. ¶ 8; D. Ct. Doc. 283 ¶¶ 43-44; Van Susteren Decl. Exhibit C to Exhibit 1. These harms are not "*feelings*" shared by "every plaintiff" who sues the federal government, Opp. 22, but real

psychological injuries to youth that are having profound impacts on the lives of Plaintiffs, with life-long consequences. Aji Decl. ¶ 8 (describing his depression and how his "anxiety causes stress-induced insomnia"); Van Susteren Decl. ¶¶ 21-29; Paulson Decl. ¶¶ 39-43; *Norsworthy v. Beard*, 87 F.Supp.3d 1164, 1192 (N.D. Cal.), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015) ("Emotional distress, anxiety, depression, and other psychological problems can constitute irreparable injury."); *see also Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. *The [psychological] impact is greater when it has the sanction of the law . . . .*" (emphasis added)). Importantly, granting this injunction will provide immediate relief for Plaintiffs' psychological harms caused by Defendants' institutional betrayal. Van Susteren Decl. ¶ 20.

II. Plaintiffs are likely to succeed on the merits

First, Plaintiffs proffered more than enough evidence to establish standing. *See, e.g.,* Ct. App. VI Doc. 37 at 9-29; D. Ct. Doc. 384 at 11-43; D. Ct. Docs. 68, 83, 369. Defendants cite no proof validating their argument that Plaintiffs' injuries are generalized;[4] that Plaintiffs have not been, and are not being, endangered by their own government; or that their injuries are not redressable. The reason is clear.

[4] Despite backtracking, Opp. 10, n.2, Defendants *did* concede Plaintiffs' injuries "are cognizable under Article III." D. Ct. Doc. 378 at 8; D. Ct. Doc. 329 at 25:6-25:20.

Defendants lose on the facts of this case, which is why they are intent on avoiding trial.[5] Plaintiffs submitted uncontroverted evidence that new sources of U.S. CO_2 emissions and new fossil fuel infrastructure are *directly* within Defendants' control and authority, and – in combination with the dangers and harms already created by Defendants' fossil fuel energy system – will push climate change over the precipice and lock in irreparable harm. *See, e.g.,* Motion at 6, 26-27, 30-31; Erickson Decl. ¶¶ 13-15, 24-27; Stiglitz Decl. ¶ 28; Hansen Decl. ¶¶ 50-51, 55. The evidence shows preventing new sources of CO_2 emissions is essential for Plaintiffs' ultimate remedy and will redress their injuries. Motion at 18-19; Jacobson Decl. ¶¶ 14-15; Williams Decl. ¶¶ 14, 19-23; Hansen Decl. ¶¶ 64-75; Van Susteren Decl. ¶¶ 20, 29, 32.

Second, Defendants' argument that this case must proceed under the APA, Opp. 11-13, was rejected by the district court, D. Ct. Doc. 369 at 19-25, and is contrary to Supreme Court and Ninth Circuit precedent. *See, e.g., Webster v. Doe,* 486 U.S. 592, 601, 603-05 (2004); *Presbyterian Church (U.S.A.) v. United States* 870 F.2d 518, 525 n.9 (9th Cir. 1989); *see also* Ct. App. VI Doc. 37 at 32-39.

Third, Plaintiffs are likely to prevail on the state-created danger substantive due process claim under the Fifth Amendment. Defendants are imperiling Plaintiffs'

[5] The sole new authority cited by Defendants is the district court decision in *Clean Air Council v. United States*, No. CV 17-4977, 2019 WL 687873 (E.D. Pa. Feb. 19, 2019) ("*Clean Air Council*"). As explained in Plaintiffs' Answering Brief, *Clean Air Council* is distinguishable on multiple grounds. *See* Ct. App. VI Doc. 37 at 55, n.33.

personal security by engaging in affirmative conduct that places Plaintiffs in danger and acting "with 'deliberate indifference' to a 'known or obvious danger'" *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016). Defendants cause and contribute to climate destabilization, endangering Plaintiffs. *See, e.g.,* Stiglitz Decl. ¶¶ 8-10; Hansen Decl. ¶¶ 35-55; Erickson Decl. ¶¶ 5-27; Hoegh-Guldberg Decl. ¶¶ 16-23; *see also* D. Ct. Doc. 98 ¶¶ 7, 213; Ct. App. VI Doc. 37 at 17-18, n.10.

The evidence shows Defendants are acting with deliberate indifference to this known danger. Olson Decl. Ex. 4, 3-7, 16-26, 31-41, 45-54, 66-74, 79-86, 94-100 (Speth Report); *id.* Ex. 3, 28 (Robertson Report). The current situation is "made more egregious due to the fact that the Defendants have a complete understanding of precisely how dangerous the situation is that they are handing down to these Plaintiffs." Hansen Decl. ¶ 54; Stiglitz Decl. ¶ 11. Vice Admiral Lee Gunn states: "The U.S. Navy has long understood the threat climate change poses to our oceans and our national security." Gunn Decl. ¶ 44; *see Winter,* 555 U.S. at 25, 27-28 (giving significant weight and deference to statements of Naval officers). Defendants' remaining arguments are flawed because they rely solely on dissenting opinions rejected by this Circuit. Ct. App. VI Doc. 37 at 51-54.

III. The balance of equities and public interest favor granting an injunction[6]

The balance of equities and public interest favor granting an injunction. *See, e.g.*, Stiglitz Decl. ¶¶ 13-27; Gunn Decl. ¶¶ 2-4, 12-45. Defendants fail to support their contention that Plaintiffs' requested relief "would undoubtedly cost the jobs of some significant portion" of workers in the mining, extraction, and utility-generation sectors. Opp. 24-25. The Department of Energy report cited by Defendants, Opp. 24, does not support Defendants' statements about job losses due to the injunction, and actually shows that jobs in coal mining and oil and gas extraction are already declining and "solar employment accounts for the largest share of workers in the Electric Power Generation sector." Department of Energy, *U.S. Energy and Employment Report* 21-24, 28, 40 (Jan. 2017); Stiglitz Decl. ¶ 24. Defendants have no expert who ties 2016 employment figures to jobs lost as a result of the injunction sought by Plaintiffs, nor do they explain how such a leap is supported by evidence.

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[6] Mindful of judicial efficiency, Plaintiffs worked efficiently to prepare for trial to achieve a full remedy necessary to redress the climate emergency. Ct. App. V Doc. 6-1 at 5-6; *id.* at 6-2 ¶¶ 8-10; *see also* D. Ct. Doc. 100 at 10:22-13:17. Meanwhile, Defendants repeatedly sought to delay trial, simultaneously engaging in conduct that unconstitutionally worsens the *status quo*. Ct. App. V Doc. 8-2 (Friedland, J., dissenting); *id.* at 6-1 at 18-20. Given the irreparable harms facing Plaintiffs, and the delayed trial, Plaintiffs now seek to enjoin conduct that Defendants will implement. Ct. App. V Doc. 6-2 ¶¶ 8-10. Plaintiffs filed this preliminary injunction a mere six weeks after this Court granted interlocutory appeal. *See Arc of Cal. v. Douglas*, 757 F.3d 975, 990-91 (9th Cir. 2014). The cases cited by Defendants support Plaintiffs or are easily distinguishable. *Menendez v. Holt*, 128 U.S. 514, 523 (1888) (relief will not be refused due to delay); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (plaintiffs moved for an injunction *six years* after disputed action took place).

Plaintiffs are not asking this Court negate the purpose of existing statutes or order agencies to do something outside their statutory authority. Opp. 25-26. In *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 493-94 (2001), the statute at issue was "clear" and left "no doubt" that there was no medical necessity defense for marijuana. On the contrary, the statutes cited by Defendants give agencies wide discretion to implement the policy directives of Congress. *See* 30 U.S.C. § 21a (development to be "economically sound" and assure "environmental needs"); *see also* 30 U.S.C. §§ 181-287 (DOI can discontinue fossil fuel leasing). Congress also declared (in the very same section cited by Defendants) that "public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8); *see also* 43 U.S.C. § 1702(c).

Defendants made *no* evidentiary showing of harm to demonstrate the balance of equities or public interest tips in their favor. *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 710 (9th Cir. 1988) ("theoretical risk is . . . insufficient to outweigh the injury which plaintiff is likely to suffer"). Plaintiffs established by undisputed evidence that the balance of equities and the public interest tip sharply in favor of granting Plaintiffs' urgent motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should grant the preliminary injunction.

DATED this 26th day of February, 2019, at Redwood City, CA.

Respectfully submitted,

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