No. 18-36082

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs/Appellees,

v.

UNITED STATES, et al.,
Defendants/Appellants.

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

APPELLANTS' OPPOSITION TO MOTION TO STAY THE MANDATE

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INTRODUCTION

Plaintiffs' motion to stay issuance of the mandate while they petition for certiorari should be denied because it does not satisfy the requirements of Federal Rule of Appellate Procedure 41(d)(1).

The Court's mandate does not alter the status quo, so its issuance will not harm Plaintiffs. Even without a stay of the mandate—and in the exceedingly unlikely event that Supreme Court reverses this Court—then this Court could remand the matter to the district court for further proceedings consistent with any Supreme Court opinion. Plaintiffs fail to show any potential harm and do not carry their burden to show that they are entitled to relief.

Further, in dismissing Plaintiffs' case for lack of standing, this Court applied settled Circuit and Supreme Court precedent in accord with the decisions of sister circuits. Thus, Plaintiffs' petition for certiorari will present no substantial questions meriting Supreme Court review and the Court is unlikely to grant the petition, much less reverse this Court's judgment.

Therefore, Plaintiffs' motion should be denied and mandate should issue.

BACKGROUND

In 2015, Plaintiffs sued numerous Executive Branch defendants for allegedly violating Plaintiffs' rights under the Constitution and a purported federal public trust doctrine. Among other requests, they asked the district court to order the defendants

to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." 3 E.R. 614, ¶ 7.

The district court denied the government's motion to dismiss and later largely denied its motion for summary judgment. 1 E.R. 1-116. It eventually certified the case for interlocutory appeal, and this Court granted the government's petition for permission to appeal. 2 E.R. 117-23. In briefing and at oral argument, Plaintiffs made clear that they seek an order requiring the Executive Branch to prepare a remedial plan to reverse climate change, with ongoing judicial oversight of the government's implementation of and compliance with the plan.

In January 2020, this Court held that Plaintiffs had plausibly alleged the first two prongs of standing but that no Article III court had authority to order the relief that they requested. Opinion at 18-29.[1] It remanded the case to the district court with instructions to dismiss for lack of Article III standing. *Id.* at 32. Plaintiffs petitioned for rehearing en banc and the Court denied their petition on February 10, 2021. DktEntry 200. Now, Plaintiffs have moved for a stay of the mandate while they petition for certiorari.

ARGUMENT

A motion to stay the mandate pending a petition for certiorari "must show that the petition would present a substantial question and that there is good cause for a

[1] One judge would have held that Plaintiffs had standing. *Id.* at 32-64.

stay." Fed. R. App. P. 41(d)(1). The movant thus bears the burden to "demonstrate (1) a reasonable probability that th[e] Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted). Plaintiffs' motion should be denied because it satisfies no part of that test.

I. Plaintiffs will not suffer irreparable harm without a stay.

Because issuance of this Court's mandate will not alter the status quo and does not require compliance with any order, Plaintiffs cannot show that a stay is necessary to prevent irreparable harm. *See Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, C.J., in chambers) (explaining that "maintenance of the status quo is an important consideration in granting a stay"). Plaintiffs' assertions that they will be irreparably harmed because their case will be dismissed and they will lose the "assistance of the court-sponsored programs of the Ninth Circuit and the district court," Motion at 19, miss the mark.

Dismissal of Plaintiffs' case is not an irreparable harm because this Court could reverse that dismissal if the Supreme Court were to grant Plaintiffs' petition for certiorari and they were to prevail. Keeping Plaintiffs' case on the docket provides them with no tangible benefit, and dismissing the case creates no tangible harm.

Dismissal of the case at this juncture would not prevent Plaintiffs from obtaining relief if the Supreme Court grants certiorari and eventually rules in their favor. Dismissal will not affect the Supreme Court's jurisdiction, *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 467 (1947), and if the Court agrees with Plaintiffs, it will reverse and remand for further proceedings. In other words, Plaintiffs' case would be reinstated. Thus, any harms that Plaintiffs might suffer from dismissal are not irreparable.

Further, if Plaintiffs were correct that an order from this Court directing that a case be dismissed or otherwise ended is an irreparable harm in itself, then the majority of plaintiffs seeking Supreme Court review would automatically be able to show irreparable harm. That cannot be. After all, a "motion to stay . . . the mandate will not be routinely granted." Circuit Advisory Committee Note to Ninth Circuit Rule 41-1, *accord* Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3987.1 (5th ed.) ("[T]he grant of a motion to stay the mandate in these circumstances is far from a foregone conclusion.").

Finally, losing the benefit of court-sponsored mediation services is not an irreparable harm. Cases are often settled without the benefit of court mediators, and there is simply no reason to grant Plaintiffs' motion only to preserve their access to convenient services that they might someday want to use. If Plaintiffs were right, then any party petitioning for certiorari could cite the existence of this Court's

mediation services as a basis for staying the mandate, which again would provide a routine basis for a stay, contrary to this Court's instruction. Further, issuance of the mandate is no impediment to settlement. As long as a case is pending—even if it is pending in the Supreme Court—it can be settled.

Because Plaintiffs have not carried their burden to show that a stay of the mandate is necessary to prevent irreparable harm, their motion should be denied.

II. This case presents no substantial questions.

Plaintiffs' petition for certiorari will present neither a question likely to merit certiorari nor a question likely to garner five votes in favor of reversal. Their motion fails for these reasons too. *See King*, 567 U.S. at 1302.

A. The Supreme Court is unlikely to grant certiorari.

Supreme Court Rule 10(a) sets forth the considerations governing review of a decision of a U.S. Court of Appeals. It specifies that a "petition for a writ of certiorari will be granted only for compelling reasons," including to resolve a conflict on a matter of law between federal courts of appeals, or to correct a decision that "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of [the] Court's supervisory power." Supr. Ct. R. 10(a). Plaintiffs can identify no compelling reason for the Supreme Court to review this Court's decision, so their motion should be denied. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718,

719 (9th Cir. 1997) (denying motion to stay the mandate where movants could not satisfy the "criteria employed by the Supreme Court in granting certiorari").

This Court's narrow holding that Plaintiffs have not satisfied the redressability requirement of Article III standing created no circuit splits and was in full accord with Supreme Court precedent. The Court simply recognized that the remedial relief that Plaintiffs seek—a "comprehensive scheme to decrease fossil fuel emissions and combat climate change"—is "beyond the power of an Article III court to order, design, supervise, or implement." Opinion at 25. The Court correctly explained that federal courts "cannot substitute [their] own assessment for the Executive's [or Legislature's] predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.' " *Id.* at 26, quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018).

To be sure, Plaintiffs' case touches on an exceptionally important public policy issue. *See* Motion at 14. Indeed, on January 27, 2021, President Biden declared a national policy "that climate considerations shall be an essential element of United States foreign policy and national security." Exec. Order No. 14,008. Still, this case implicates no *legal* issue meriting further review. The Court properly recognized that the "central issue" before it was an ordinary legal question—whether "an Article III court can provide the plaintiffs" with an "order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down

excess atmospheric CO2.' " Opinion at 11. The Court's decision will not, as Plaintiffs assert, "debilitate Article III courts in deciding constitutional cases," Motion at 7; instead, it merely reaffirms the longstanding principle that plaintiffs seeking to vindicate constitutional claims (or any claims in an Article III court, for that matter) must first establish that their harms can be redressed by that court. The Court's ruling bars only this case and others seeking sweeping relief that no federal court can provide.[2]

B. Even if the Court were to grant certiorari, it is unlikely to reverse.

Plaintiffs contend that the Court made four "significant errors of law" that merit reversal, Motion at 7, but the Court did not.

First, the Court did not "err[] in finding declaratory relief insufficient for standing." *Id.* at 8. Instead, it correctly held that declaratory relief would not redress the specific injuries that it had held cognizable. Opinion at 22. The Court explained that a "declaration, although undoubtedly likely to benefit the plaintiffs

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[2] Plaintiffs' suit is one of several attempting to hold the federal government responsible for climate change. The other suits were properly dismissed for lack of standing. *See, e.g.*, *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250 (E.D. Pa. 2019) (holding that plaintiffs satisfied no prong of the standing analysis); *Animal Legal Defense Fund v. United States*, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019) (holding that plaintiffs failed to identify a cognizable injury and failed to state a claim), *appeal docketed*, No. 19-35708 (9th Cir. Aug. 21, 2019); *see also Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014) (affirming dismissal for lack of federal question jurisdiction).

psychologically, is unlikely by itself to remediate their alleged injuries absent further court action." *Id.* Plaintiffs assert that a declaratory judgment would "resolve the controversy of whether the government's decades-long, and ongoing conduct" amounts to "a constitutional violation." Motion at 8. But "resolv[ing] the controversy" solely by answering the legal question is just another way of saying that Plaintiffs seek an advisory opinion. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The Court properly refused to issue such an opinion.

In any event, Plaintiffs have forfeited their argument that the Court should have considered declaratory relief an adequate stand-alone remedy. Before the panel, Plaintiffs consistently argued that that declaratory relief would be only a "partial" remedy, Answering Brief at 24 n.15, and that a "wholesale structural remedy," *id.* at 27, would be necessary to redress their injuries. *See* Oral Argument 39:00-40:00; *see also* Answering Brief at 26 & n.17. They changed their tack in their petition for en banc review, arguing there for the first time that declaratory relief would in fact be sufficient. Just as Plaintiffs' new argument did not belong in their petition for en banc review, *see Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009), it does not belong in any forthcoming petition for certiorari and is not a ground for reversal, *see United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers) (explaining that Court is unlikely to grant certiorari

or reverse when it would have to "disregard a series of forfeitures" to reach the petitioner's arguments).

Second, the Court did not "reject[] partial redress of the children's injuries as insufficient for standing." Motion at 11. Instead, it expressed doubt that Plaintiffs' harms are likely to be redressable because even an extreme remedy would not provide meaningful relief. Opinion at 22-25. It then proceeded to assume that even *if* Plaintiffs' requested remedy could redress their harms, Plaintiffs could "not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court." *Id.* at 25. Thus, Plaintiffs' characterization of the Court's analysis is simply incorrect.

Third, the Court did not err in distinguishing Plaintiffs' requested relief—a "remedial plan of Defendants' own devising," Motion at 17—from "decades of remedial plans . . . ordered and overseen" by courts in the past, *id.* at 16. Instead, it rightly recognized that, unlike the remedial plans cited by Plaintiffs, the remedial plan that they demanded "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." Opinion at 25. The Court properly held that it lacked the authority to order such unprecedented relief. *Id.* at 29.

Fourth and finally, the Court did not "create[] a new redressability test infused with the political question analysis" by improperly "extrapolating from" *Rucho v.*

Common Cause, 139 S. Ct. 2484 (2019), Motion at 17-18. Instead, the Court properly recognized that its redressability analysis touched on the same separation-of-powers principles discussed in *Rucho*. There, voters in Maryland and North Carolina challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. 139 S. Ct. at 2491. But the Supreme Court ultimately declined to reach the merits of their claims, holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. Here, as the Court correctly put it, "*Rucho* reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority." Opinion at 28, quoting *Rucho*, 139 S. Ct. at 2506-07, 2508.

In sum, Plaintiffs have not demonstrated that the Supreme Court is likely to grant their petition for certiorari or to reverse this Court's judgment. Their motion to stay issuance of the mandate should be denied for those reasons as well.

CONCLUSION

For the foregoing reasons, the motion to stay issuance of the mandate should be denied.

Dated: March 1, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing opposition complies with the length limits permitted by Ninth Circuit Rules 27-1 and 32-3, which together establish a word-limit of 5,600 words. This motion is 2,395 words in length, and the type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

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