No. 18A410

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR A STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON AND ANY FURTHER PROCEEDINGS IN THIS COURT

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Respondents reiterate their contention that "creating, controlling, and perpetuating a national fossil fuel-based energy system" violates the Constitution, and that a district court can order a broad swath of Executive Branch agencies and officials to "prepare and implement an enforceable national remedial plan" to, among other things, "phas[e] out fossil fuel emissions." Br. in Opp. 8-9. Respondents thus confirm that they seek nothing less than a complete transformation of the American energy system -- including the abandonment of fossil fuels -- ordered by a single district court at the behest of "twenty-one children and youth." Id. at 1.

As the government has maintained since first moving to dismiss this suit in 2016, respondents' assertion of sweeping new fundamental rights to certain climate conditions has no basis in the Nation's history and tradition -- and no place in federal court. The government has repeatedly urged the district court to dismiss

the suit on justiciability grounds or on the merits. The court has not only rejected those efforts, but has refused to certify its decisions for appellate review, even after this Court explained that "the justiciability of [respondents'] claims presents substantial grounds for difference of opinion" -- a direct reference to the standard for certification of an order for interlocutory appeal under 28 U.S.C. 1292(b). United States v. U.S. Dist. Court, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018) (Juliana). With an expected 50-day trial set to commence on October 29, 2018, the government had no choice but to ask this Court for a stay pending consideration of a petition for a writ of mandamus or certiorari.

Respondents' opposition fails to rebut the straightforward arguments for a stay presented in the government's application. Respondents recite (Br. in Opp. 46-54) but barely defend the district court's unprecedented decisions on jurisdiction and the merits, confirming the "fair prospect" that the Court will either issue a writ of mandamus or grant certiorari and reverse the relevant decisions below, Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). Although respondents dispute (Br. in Opp. 33-41) that "irreparable harm will result from the denial of a stay," 558 U.S. at 190, they cannot deny the profound separation-of-powers consequences inherent in their attempt to subject eight Executive Branch departments and agencies, as well as numerous Cabinet and other Executive Branch officials, to (i) a 50-day trial on liability for what respondents assert to be "systemic

affirmative ongoing conduct, persisting over decades," and (ii) a remedial proceeding at which the district court may direct the Executive Branch to "prepare and implement an enforceable national remedial plan" to "phas[e] out fossil fuel emissions," Br. in Opp. 8-9. Nor can respondents support their assertion (id. at 33) that this suit presents only the "ordinary burdens of discovery and trial." Indeed, that contention is belied by the district court's recognition that "[t]his is no ordinary lawsuit," Pet. App. 106a (No. 18-505), and respondents' own billing of the case as the "Trial of the Century."[1] Given the length and complexity of both the trial and subsequent remedial proceeding, it could be years before the government could obtain any appellate review of respondents' unprecedented claims.

Respondents suggest (Br. in Opp. 3, 40) that a ruling against them would "undermine the confidence of the American people in our Nation's justice system" or sap "this Court['s] institutional credibility." That is not true. By granting the government's petition for a writ of mandamus or certiorari to confine the district court to a "'lawful exercise of its prescribed jurisdiction,'" the court will prevent a "judicial 'usurpation of power,'" and preserve the judiciary's essential role under the Constitution. Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004) (citations omitted).

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[1] Youth v. Gov, The Trial of the Century, https://www.youthvgov.org/trial (last visited Oct. 24, 2018).

ARGUMENT

The government explained in its stay application why the requirements for a stay pending disposition of a petition for a writ of mandamus or certiorari are readily satisfied here. Stay Appl. 18-34. Respondents offer no persuasive response.

I. First, there is a "fair prospect" that this Court will issue a writ of mandamus to the district court or grant certiorari and reverse the relevant decisions below. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). Critically, the Court has already indicated that appellate review before trial is appropriate by using the language of the interlocutory appeal certification statute in denying the government's July stay application without prejudice. See United States v. U.S. Dist. Court, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018). Given the district court's refusal to certify its decision on the government's dispositive motions for interlocutory appeal -- notwithstanding this Court's contrary indication -- granting mandamus or certiorari is the only way to provide the pretrial appellate review this Court envisioned.

A. The most direct way for this Court to review the suit is to issue a writ of mandamus to the district court. Mandamus is warranted when a party establishes that (1) the "right to issuance of the writ is 'clear and indisputable'"; (2) "no other adequate means [exist] to attain the relief" sought; and (3) "the writ is appropriate under the circumstances." Cheney v. United States

Dist. Court, 542 U.S. 367, 380-381 (2004) (citations omitted). The government has satisfied that standard here.

1. The government's "right to issuance of the writ is 'clear and indisputable,'" Cheney, 542 U.S. at 380 (citations omitted), because the district court egregiously erred in at least three independent ways.

a. Most fundamentally, this suit is not a case or controversy within the meaning of Article III. Stay Appl. 20-22. Respondents fail to satisfy any of the three requirements for Article III standing. The injuries they assert arise from the diffuse effects of a global phenomenon that affects everyone in the world and are thus precisely the sort of "generalized grievance[s]" this Court has repeatedly found insufficient to create standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 575 (1992) (citations omitted); see Massachusetts v. EPA, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting).

Moreover, respondents do not begin to explain how their asserted injuries were caused by the broad and undifferentiated government policies they challenge. Stay Appl. 21. To satisfy the causation requirement, respondents must establish that the injuries they assert -- for example, "flooding in [a] child's roads, home, and school," Br. in Opp. 47 -- were caused by challenged governmental actions, not by "the independent action of some third party not before the court." Defenders of Wildlife, 504 U.S. at 560 (citation omitted). But given the complexity of global climate

change, including the effect of "third part[ies]" such as fossil fuel companies and foreign nations, respondents cannot draw the "casual connection" required. Ibid. (citation omitted); see Massachusetts, 549 U.S. at 542-543 (Roberts, C.J., dissenting).

Indeed, other than block-quoting the district court's summary-judgment opinion (Br. in Opp. 48), respondents' only argument in support of their causation theory is a citation to a footnote in Brown v. Plata, 563 U.S. 493, 500 n.3 (2011), in which this Court explained that California prisoners relied on "systemwide deficiencies in the provision of medical and mental health care" in California prisons as cause for their injuries. But there is a significant difference between the argument in Plata that deficiencies in the performance of prison officials caused harm to inmates in those prisons, and the argument here that deficiencies in the performance of the entire Executive Branch over a period of 50 years -- as distinguished from the actions of countless other actors around the world -- caused the global climate-related harms respondents assert.

Even if respondents could somehow show that petitioners caused their injuries, they fail to establish that the district court could redress those injuries. Stay Appl. 21-22. Global climate change is one of the most complex policy problems in the world, yet respondents ask (Br. in Opp. 49) this Court to simply accept that the district court "could provide meaningful relief." Respondents assert (ibid.) that the court could "undoubtedly order

Petitioners to cease certain actions which substantially cause and sanction carbon dioxide emissions." But under our Constitution, regulating "actions which substantially cause and sanction carbon dioxide emissions" is the responsibility of Congress and the Executive Branch -- a responsibility they have fulfilled through a complicated web of statutes and regulations governing energy and environmental policy. See American Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011). Respondents' failure to articulate any authority for a single district court to order the sort of sweeping remedy they seek is fatal to their suit.

Finally, even apart from respondents' failure to satisfy any of the three standing requirements, respondents fail to identify any basis in the "judicial Power" conferred by Article III for a federal court to adjudicate this suit. Stay Appl. 22-23. The judicial power can "come into play only in matters that were the traditional concern of the courts at Westminster," when those matters arise "in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 774 (2000) (citation omitted). Respondents identify no court, from those at Westminster to the present day, that has adjudicated a claim of the kind they assert here. Nor do they identify any instance in which a federal court has exercised equitable jurisdiction to order sweeping relief against largely unspecified "aggregate actions" of the Executive Branch as a whole. Those failures also doom their suit.

b. A second fundamental flaw in respondents' suit is their failure to proceed under the Administrative Procedure Act (APA), which Congress established as the exclusive mechanism for challenging agency regulatory and adjudicatory actions and inactions of the kind that underlie respondents' claims. Stay Appl. 23-26. Respondents acknowledge (Br. in Opp. 50-51) that they seek to proceed "against executive agencies" but that they "do not bring their claims under the APA." Taken together, those admissions concede their case. Respondents suggest (id. at 50) that they can raise their constitutional claims "outside of the APA." But the APA provides for judicial review of "constitutional" claims against agencies, 5 U.S.C. 706(2)(B), and thereby constitutes an "express[]" "statutory limitation[]" that "'forcelose[s]'" any otherwise-existing equitable power to hear constitutional claims of the kind respondents assert. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015) (citation omitted).

None of the decisions on which respondents relies (Br. in Opp. 50-52) is to the contrary. In Franklin v. Massachusetts, 505 U.S. 788 (1992), the Court agreed that "[t]he APA sets forth the procedures by which federal agencies are accountable to the public and their actions are subject to review by the courts." Id. at 796. The Court simply found that the APA did not apply because the President -- who was the final actor in the challenged scheme -- was not himself "an 'agency.'" Ibid. In Webster v. Doe, 486 U.S. 592 (1988), the plaintiff did raise his claim "under the APA."

Id. at 602. The decision in Hills v. Gautreaux, 425 U.S. 284 (1976), did not discuss the appropriate cause of action for seeking injunctive relief against federal agencies. And neither Davis v. Passman, 442 U.S. 228 (1979), nor Bolling v. Sharpe, 347 U.S. 497 (1954), involved a suit against a federal agency at all.

c. Third, as explained in our application and petition, respondents' claims entirely lack merit. Stay Appl. 26-28; Pet. 25-28. Indeed, respondents make virtually no attempt to defend the district court's recognition of a previously unknown fundamental right to "a climate system capable of sustaining human life," or its novel application of state-law "public trust" theories to the federal government. Pet. App. 142a, 167a.

Respondents instead pivot (Br. in Opp. 50-52) to their assertions of related rights "to personal security, to be free of state-created danger, to family autonomy, and to equal protection." Respondents make no substantive argument in support of those claims, but suggest (id. at 53) that the government "did not move for summary judgment on" those claims and is accordingly "foreclosed from seeking any form of mandamus as to those claims." Respondents are incorrect. The government moved to dismiss and for summary judgment on all of respondents' claims, most of which are derivative of their asserted fundamental "right to a climate system capable of sustaining human life." Pet. App. 73a; see ibid. (explaining that respondents' equal protection claim "rests on" their asserted fundamental right). And the government seeks a

writ of mandamus "directing the district court to dismiss this suit" -- that is, to dismiss all of respondents' claims. Pet. 33.

2. The government has no other adequate means to obtain relief from the district court's egregious errors in refusing to dismiss this litigation or prevent the impending trial. Stay Appl. 28-31. Respondents' sole rejoinder (Br. in Opp. 46) is that the government's objections "can all be addressed on appeal after final judgment." But the question for purposes of mandamus is not whether some means of relief are available; it is whether "adequate means" are available. Cheney, 542 U.S. at 380 (emphasis added; citation omitted). An appellate remedy after an extensive trial on the government's liability for the harms of climate change -- followed by a remedial proceeding to address how to "phas[e] out fossil fuel emissions," Br. in Opp. 9 -- is not an "adequate" means of relief. The very process of a trial seeking to commit the entirety of the United States Government to a broad range of legal, scientific, and policy judgments would be a violation of the governing organic statutes and the APA, as well as the separation of powers. Congress has mandated broad public participation before agencies make legal and factual judgments or issue regulations that affect the general public. Respondents' attempt to have the district court bypass those substantive and procedural frameworks, at the behest of a few individuals, is incompatible with the role of the federal courts.

3. Finally, mandamus is "appropriate under the circumstances." Stay Appl. 31-32. Respondents attempt to distinguish Cheney, supra, and In re Kellogg Brown & Root, 756 F.3d 754, 761 (D.C. Cir. 2014), cert denied, 135 S. Ct. 1163 (2015), because those cases involved "confidential communications." Br. in Opp. 39. But neither decision suggests that mandamus would only be appropriate to preserve confidentiality. To the contrary, then-Judge Kavanaugh's opinion in Kellogg described the "'appropriate under the circumstances'" prong of the mandamus standard as "a relatively broad and amorphous totality of the circumstances" test, and went on to cite the "novelty" of the district court's decision, along with its "potentially broad and destabilizing effects," as reasons mandamus was appropriate. 756 F.3d at 762-763 (citation omitted). Both of those considerations favor mandamus here as well. Cheney, moreover, emphasized the propriety of mandamus "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." 542 U.S. at 382. So too here.

B. For many of the same reasons, this Court is likely to grant the government's request for certiorari if it declines to grant mandamus. As another alternative, this Court could, under 28 U.S.C. 1651, grant a common-law writ of certiorari to review the district court's decisions denying the government's dispositive motions. See Pet. 15; De Beers Consol. Mines v. United States, 325 U.S. 212, 217 (1945) (granting a common-law writ of

certiorari where "there is a substantial question whether the District Court has jurisdiction of a suit which it has retained for trial on the merits"). Granting certiorari here would be an appropriate way of providing the pretrial appellate review that this Court envisioned in its July 2018 order but that the district court declined to permit. See Juliana, 2018 WL 3615551, at *1.

II. A stay pending this Court's consideration of the government's petition is warranted because irreparable harm will otherwise result. Stay Appl. 32-34. Respondents largely brush aside (Br. in Opp. 9) the massive separation-of-powers implications of allowing a collection of individual plaintiffs to put eight Executive Branch agencies and officials on trial for causing climate change and then allowing a district court to order them to develop a "remedial plan" that will, inter alia, "phas[e] out fossil fuel emissions." But as described above and in the government's application and petition, respondents' proposed approach runs roughshod over core separation-of-powers principles.

Remarkably, respondents characterize (Br. in Opp. 2, 41) this suit as "run of the mill litigation" that creates only the "ordinary burdens" of defending a civil action. That description runs directly counter to respondents' own framing of the scheduled trial as the "Trial of the Century," which they say is drawing children from across the country to Eugene, Oregon, and is "being taught in dozens of law schools across the country." Id. at 7. As respondents reveal more about their trial plans, moreover, the

burdens only grow more severe. Last week, respondents filed an amended witness list, which now includes a total of 68 witnesses, eight of whom were not previously disclosed, including quasi-experts, parents of respondents, and former governmental employees. D. Ct. Doc. 387 (Oct. 17, 2018). Respondents project approximately 182 hours of direct testimony by their witnesses. Ibid. Assuming a six-hour trial day, that would amount to some 30 trial days of testimony before cross-examination begins or a single defense witness takes the stand. Respondents have also submitted an expanded exhibit list that now contains nearly 2000 exhibits. See D. Ct. Doc. 402 (Oct. 19, 2018).

The liability phase is only the beginning. In their recently filed pretrial brief, respondents provide a preview of their plans for the remedial phase, at which they will seek an order compelling the federal government to "prepare and implement a remedial plan to decarbonize the U.S. energy system and protect carbon sinks, thereby substantially reducing GHG emissions, drawing down [the government's] contribution to excess CO_2 in the atmosphere, and redressing [respondents'] injuries." D. Ct. Doc. 384 at 41-42 (Oct. 15, 2018). Respondents' experts will opine on the technical and economic feasibility of such an order to "decarbonize the U.S. energy system," id. at 41, discussing (among other things) the merits of imposing a carbon tax, expanding subsidies to renewal energy, eliminating subsidies to fossil fuels, and eliminating leasing of federal lands for fossil fuels. Respondents also intend

to offer testimony on the merits of enacting subsidies or, if necessary, regulatory mandates to require modified crop rotations, eliminate or reduce fertilizer practices, retire farmland, expand use of ethanol and bioenergy, alter stocking rates on rangeland, restore wetlands, and eliminate the tillage of farmlands in the United States -- among other potential measures.[2]

Respondents' plan reads more like the agenda for a joint hearing by a number of congressional committees than a proceeding to award relief in a case or controversy that the Constitution authorizes a federal court to entertain. And it underscores just how radical an invasion of the separation of powers this deeply misguided suit is. There is no telling how long it might take for the district court to complete the opening phase of the trial, determine the scope of petitioners' liability, and then conduct the unprecedented remedial proceeding that respondents propose. It could well be years into the future before the government could appeal as of right to seek relief from such an egregious abuse of the civil litigation process and violation of the separation of powers. That is plainly irreparable harm.

* * * * *

The government does not lightly seek extraordinary relief of the kind it requests here. And the government has exhausted every

[2] See D. Ct. Doc. 268-1, at 5-11 (June 28, 2018); D. Ct. Doc. 266-1, at 7, 27-34, 37-39 (June 28, 2018); D. Ct. Doc. 263-1, at 8-28 (June 28, 2018); D. Ct. 261-1, at 4-11, 13-16 (June 28, 2018); D. Ct. Doc. 258-1, at 13-19 (June 28, 2018); D. Ct. Doc. 257-1, at 19-20 (June 28, 2018).

possible mechanism to secure relief from the lower courts through the usual process. But those efforts have failed, even in the face of direct guidance from this Court. Given the overwhelming defects in both the justiciability and merits of respondents' claims -- and the severe intrusion on the separation of powers from allowing this suit to proceed -- the Court should grant a stay of discovery and trial while it considers the government's petition for a writ of mandamus or certiorari to dismiss the suit.

Respectfully submitted.

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