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)

URGENT MOTION UNDER CIRCUIT RULE 27-3(b) FOR PRELIMINARY INJUNCTION

ACTION NECESSARY BY MARCH 19, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellee Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock

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I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8 and Circuit Rule 27-3(b), twenty-one children and youth ("Plaintiffs") respectfully move this Court for preliminary injunctive relief pending resolution of the interlocutory appeal.[1] This injunction is urgently needed because, despite long-standing knowledge of the resulting destruction to our Nation and the profound harm to these young Plaintiffs, Defendants' ongoing development of the fossil fuel-based energy system is actively harming Plaintiffs and jeopardizing Plaintiffs' ability to obtain the full remedy in their case. This Court should preliminarily enjoin, for the pendency of this interlocutory appeal, Defendants[2] from authorizing through leases, permits, or other federal approvals: (1) mining or extraction of coal on Federal Public Lands[3]; (2)

[1] Moving for preliminary injunctive relief in the district court is not possible as the district court stayed all proceedings. D. Ct. Doc. 444. Following Plaintiffs' motion for reconsideration of the stay order, D. Ct. Doc. 446, the district court reaffirmed the proceedings in the district court were stayed and "[a]ny further motions should be directed to the Ninth Circuit Court of Appeal." D. Ct. Doc. 453.

[2] In accordance with Federal Rule of Civil Procedure 65(d), and for purposes of the injunction, the term "Defendants" includes the parties' officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

[3] "Federal Public Lands" include any land and interest in land owned by the United States and within the several States and administered by any Defendant, without regard to how the United States acquired ownership. The term "Federal Public Lands" shall include any and all land and interests in land owned by the United States which are subject to the mineral leasing laws, including mineral resources or mineral estates reserved to the United States in the conveyance of a surface or non-mineral estate. 30 U.S.C. § 1702(1).

offshore oil and gas exploration, development, or extraction on the Outer Continental Shelf[4]; and (3) development of new fossil fuel infrastructure[5], in the absence of a national plan that ensures the above-denoted authorizations are consistent with preventing further danger to these young Plaintiffs.[6] At a minimum, this injunction would apply to the approximately 100 new fossil fuel infrastructure projects poised for federal permits, including pipelines, export facilities, and coal and liquefied natural gas terminals. Erickson Decl. ¶18. The evidence shows that these systemic activities must be enjoined immediately to preserve Plaintiffs' ability to obtain a remedy in this case that redresses their injuries and protects the public interest.[7]

The law, facts, and persistent delay of this case necessitate this preliminary injunction. Plaintiffs are likely to prevail on the merits of their constitutional claims.

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[4] "Outer Continental Shelf" means "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 [of the Outer Continental Shelf Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a).

[5] "Fossil Fuel Infrastructure" includes any equipment or facility used to extract, process, transport, import, export, store, or generate electricity from, fossil fuels. This specifically includes onshore and offshore drilling equipment, pipelines, port facilities, terminals, storage facilities, refineries, and electric generation facilities, used for fossil fuels of any kind.

[6] Once the case is remanded to the district court and the district court's stay is lifted, that court can determine whether to maintain any preliminary injunction issued by this Court until final judgment is rendered.

[7] Counsel for Plaintiffs conferred with counsel for Defendants, who oppose this motion. Olson Decl. ¶8.

The record shows that, for decades, Defendants have knowingly and affirmatively placed Plaintiffs in peril of present and worsening climate change-induced harms, with shocking, deliberate indifference to the known and obvious dangers in advancing a fossil fuel-based energy system.

The record shows Plaintiffs are already suffering concrete harm to their persons, and these harms will worsen and likely become irreversible in the absence of a preliminary injunction. The longevity of the dangers to Plaintiffs and the protracted time-frame for a full remedy does not in any way diminish the additional harm being waged on these youth, by these Defendants, today and every day this Court does not intervene. Plaintiffs made every effort to avoid seeking preliminary relief by moving the case swiftly to trial; Defendants made every effort to prevent Plaintiffs' case from being decided, all while accelerating fossil fuel development and increasing GHG emissions to the point where it will become impossible for Plaintiffs to protect themselves from the climate danger Defendants have had a substantial role in causing. Defendants have deliberately chosen to prioritize use of fossil fuels in our national energy system, disregarding decades of knowledge that this path would destroy our Nation and the lives of children and future generations. This injunction will serve and protect the public's interest in national security and liberty and prevent further inequity to Plaintiffs.

As stated in the Declaration of Nobel Laureate and renowned economist Dr. Joseph Stiglitz: "An injunction on future leases and mining permits for extracting coal on federal public lands and on future leases for offshore oil and gas exploration and extraction activities, alongside enjoining new fossil fuel infrastructure requiring federal approval will prevent, not cause, economic harm." Stiglitz Decl. ¶13. Dr. Stiglitz opines:

> There is no urgency to promote more fossil fuels. There is no urgency for energy supply. There is no urgency for employment or economic growth. There is, however, real urgency to stop the climate crisis and the already-dangerous *status quo* from worsening, and to protect these young people's constitutional rights. There are very real and substantial societal costs and risks of moving forward with these fossil fuel enterprises while this lawsuit is pending.

Id. ¶28.

Plaintiffs request this Court enjoin Defendants from committing further constitutional violations by authorizing new, unnecessary, and harmful fossil fuel extraction from federal public lands and waters and by authorizing new, unnecessary, and harmful fossil fuel infrastructure. Such a prohibitory injunction would protect the already dangerous *status quo* from worsening while the parties conduct this appeal. This injunction is properly intended to "prevent[] the irreparable loss of rights before judgment," not to litigate the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Plaintiffs meet all of the factors for preliminary relief and the equities tip sharply in favor of Plaintiffs.

Plaintiffs seek issuance of an injunction within six weeks of this filing, prior to yet another lease sale by Defendant Department of Interior of federal public offshore lands in the Gulf of Mexico on March 20, 2019.[8] Plaintiffs respectfully ask this Court to schedule oral argument and live witness testimony in support of a preliminary injunction should Defendants contest the facts of irreparable harm or the public interest in the injunction.

II. SUMMARY OF THE EVIDENCE[9]

> *The federal government has for many years had knowledge, information, and scientific recommendations that it needed to transition the Nation off of fossil fuels in order to first prevent against, and now try to stop, catastrophic climate change. We are well beyond the maxim: 'If you find yourself in a hole, quit digging.'*

Dr. Steve Running, Professor Emeritus University of Montana, Decl. ¶46.[10]

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[8] Upon information and belief, the next lease sale is Defendant Department of Interior's Bureau of Ocean Energy Management's Gulf of Mexico Region-wide Planning Area Oil and Gas Lease Sale 252, scheduled for 9 a.m. on March 20, 2019. This lease sale covers 14,696 unleased blocks (approximately 78.5 million acres). *See* https://www.boem.gov/Proposed-Notice-of-Sale-252-Cover-Sheet/.

[9] Plaintiffs recognize they are submitting substantial new evidence to this Court and that, in this short brief, the numerous Declarations cannot appropriately "be distilled" so that the full scope of Defendants' Due Process violation can be set forth. D. Ct. Doc. 444, 2. As the district court noted, "[g]iven the sheer volume of evidence submitted by the parties … a bifurcated trial might present the most efficient course for both the parties and the judiciary." *Id*. While they would have preferred to have presented this evidence at the October 29 trial, given both the urgency and the harm, Plaintiffs have no choice but to seek an injunction from this Court, notwithstanding the district court's view, "that this case would be better served by further factual development at trial." *Id*. at 5.

[10] All Declarations in support of this Motion are cited by last name of the expert declarant, followed by "Decl." and the paragraph number. Plaintiffs are cited by first name. The Declaration of Julia Olson filed herewith addresses Defendants'

The United States is responsible for one-quarter of the accumulated carbon dioxide (CO_2) in the atmosphere. Hansen Decl. ¶6. For over 100 years, scientists have understood that burning fossil fuels caused CO_2 emissions and increasing atmospheric CO_2 levels caused climate change. Running Decl. ¶4. For at least 50 years, the federal government, including the White House, has understood the climate science and issued reports on the catastrophic dangers of continuing to burn fossil fuels. Rignot Decl. ¶15; Hansen Decl. ¶¶77-81. For decades, in spite of this knowledge, Defendants have knowingly promoted and controlled a national fossil fuel energy system when available alternatives existed. Running Decl. ¶46; Erickson Decl. ¶¶10-11; Hansen Decl. ¶¶82-83. Dr. Stiglitz confirms that "[t]he current national energy system, in which approximately 80 percent of energy comes from fossil fuels, is a direct result of decisions and actions taken by Defendants." Stiglitz Decl. ¶8. In his expert opinion Dr. Stiglitz avers:

> The fact that the U.S. national energy system is so predominately fossil fuel-based is not an inevitable consequence of history. The current level of dependence of our national energy system on fossil fuels is a result of intentional actions taken by Defendants over many years. These actions, cumulatively, promote the use of fossil fuels, contribute to dangerous levels of CO_2 emissions, and are causing climate change.

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upcoming lease sales and similar actions, as well as attaching expert reports served in the district court. The Declaration of Andrea Rodgers is filed in support Plaintiffs' Motion to File Documents Under Seal and attaches the Declaration of Dr. Van Susteren and the Rebuttal Expert Reports of Drs. Karrie Walters and Akilah Jefferson, all of which contain confidential medical information of the Plaintiffs.

Stiglitz Decl. ¶9.

Today, when it is technically and economically feasible to transition swiftly away from fossil energy, and when the climate system is in a dangerous state of emergency, Defendants are recklessly increasing fossil fuel development. Stiglitz Decl. ¶10 ("For decades, the U.S. government has had extensive knowledge that there were viable alternatives to a fossil fuel-based, national energy system, and with the appropriate allocation of further resources to research and development, it is likely that these alternatives would have been even more competitive than fossil fuels."); Williams ¶1, 13-18; Jacobson Decl. Ex. 1, 2, 21-22; Erickson Decl. ¶14 (Defendants have plans for "new offshore oil and gas drilling in virtually all (98%) of U.S. coastal waters during 2019-2024."). "The United States is expanding oil and gas extraction on a scale at least four times faster and greater than any other nation and is currently on track to account for 60% of global growth in oil and gas production." Erickson Decl. ¶15. As part of Defendants' fossil fuel energy system and strategy for fossil fuel dominance, there are presently close to 100 new fossil fuel infrastructure projects poised for federal permits, including pipelines, export facilities, and coal and liquefied natural gas terminals. *Id.* ¶17. Such conduct threatens national security. Gunn Decl. *passim.*

"The economic impacts of these actions are deleterious to Youth Plaintiffs and the Nation as a whole. Defendants' actions promoting a fossil fuel based energy system are serving to undermine the legitimate government interests of national security and economic prosperity that they purport to advance." Stiglitz Decl. ¶9. The enormous economic burdens and costs will be borne by these Plaintiffs and other children. *Id.* ¶9 n.4.

Children, including Plaintiffs, are also bearing the health burdens of climate change. Dr. Paulson, an expert on the health effects of climate change, explains: "By continuing to promote fossil fuels, the federal government is knowingly putting these children in an increasingly risky situation when it comes to their health." Paulson Decl. ¶23. Dr. Paulson finds Defendants' actions "truly shocking" in light of the "undisputed health risks to children." *Id.* ¶41. Some Plaintiffs are "at risk of irreparable harm from having decreased lung function as a result of growing up in environments with more air pollution." *Id.* ¶34. Plaintiffs like Nicholas who have asthma are already harmed by pollution from fossil fuels, increased prevalence of wildfire smoke, and exacerbated ozone conditions due to climate change. Nicholas Decl. ¶¶4-7. The more fossil fuels burned, the worse Nicholas's health will be. Paulson Decl. ¶¶27-30. "Without immediate and significant actions to reduce greenhouse gas emissions by Defendants, global temperatures will continue to increase and exacerbate [wildfire] conditions. The magnitude of wildfire that

destroyed Paradise, is a harbinger of destruction to come in the West." Running Decl. ¶36.

Plaintiffs are also being profoundly psychologically harmed by Defendants. Van Susteren Decl. ¶¶13, 28-29. Plaintiffs Aji, Nicholas, Levi, and Journey all attest to intense impacts to their mental and emotional wellbeing. Sleeplessness, nightmares, anxiety, anger, depression, fear, and deep feelings of betrayal by their government are part of the psychological makeup of these young people. Aji Decl. ¶¶3-4, 8, 11; Levi Decl. ¶¶7-9, 25; Journey Decl. ¶¶25-26; Nicholas Decl. ¶8. Plaintiff Aji feels as if he is in a pressure cooker. Aji Decl. ¶¶5-6, 11-13.

In addition to harming Plaintiffs' economic, physical, and psychological wellbeing, Defendants are also contributing to the irreversible loss of resources on which Plaintiffs depend, like coral reefs. Hoegh-Guldberg Decl. ¶15. "If emissions are not rapidly reduced, the damage we are doing now may not be completely undone for generations if not millennia." *Id*. ¶18. "To give Hawai'ian reefs any chance of survival, CO_2 concentrations must rapidly decline, and the warming of the oceans must be stabilized as quickly as is possible. Such a turnaround will not occur if the U.S. continues to grow its emissions and lock in more fossil fuel use." *Id*. ¶21. Plaintiff Journey is already harmed by the dying reefs:

> My two favorite places I used to swim and snorkel at – Anini Beach and Tunnels Beach – are suffering terribly. Almost all of the reefs have died over the last couple of years at both beaches. Diseased corals are disintegrating from high ocean temperatures and releasing a lot of

> bacteria in the water, such that many surfers at Tunnels are getting sick. The local marine biologist has advised me that the places where these reefs are dying present a health hazard and are no longer safe for swimming, surfing, or snorkeling. I will not return to these beaches as a result.

Journey Decl. ¶12. Similarly, "U.S. government agencies have acknowledged that there is virtually no chance that the coral reefs of Florida, which Levi enjoys visiting, will continue to exist in a few decades if warming and emissions trends continue." Hoegh-Guldberg Decl. ¶23; *see also id*. ¶25.

Melting ice sheets are yet another catastrophe of our heating oceans. The nation's leading expert, Dr. Eric Rignot, declares:

> What we do *today* will influence the stability of ice sheets for the next 30-40 years with enormous consequences for the nation's shorelines and marine resources. Presently, we are on course to launch the ice sheets of Greenland and Antarctica into multi-meter sea level rise. While we have passed the point of return for some of these ice sheets, we cannot afford for others, like the East Antarctic Ice Sheet, to follow the same fate. Every 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. Dr. Rignot maintains "that if emissions do not steeply decline forthwith, we will lose the opportunity to protect even more of these giant ice sheets from collapse. We are running out of time." *Id*. ¶12. The leading expert on climate change and extreme weather explains that the amount of energy absorbed by the oceans alone in 2018, from CO_2 levels, is equivalent to 680 times the total electricity energy consumption in the United States in 2017. Trenberth Decl. ¶10. The 2016

Louisiana Floods, which flooded Plaintiff Jayden's home and harmed her physical and emotional health, were driven by this increased ocean heat content and resulting high sea surface temperatures. Trenberth Decl. ¶¶12-13; D. Ct. Doc. 283, Jayden Decl. ¶¶6-26.

Locking in more fossil fuel use right now, and delaying the transition to clean energy, will cost lives. Dr. Mark Jacobson explains: "[e]very year of powering the United States national energy system primarily with fossil fuels for all purposes (as it is now) costs about 62,000 U.S. lives annually compared with a 100% renewable system." Jacobson Decl. ¶16. It also makes it much harder to transition the energy system in the time frame needed because new infrastructure becomes embedded in our energy system for decades. *Id*. ¶14. "Ceasing new fossil fuel leasing on federal public lands and preventing new fossil fuel infrastructure is necessary for meeting an 80% transition by 2030 and a 100% transition by 2050, because any new leasing will result in embedded infrastructure that can last for decades." *Id*. ¶15; Erickson Decl. ¶¶24-27; Williams Decl. ¶22.

Climate scientists agree that there is still time to slow climate change if we act now, "but we are on the brink of being too late." Running Decl. ¶44. "The more GHG emissions that are emitted into the atmosphere, the more unlikely it is that mitigation efforts can be implemented quickly enough to avoid the devastating climate change impacts that are projected to occur." *Id*. The world's leading coral

reef expert says to preserve viable remnants of coral reef ecosystems in the short-term for a chance at eventual recovery: "I cannot emphasize enough the urgent and dire necessity of bringing CO_2 emissions swiftly down from every major emitting nation, this year in 2019 and beyond." Hoegh-Guldberg Decl. ¶17.

"Each month that passes by without action by the federal government to reduce fossil fuel extraction and GHG emissions exacerbates this already grave public health emergency facing our nation's must vulnerable population – our children." Paulson Decl. ¶14. "In order to prevent additional physical harms to Plaintiffs from climate change and air pollution associated with fossil fuels, and to ensure that the Plaintiffs' current physical ailments do not worsen at the hands of their own government, the federal government must stop authorizing and sanctioning new investments in fossil fuel energy." *Id*. ¶43.

There is not "any significant economic cost to the federal government or the public of delaying pipeline permits or leasing federal public lands for coal extraction or offshore drilling." Stiglitz Decl. ¶17. Nor is there a threat to energy independence or jobs. *Id*. ¶23. Conversely, authorizing those fossil fuel projects during this appeal will cause harm to the Plaintiffs, society, the economy, and the government's own fiscal resources. *Id*. ¶¶13, 19, 20, 26-28. "[E]fforts by the present administration to expand fossil fuel production and continue authorizing the extraction of coal on federal lands are extremely reckless." Trenberth Decl. ¶13.

III. PROCEDURAL HISTORY

This Panel is well-aware of the procedural history underlying this case,[11] which has been described in numerous prior filings. *See, e.g.,* Ct. App. IV Doc. 5, 1-14 (Plaintiffs' Response to Defendants' Fourth Petition for Writ of Mandamus); Ct. App. V App. Doc. 2-1, 3-10 (Plaintiffs' Response to Defendants' Petition for Interlocutory Appeal). Here, Plaintiffs provide a concise version of that history.

On September 10, 2015, twenty-one Youth Plaintiffs, a youth organization known as Earth Guardians, and Dr. James Hansen on behalf of future generations filed the First Amended Complaint ("FAC") to stop Defendants from infringing their substantive due process rights to life, liberty, and property, including recognized unenumerated rights to personal security and family autonomy, and by placing Plaintiffs in a position of danger with deliberate indifference to their safety under a state-created danger theory. D. Ct. Doc. 7, ¶¶277-289, 302-306.

On November 10, 2016, Judge Aiken denied Defendants' motion to dismiss, finding, *inter alia*, that Plaintiffs' state-created danger claim was adequately pled:

[11] 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' First Petition, *In re United States*, No. 17-71692 (9th Cir.), as "Ct. App. I Doc."; the docket for Defendants' Fourth Petition, *In re United States*, No. 18-73014 (9th Cir.) as "Ct. App. IV 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 App. Doc."; the docket for Defendants' Second Application to the Supreme Court for stay, *In re United States*, No. 18A410, as "S. Ct. II App. Doc."

> Plaintiffs have alleged that defendants played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change. They may therefore proceed with their substantive due process challenge to defendants' failure to adequately regulate CO_2 emissions.

Juliana v. United States, 217 F.Supp.3d 1224, 1252 (D. Or. 2016).

On January 13, 2017, Defendants filed their Answer, admitting many of Plaintiffs' scientific and factual allegations. *See* D. Ct. Doc. 98, ¶¶1, 7, 10, 150, 151, 213; *see also* D. Ct. Doc. 146, 2-4 (district court setting forth "non-exclusive sampling" of significant admissions in Answer).

On June 9, 2017, Defendants first petitioned for mandamus with this Court. Ct. App. I Doc. 1 ("First Petition"). After a seven-and-a-half month delay of pretrial proceedings, this Court denied the First Petition on March 7, 2018. *In re United States*, 884 F.3d at 834.

On April 12, the district court set trial to commence on October 29, 2018. Thereafter, Defendants moved for judgment on the pleadings under Rule 12(c) and for partial summary judgment. D. Ct. Docs. 195, 207, i, 1-2. At oral argument, Defendants conceded Plaintiffs established injury-in-fact. *See* D. Ct. Doc. 329, 25:5-13, 19-20.

On October 15, the district court granted in part the Rule 12(c) and summary judgment motions. *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018).

Regarding Plaintiffs' state-created danger claim, the district court found "plaintiffs have introduced sufficient evidence and experts' opinions to demonstrate a question of material fact as to federal defendants' knowledge, actions, and alleged deliberate indifference." *Id*. at 1101.

On October 18, Defendants filed another Petition with the Supreme Court and applied to stay district court proceedings. S. Ct. II. App. Doc. 1 ("Second Application"). On October 19, Chief Justice Roberts ordered a stay pending Plaintiffs' response to the Second Application. *In re United States*, No. 18A410, 2018 WL 5115388. On November 2, the Supreme Court denied the Second Application and lifted the temporary stay. *In re United States*, No. 18A410, 2018 WL 5778259.

On November 8, this Court issued a partial stay pending consideration of Defendants' Fourth Petition for mandamus, staying only trial. Ct. App. IV. Doc. 3. On November 21, in response to this Court's request, the district court certified four orders for interlocutory appeal and stayed proceedings, but in doing so set forth the many reasons why it believed interlocutory appeal was *not* appropriate. *See* D. Ct. Doc. 444.

On November 30, Defendants petitioned for permission to appeal the certified orders. Ct. App. V. App. Doc. 1-1. In opposition, Plaintiffs outlined the further delay that would occur, the urgent nature of the case, and the likely need for preliminary

injunctive relief should interlocutory appeal be awarded to Defendants. Ct. App. V. App. Doc. 2-1, 14-18. On December 26, Defendants' petition for permission to appeal was granted. Ct. App. V. App. Doc. 8. On December 5, Plaintiffs moved the district court for reconsideration of its November 21, 2018 stay order. D. Ct. Doc. 446. On January 8, 2019, the district court denied Plaintiffs' motion for reconsideration, affirming that district court proceedings are stayed, and directing "[a]ny further motions should be directed to the Ninth Circuit Court of Appeal." D. Ct. Doc. 453.

IV. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

To justify an urgent injunction pending appeal, Plaintiffs need establish: "that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where there is a likelihood of irreparable harm, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff" can warrant a preliminary injunction that favors the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

A preliminary injunction is "a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Sierra On-Line, Inc.*, 739

F.2d at 1422; *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). However, "'[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . .'" *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (citations omitted). An "injunction [that] prevents future constitutional violations [is] a classic form of 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).

V. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

There is overwhelming evidence that irreparable harm to Plaintiffs is "*likely* in the absence of an injunction." *Arc of California v. Douglas,* 757 F.3d 975, 990 (2014) (quoting *Winter*, 555 U.S. at 22). Plaintiffs' harms either have occurred, are occurring, are immediately threatened to result, or certain to become irreversibly inevitable absent injunctive relief from this Court. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also, Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014); *Hernandez,* 872 F.3d at 994–95. Therefore, Plaintiffs "carry their burden" to demonstrate irreparable harm by demonstrating infringement of their rights under the Due Process Clause. *Id.* at 995; *Am. Trucking*

Ass'n, Inc. v. City of Los Angeles, 559 F.3d 1046, 1059 (9th Cir. 2009) (citations omitted). Further, without injunctive relief, Plaintiffs will likely lose the ability to achieve their required remedy, which would lock-in irreparable harm to Plaintiffs, including to their psychological health.

A. WITHOUT INJUNCTIVE RELIEF IT IS LIKELY THAT PLAINTIFFS WILL LOSE THE ABILITY TO ACHIEVE THEIR DESIRED REMEDY, CAUSING PLAINTIFFS IRREPARABLE HARM

One of the purposes of preliminary injunctive relief is "to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Golden Gate Rest. Ass'n*, 512 F.3d at 1116 (quoting *Canal Auth. of Florida*, 489 F.2d at 576). Here, after trial, Plaintiffs will seek an order that would, among other things, enjoin Defendants from violating Plaintiffs' constitutional rights and require Defendants to prepare and implement a national remedial plan, of their own devising, to stabilize the climate system and protect the vital resources on which Plaintiffs depend. D. Ct. Doc. 7, Prayer for Relief. According to the best available science, atmospheric CO_2 concentrations must be reduced to no more than 350 parts per million ("ppm") by 2100 in order to stabilize our climate system. D. Ct. Doc. 7, ¶257; Hansen Decl. Ex. 1 at 3-5; Hoegh-Guldberg Decl. Ex 1 at 8-9. A remedial plan that aligns the United States with restoring CO_2 to 350 ppm by 2100 is economically and technically feasible. Williams Decl. ¶¶13-18; Jacobson Decl. ¶¶7-13. However, without immediate action to reduce U.S. GHG emissions resulting

from fossil fuel extraction from federal lands and waters and new fossil fuel infrastructure, it will not be possible to stabilize atmospheric CO_2 concentrations to 350 ppm by 2100, and the district court's ability to render a meaningful remedy will be compromised. Williams Decl. ¶14, 19-23; Jacobson Decl. ¶¶14-15.

Preserving the ability to return atmospheric CO_2 concentrations to 350 ppm by 2100 is critical because, without that remedy, the natural resources that Plaintiffs depend upon for their safety, well-being, recreation, and survival will be irrevocably damaged and lost. Hansen Decl. ¶¶9, 39-40, 43, 49, 55-56; Hoegh-Guldberg Decl. ¶¶17-18; Rignot Decl. Ex. 1, 18-19; Running Decl. ¶¶13-14, 29, 36-37, 44-45; Trenberth Decl. ¶14. This causes Plaintiffs irreparable harm. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005) quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (environmental harm is often irreparable). Plaintiffs' harms, some of which are not yet irreparable, will become locked-in, causing *life-long* consequences for Plaintiffs in the absence of an injunction. Hansen Decl. ¶¶9, 66; Rignot Decl. ¶¶8-9, 12, 16; Running Decl. ¶14 ("Continuing U.S. emissions at the present level for even two years will make it progressively more difficult to stabilize the climate system this century in order to preserve the critical components for human life on this planet as we know it today, such as ice sheets."); Hoegh-Guldberg Decl. ¶¶17-18, 21.

Plaintiff Journey's personal wellbeing depends upon the coral reefs in Hawaii that are dying at accelerating rates. Journey Decl. ¶¶10-13. The harms Plaintiff Journey is experiencing from the loss of coral reefs in Hawai'i will become irreparable with more fossil fuel development. Hoegh-Guldberg Decl. ¶20-21. "I cannot emphasize enough the urgent and dire necessity of bringing CO_2 emissions swiftly down from every major emitting nation, this year in 2019 and beyond . . . . If emissions are not rapidly reduced, the damage we are doing now may not be completely undone for generations if not millennia." *Id.* ¶¶17-18; Hansen Decl. ¶11 (explaining that we are approaching a point of no return and, "if we arrive at this point, climate change becomes irreversible for centuries to millennia").[12]

Additionally, the extreme weather events that have already harmed individual Plaintiffs, including Levi, Journey, and Jayden, are becoming increasingly frequent and destructive and will get worse without immediate action to reduce GHG emissions. Levi Decl. ¶¶18-22; Journey Decl. ¶¶14-19; D. Ct. Doc. 283, Jayden Decl. ¶¶6, 23; Paulson Decl. ¶¶19-20. Plaintiff Levi has been forced to evacuate his home on a barrier island off Florida because of hurricanes and flooding, which are driven by increased ocean heat content and the resulting high sea surface

[12] While actions of other nations are certainly a factor in the ultimate global effort to stave off climate catastrophe, irreparable harm cannot be avoided without changing Defendants' course of conduct. Hansen Decl. ¶¶35-37. Regardless of the actions of third-party nations not before this Court, *these Defendants* cannot affirmatively continue to endanger these youth under the constitutional law of our Nation.

temperatures. Levi Decl. ¶¶18, 22; Trenberth Decl. ¶12. Fleeing from his home, having his school permanently closed after Hurricane Irma, and witnessing climate change-induced environmental devastation has caused Levi to legitimately fear for his personal safety and security. Levi Decl. ¶¶7, 22.

Many of Plaintiffs' injuries due to rising temperatures, ice melt, sea level rise, and ocean acidification are becoming irreversible. Increasing concentrations of CO_2, largely from the burning of fossil fuels, have changed the Earth's energy balance, which directly results in increasing air temperatures. Running Decl. ¶9; Hansen Decl. ¶6-8 ("Earth's energy imbalance is . . . equivalent of the energy of 400,000 Hiroshima atomic bombs per day every day of the year."). Dr. Rignot explains how "we have already lost too much of our ice sheets to unstoppable collapse and if the United States does not shift course, we will lose even more." Rignot Decl. ¶1. "Enormous irreparable damage has already been done, but there is even greater damage that is still preventable if we act swiftly." *Id.* ¶8. The "dire implications" of this accelerated warming also include "record-breaking hurricanes, super storms and extreme flooding" as well as increased sea level rise. Trenberth Decl. ¶¶12-13. "We are in a situation where the extra heat from accumulated carbon dioxide ("CO_2") concentrations has created a ticking time bomb for the planet's ice sheets." Rignot Decl. ¶7.

Plaintiffs are already being harmed by the climate-induced increase in

wildfires and their severity and the impacts will get even worse if GHG emissions are not reduced immediately. Nicholas states: "I have asthma. The wildfire smoke makes it impossible for me to exercise and sometimes I can't even go outside at all on particularly poor air quality days." Nicholas Decl. ¶4. Dr. Paulson warns:

> For Sahara, Jacob, Alex, Isaac, Aji, Nicholas, and other Plaintiffs exposed to smoke from wildfire, I expect, consistent with the literature, that their increased exposure to smoke will exacerbate existing health issues, such as asthma, and may cause new acute and chronic respiratory illnesses. By continuing to promote fossil fuels, the federal government is knowingly putting these children in an increasingly risky situation when it comes to their health.

Id. ¶23; *see also* Olson Decl. Ex. 2, 15 (Frumkin Report); Rodgers Decl. Ex. 3, 3-6 (Jefferson Report); Nicholas Decl. ¶¶4-7. "[T]he irreversible harms associated with current levels of warming will only increase as GHG emissions continue to rise." Running Decl. ¶14.

If Defendants are allowed to continue to issues leases, permits, or otherwise authorize the extraction of coal, offshore oil and gas development, and fossil fuel infrastructure, the adverse health impacts to Plaintiffs due to extreme weather events, rising temperatures, wildfire, air pollution, and other climate impacts will get worse, have life-long consequences, and potentially become irreversible. Plaintiffs, as youth, are especially vulnerable to the impacts of climate change. Paulson Decl. ¶¶32-41; *see Arizona Dream Act Coal.*, 757 F.3d at 1068 ("The irreparable nature of Plaintiffs' injury is heightened by Plaintiffs' young age and fragile socioeconomic

position."). Injunctive relief is necessary in order to avoid locking in these and other irreparable harms. Erickson Decl. ¶29; Williams Decl. ¶23.

B. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM TO THEIR PSYCHOLOGICAL HEALTH IN THE ABSENCE OF AN INJUNCTION

Without an injunction, existing harms to Plaintiffs' psychological health will worsen and become irreparable. According to Dr. Van Susteren:

> Climate change is causing devastating physical impacts – injuries, illnesses, and deaths. But for the magnitude of its impacts, the potential insinuation into every aspect of our lives, the relentlessness of its nature and debilitating effects, it is the emotional toll of climate change that is even more catastrophic, especially for our children. It has the capacity to destroy children psychologically.

Van Susteren Decl. ¶12.

Plaintiffs have testified about the deep anger, frustration, depression, and feelings of betrayal they are experiencing because of their knowledge that the federal government is actively causing them harm, when the government is supposed to be protecting them. Van Susteren Decl. ¶19; *id.* Ex. C to Ex. 1; Aji Decl. ¶¶3-4, 8, 11; Levi Decl. ¶¶7-9, 25; Journey Decl. ¶¶25-26; Nicholas Decl. ¶8. These emotional harms are consistent with what is reported in the medical literature. Van Susteren Decl. Exhibit 1, 16-17; Rodgers Decl. Ex. 2, 5 (Walters Report). Dr. Van Susteren characterizes these psychological harms as "institutional betrayal," in that the federal government, a trusted and powerful institution, is affirmatively causing harm to

individuals that trust and depend on the government. Van Susteren Decl. ¶¶10-11. Dr. Van Susteren notes:

> Harms that are inflicted intentionally are much more psychologically damaging than what happens to us accidentally. The Plaintiffs know that the harm coming to them has been inflicted intentionally and that they are attributable not only to past actions but are also a direct result of actions the federal government is taking ***today***.

Id. ¶16; Aji Decl. ¶11 (Defendants "keep making more dire projections about my future" but "my government doesn't stop doing what it is doing to make my life unsafe."). Jayden described her horror when the federal government made the decision to *increase* off-shore oil drilling in the Gulf of Mexico near her home immediately after her home, health, and well-being were harmed by the climate change-driven Louisiana floods of 2016. D. Ct. Doc. 283, Jayden Decl. ¶¶43-44; Trenberth Decl. ¶12. For Aji, Defendants' decisions increase "the pressure cooker feeling that lives in me and ignites my feeling of panic." Aji Decl. ¶11. Levi has had recurring nightmares about climate change. Levi Decl. ¶¶8, 24-25. Journey says that knowing U.S. GHG emissions are rising and Defendants are expanding fossil fuel extraction causes him great "emotional pain." Journey Decl. ¶25. For Nicholas, "the speed at which we achieve those solutions greatly matters. And the government is not just going too slow, it is going backwards." Nicholas Decl. ¶8.

Children are uniquely vulnerable to psychological harms from climate change. Trauma from climate change and institutional betrayal can alter hormone

levels, brain development, cognitive functioning, reproductive success, and even alter children's DNA. Van Susteren Decl. ¶¶21-29; Paulson Decl. ¶¶39-42; Olson Decl. Ex. 2, 10-11 (Frumkin Report). These "particularly pernicious" irreparable harms are likely to befall Plaintiffs without injunctive relief. Van Susteren Decl. ¶17. Granting the injunctive relief, however, would provide an immediate remedy for Plaintiffs' psychological suffering related to their feelings of institutional betrayal. According to Dr. Van Susteren:

> The only way to relieve at least part of the psychological harm Plaintiffs are experiencing from the federal government's institutional betrayal is for the government to stop endangering Plaintiffs. . . . [I]njunctive relief would also give the Plaintiffs hope that the judiciary understood the harms they are grappling with ***on a daily basis. It would also help restore confidence that ultimately they would find recourse for government supported and sponsored threats to their survival.***

Id. ¶20 (emphasis added).

VI. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR STATE-CREATED DANGER CLAIM

A. PLAINTIFFS HAVE STANDING TO BRING THEIR FIFTH AMENDMENT CLAIM AND SEEK PRELIMINARY RELIEF[13]

To establish standing, a plaintiff must demonstrate he or she has suffered a concrete and particularized injury that is either actual or imminent; the injury is fairly

[13] Given space limitations, Plaintiffs are not briefing in detail the extensive factual record as to whether they have standing to seek injunctive relief. Plaintiffs incorporate by reference the district court's analysis in denying summary judgment, where it concluded Plaintiffs have Article III standing to seek injunctive relief. D. Ct. Doc. 369 at 29-45.

traceable to the defendant; and it is likely that a favorable decision will redress that injury. *Horne v. Flores*, 557 U.S. 433, 445 (2009); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). As the district court repeatedly found below, Plaintiffs have provided sufficient factual evidence and legal justification to satisfy all three criteria and avoid adverse summary judgment. *Juliana*, 217 F.Supp.3d at 1242-48; *Juliana*, 339 F.Supp.3d at 1086-96. On summary judgment, Defendants conceded Plaintiffs made a prima facie case of injury-in-fact. D. Ct. Doc. 329, 25. As a result, there is an Article III "case or controversy," and the issue for purpose of this motion turns to whether Plaintiffs show a "real or immediate threat that the plaintiff[s] will be wronged again" adequate to maintain a claim for equitable relief. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (en banc) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

To assert a claim for prospective injunctive relief, a plaintiff must demonstrate "that he is realistically threatened by a repetition of [the violation]." *City of Los Angeles*, 461 U.S. at 109. Courts have "enumerated two ways in which a plaintiff can demonstrate that such injury is likely to recur." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010). "First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001), abrogated on other grounds

by *Johnson v. California*, 543 U.S. 499, 504–05 (2005).[14] "Second, the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights.'" *Id.* (alterations in original) (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985)). Here, Defendants' ongoing systemic aggregate actions to perpetuate a fossil fuel energy system as challenged herein include both written policies and a pattern of officially sanctioned behavior that give rise to Plaintiffs' injuries. Plaintiffs seek to enjoin Defendants' perpetuation of new fossil fuel extraction from federal public lands and infrastructure components of those systemic policies and patterns of conduct, which most immediately threaten to worsen the *status quo* for Plaintiffs during the pendency of this appeal and adversely affect the options Defendants have after final judgment to devise a plan to bring the Nation's energy system into constitutional compliance.[15]

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[14] A policy is "'a deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Fairley v. Luman*, 281 F.3d 913, 917-18 (9th Cir. 2002) (per curiam) (citations omitted). A policy may consist of actions or inaction. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

[15] Defendants have repeatedly mischaracterized Plaintiffs' ultimate prayer for relief as requiring the district court to take over the policy-making of the other branches. On the contrary, Plaintiffs wish to preserve the ability of the other branches to develop policies and plans that protect Plaintiffs' rights and preserve the capacity of our government to govern our Nation away from precipitous climate danger. A national plan, developed by Defendants, not the courts, is Plaintiffs' ultimate relief. This short-term preliminary injunction will preserve the varied options and ultimate efficacy of that plan, should it be ordered.

Any inquiry into whether Plaintiffs have standing is "gauged by the specific . . . claims that [they] present[]." *Int'l Primate Protection League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). When federal government agencies and officials are "deliberately indifferent" to their safety, children can allege claims to challenge the "substantial risk of serious future harm" that these policies and practices create. *E.g., Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012) (describing foster children's substantive due process rights). These claims are equivalent to those brought by prisoners when prison mismanagement subjects them to a risk of harm. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 531 (2011). Thus, standing imposes no barrier to this action of children bringing claims of substantial risk of harm arising from system-wide governmental policies and practices.

B. DEFENDANTS KNOWINGLY, AND WITH DELIBERATE INDIFFERENCE, PLACE PLAINTIFFS' LIVES AND SECURITY IN DANGER[16]

A "state-created danger" claim under the Due Process Clause arises where: (1) "the state affirmatively places the plaintiff in danger"; and (2) "act[s] with 'deliberate indifference' to a 'known or obvious danger'. . . ." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016) (citations omitted). Here, given Defendants'

[16] Plaintiffs are likely to succeed on the merits of their other Fifth Amendment claims as well, as illustrated by the district court's orders. For brevity, Plaintiffs address this singular claim in this Motion as it is tied closely to the urgency of the moment and the irreparable harm Plaintiffs face.

longstanding knowledge of the profound dangers of climate change, as well as the economically and technologically feasible alternatives to the present fossil fuel energy system, unless immediately enjoined, Defendants will affirmatively place Plaintiffs in further peril of worsening climate-induced harms by entering into new leases and new infrastructure projects.

1. Defendants' Historic and Ongoing Affirmative Conduct Has Placed Plaintiffs in Danger

Plaintiffs must show "the state engaged in 'affirmative conduct' that placed him or her in danger." *Pauluk*, 836 F.3d at 1124 (quoting *Patel v. Kent Sch. Dist*, 648 F.3d 965, 974 (9th Cir. 2001)). Affirmative conduct is conduct that creates, exposes, or increases a risk of harm Plaintiffs would not have faced to the same degree absent such conduct. *Hernandez v. City of San Jose*, 897 F.3d 1125, 1134-35 (9th Cir. 2018); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

Here, Defendants have substantially caused and contributed to dangerous climate destabilization and the already-occurring and imminently threatened harms Plaintiffs face. Hansen Decl. ¶¶35-37; Erickson Decl. ¶28, *passim*. Plaintiffs do not contend Defendants are the sole contributors to climate change, nor do they need to be for Plaintiffs to prevail. Defendants admit they affirmatively "permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation;" D. Ct. Doc. 98, ¶7; that "emissions from such activities have increased the

atmospheric concentration of CO_2[;]" that "the United States is responsible for more than a quarter of global historic cumulative CO_2 emissions;" that "current and projected atmospheric concentrations of CO_2[] threaten the public health and welfare of current and future generations; and that this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change." *Id.* ¶¶7, 213.

Defendants' affirmative conduct with respect to fossil fuels is resulting in greater CO_2 emissions levels and concentrations than would occur absent such conduct. Erickson Decl. at ¶¶20-21, 28; Hansen Decl. ¶35-37, Ex. 1 at 41-43; Olson Decl. Ex. 4, at 112-115 (Speth Report). Excess CO_2 emissions resulting from Defendants' conduct continue to destabilize the climate, resulting in mounting injuries to Plaintiffs. Hansen Decl. ¶38-55, Ex. 1, 26, 41-43; Hoegh-Guldberg Decl. at ¶¶16-23; Erickson Decl. at ¶¶28, *passim*; Olson Decl. Ex. 5 (Wanless Report). "Cumulative emissions by the United States substantially exceed those of any other nation. Thus, the United States is, by far, more responsible than any other nation for the associated increase of global temperature." Hansen Decl. ¶35; Erickson Decl. ¶8 ("energy-related U.S. CO_2 emissions from fossil fuel combustion grew by about 3.4% in 2018."). Defendants' affirmative conduct has thereby placed Plaintiffs "in a situation more dangerous than the one" they would otherwise face. *DeShaney*, 489 U.S. at 196; Hansen Decl. ¶9 ("Plaintiffs are already being harmed by Defendants'

conduct, past and present, in causing substantial amounts of GHG emissions, but the harm continues to worsen with increasing amounts of fossil fuel development and promotion of fossil fuel energy."); Olson Decl. Ex. 1, 2, 20-21 (Ackerman Report); Gunn Decl. *passim*.

2. Defendants Have Acted With Deliberate Indifference to the Known Or Obvious Dangers to Which They've Exposed Plaintiffs

To establish "deliberate indifference," Plaintiffs must show: (1) Defendants' actual knowledge of or willful blindness to; (2) an unusually serious risk of harm; and (3) Defendants either failed to take obvious steps to address the risk or exposed a claimant to the risk. *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996).[17] Defendants' long-standing knowledge of the profound risks of climate destabilization from continued fossil fuel use, and the resulting harms to Plaintiffs, is extensively recorded in federal government documents spanning decades and corroborated by expert reports in this case. *See* 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); Hansen Decl. ¶51 ("The great danger for young people, is that they are being handed a situation that is out of their control, a situation made more egregious due to the fact

[17] *See also Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a [claimant] faces an excessive risk. . . for reasons personal to him or because all [others] in his situation face such a risk.").

that the Defendants have a complete understanding of precisely how dangerous the situation is that they are handing down to these Plaintiffs."), ¶¶76-79, ¶84, Ex. 1, at 7-24, 38-39; Gunn Decl. ¶44.

With respect to the third component of deliberate indifference, Defendants have refused for decades to take obvious steps to address the profound harms and unprecedented dangers, ignoring technologically- and economically-feasible alternative energy pathways. Olson Decl. Ex. 4, 50-54, 79-80, 85-87, 100-101 (Speth Report); Stiglitz Decl. ¶¶10-11, Ex. 1, ¶¶44-50; *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) ("When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."); Williams Decl. ¶23; Jacobson Decl. ¶¶7-13 (describing how transitioning to 100% renewable energy will cost less than the current fossil fuel-based energy system).

Beyond their failures to mitigate dangerous climate change, Defendants continue to affirmatively double-down on the use of fossil fuels. Olson Decl. Ex 4, 26-28, 29-31, 41-46, 54-67, 75-80, 87-95, 101-111 (Speth Report); Stiglitz Decl. ¶¶8-9, 11-12, Ex. 1, ¶¶51-52; Erickson Decl. ¶¶10-16. The U.S. is among the world's largest producers of fossil fuels, and is the world's single largest producer of both oil and gas. *Id.* ¶9. A staggering amount of GHG emissions is caused by Defendants' leasing of federal public lands for fossil fuel extraction and production. *Id.* ¶¶10-11,12 (GHG emissions from fossil fuels produced on federal lands and waters in

2014 were 1,279 million metric tons of CO_2, and 23% of total national CO_2 emissions). From 2008 through 2017, U.S. petroleum and natural gas production increased by nearly 60%. *Id.* ¶13. Since 2017, Defendants have opened vast areas of federal lands and waters for fossil fuel exploration and production. *Id.* ¶¶14, 15 ("The United States is expanding oil and gas extraction on a scale at least four times faster and greater than any other nation and is currently on track to account for 60% of global growth in oil and gas production. If this trajectory is maintained, drilling into new U.S. oil and gas reserves is projected to unlock the equivalent of the lifetime cumulative CO_2 emissions of nearly 1,000 coal-fired power plants."). Presently, Defendants have "plans to allow new offshore oil and gas drilling in virtually all (98%) of U.S. coastal waters during 2019-2024." *Id.* ¶14. Defendants are also poised to lease even more federal public lands for fossil fuel extraction and permit upwards of 60 new oil and gas pipelines, 32 liquefied natural gas and coal terminals, and one deepwater port oil export facility as part of the national fossil fuel energy system. *Id.* ¶16,18.

Defendants' present conduct recklessly disregards the substantial risk of harm to Plaintiffs and the Nation. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994) ("acting or failing to act with deliberate indifference to a substantial risk of serious harm . . . is the equivalent of recklessly disregarding that risk."); Trenberth Decl. ¶13 (calling Defendants' actions "extremely reckless"); Erickson Decl. ¶15 ("It is

my opinion that expanding U.S. fossil fuel extraction is a reckless course of conduct."); Hansen Decl. ¶82; Stiglitz Decl. Ex. 1, ¶¶9, 40; Olson Decl. Ex. 4, 68 (Speth Report). Plaintiffs are thus likely to succeed and, at a minimum, have raised "serious questions," on the merits of their state-created danger claim. *Alliance for the Wild Rockies*, 632 F.3d at 1135.

VII. THE BALANCING OF EQUITIES FAVORS AN INJUNCTION

Plaintiffs are being irreparably harmed *today* by the accelerating increase in U.S. GHG emissions caused in significant part by Defendants' conduct and because Plaintiffs' ability to seek a full remedy in their case is quickly slipping away. In contrast, Defendants will suffer minimal harm because the injunction merely puts a temporary pause on components of an unconstitutional energy system. *See* Stiglitz Decl.¶27 ("there would be no harm imposed on our economy or society in any way (e.g., security or the environment) by a delay"); Gunn Decl. ¶¶3, 4, 43, 45. "To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it." *Univ. of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999).

Courts regularly maintain the *status quo* while the government litigates the extent of its authority or legality of its conduct. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 (2018) (nationwide stay of the Waters of the

United States Rule); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (Controlled Substances Act); *see also Hills v. Gautreaux*, 425 U.S. 284 (1976) (approving permanent, affirmative structural injunction correcting federal agency's systemic due process violations). The balance of equities favors an injunction here "because the 'government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented.'" *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)); *Ariz. Dream Act Coal.*, 757 F.3d at 1069 (when a plaintiff establishes a constitutional violation, plaintiff also establishes that "the balance of equities favor a preliminary injunction."); *Melendres*, 695 F.3d at 1002 (the balance of equities favors "prevent[ing] the violation of a party's constitutional rights.").

An injunction will pose no real harm to employment, the economy, energy security, or the national treasury. Stiglitz Decl. ¶27. In fact, an injunction will prevent fiscal harm by temporarily halting public and private investments in new fossil fuel energy before the full risks of those collective investments and use of public resources has been evaluated in light of the constitutional holdings by the third branch of government. Stiglitz Decl. ¶¶13, 15, 19. Even if there were minimal financial repercussions, "[f]aced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of

hardships tips decidedly in plaintiffs' favor." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983); *Hernandez*, 872 F.3d at 995-96; *Golden Gate Rest. Ass'n*, 512 F.3d at 1126 (balance of hardships tips in favor of party seeking to prevent human suffering). Similarly, any purported claims of administrative burdens caused by the injunction are insufficient to outweigh the harms to Plaintiffs. *Hernandez*, 872 F.3d at 995. "[P]hysical and emotional suffering shown by plaintiffs . . . is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government." *Lopez*, 713 F.2d at 1437.

VIII. THIS PRELIMINARY INJUNCTION PROMOTES THE PUBLIC INTEREST

This injunction *advances* the public interest in several important ways. "Courts of equity have much greater latitude in granting injunctive relief 'in furtherance of the public interest . . . than when only private interests are involved.'" *City of Los Angeles*, 461 U.S. at 133 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937)).

This case involves important public interests that can only be served by an injunction in this case. *First*, "public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005); *Arizona Dream Act Coal.*, 757 F.3d at 1069 (the public interest favors an injunction when a plaintiff establishes "a likelihood that Defendants' policy violates the U.S.

Constitution"); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). *Second*, "[t]he 'general public has an interest in the health' of state residents." *Stormans, Inc.*, 586 F.3d at 1139 (citing *Golden Gate Rest. Ass'n*, 512 F.3d at 1126). This is particularly true with respect to the protection of children who are being physically and psychologically harmed by their government's conduct.[18] *See generally* Paulson Decl.; Van Susteren Decl. *Finally*, the injunction would serve the public interest by promoting economic and national security. Stiglitz Decl. ¶¶13-28 (discussing public economic benefit of injunction). One of our nation's leading retired military officers and experts on energy, climate, and security, Vice Admiral Lee Gunn, USN (Ret.), stated "climate change is *the* most serious national security threat facing our Nation today" and "poses unprecedented risks to our Nation's economic prosperity, public health and safety, and international stability." Gunn Decl. ¶2.

> The current status quo in our Nation with increasing greenhouse gas emissions and no plan to mitigate them is already causing irreparable harm to many parts of society in our Nation and promises irreparable injury to our Nation as a whole without comprehensive, coordinated action by the U.S. government to stabilize the climate system. … It is vital to the public interest and national security of our Nation that we

[18] The Supreme Court has consistently recognized the need to protect children from government action that harms them. *See*, *e.g.*, *In re Gault*, 387 U.S. 1, 13 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plyler v. Doe*, 457 U.S. 202, 220 (1982); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015); *Windsor v. U.S.*, 570 U.S. 744, 772 (2013).

> reverse the current status quo of the U.S. government's pursuance and promotion of a national fossil-fuel based energy system.
> . . .
> The U.S. Navy has long understood the threat climate change poses to our oceans and our national security. To ignore those threats today and to continue supporting the source of those threats, through further extraction and development of fossil fuels, is folly given the dangerous state of our climate system today and the abundant threats it poses to our national security.

Gunn Decl. ¶¶43-44; *see also id.* ¶¶3, 4, 12, 14, 16, 18, 23, 45; Stiglitz Decl. ¶9.

IX. THE SCOPE OF THIS PRELIMINARY INJUNCTION IS LIMITED

Finally, the scope of Plaintiffs' requested injunctive relief is limited "to the necessities of the particular case." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982). The requested injunctive relief seeks nothing more than to preserve during the pendency of the interlocutory appeal Plaintiffs' ability to obtain their ultimate remedy. This requested relief is confined to *new* fossil fuel activities on federal lands and in federal waters, and *new* fossil fuel infrastructure, the permitting and authorization of which is *directly* within the control of Defendants. The threat to Plaintiffs' rights posed by these new actions is significant, as it would lock-in additional CO_2 emissions and jeopardize the feasibility of the relief Plaintiffs will seek at trial. Given the systemic nature of Defendants' danger-creating conduct, enjoining actions that further entrench that system is the minimum effective relief that Plaintiffs could seek. Plaintiffs' requested relief thus achieves a "nice adjustment and reconciliation between the competing claims" in this case,

Weinberger, 456 U.S. at 312, and is minimally commensurate with the scale of the violations to Plaintiffs' Due Process rights. The relatively-narrow scope of Plaintiffs' requested injunctive relief, which is "no broader than [that] required by the precise facts" of this case, militates strongly in Plaintiffs' favor. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000).

X. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A BOND

When a party shows that it is likely to succeed on the merits, no bond should be required. *Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985), *amended by* 775 F.2d 998 (9th Cir. 1985). These Youth Plaintiffs do not have significant resources at their disposal to protect their constitutional rights. Furthermore, Plaintiffs are pursuing this litigation in the public interest. A court has the discretion to dispense with the security requirement where giving security would effectively deny access to judicial review. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (citation omitted); *Tenakee Springs v. Clough*, 915 F.2d 1308, 1314 n.4 (9th Cir. 1990). Under these circumstances, a bond should not be required.

XI. CONCLUSION

For the foregoing reasons, this Court should issue a preliminary injunction during the pendency of this interlocutory appeal. As the Supreme Court noted in the civil rights context, "[t]he reconciliation of competing values in a desegregation case

is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31 (1971). Based on the foregoing evidence, this Court has "the necessary predicate for the entry of a remedial order," structured to address the nature and scope of relief appropriate under the circumstances. *Hills v. Gautreaux*, 425 U.S. at 297 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). This Court has assumed full jurisdiction of this critical constitutional case and it is now in this Panel's hands to preserve Plaintiffs' rights, and minimize further irreparable harm to these young people, during the pendency of this interlocutory appeal.

DATED this 7th day of February, 2019, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson
JULIA A. OLSON

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Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

These cases were previously before this Court and each is a related case within the meaning of Circuit Rule 28-2.6: Defendants' four prior Petitions for Writs of Mandamus and a Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b). *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692); *In re United States*, 895 F.3d 1102 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776 (denied as moot Nov. 2, 2018); *In re United States*, No. 18-73014 (denied as moot Dec. 26, 2018); and *Juliana v. United States*, No. 18-80176 (granted petition for permission to appeal Dec. 26, 2018).

CERTIFICATE OF COMPLIANCE

I certify that this Motion is accompanied by a motion for leave to file an overlength brief pursuant to Circuit Rule 32-2 and contains 40 pages and 10,153 words, excluding the portions exempted by Federal Rule of Appellate Procedure 27(a)(2)(B),. The Motion's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

s/ Julia A. Olson
Julia A. Olson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 7, 2019.

I further certify that on this date, an electronic copy of the foregoing has been provided via e-mail to the following counsel for Defendants, who have consented in writing to such service pursuant to Federal Rule of Appellate Procedure 25(c)(2):

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