No. _____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE DUARTE NURSERY, INC., and JOHN DUARTE

DUARTE NURSERY, INC.; and JOHN DUARTE,
Plaintiffs & Counterclaim-Defendants–Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES ARMY CORPS OF ENGINEERS; and UNITED STATES OF AMERICA,
Defendants & Counterclaim-Plaintiffs–Real Parties in Interest.

From the United States District Court
Eastern District of California
Case No. 2:13-cv-02095-KJM-DB

PETITION FOR WRIT OF MANDAMUS

ANTHONY L. FRANÇOIS
JEFFREY W. MCCOY
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org
E-mail: jwm@pacificlegal.org
Attorneys for Plaintiffs/Counterclaim-Defendants - Petitioners Duarte Nursery, Inc., and John Duarte

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Duarte Nursery, Inc., a corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated: July 7, 2017.

By: /s/ Anthony L. François

ANTHONLY L. FRANÇOIS
JEFFREY W. MCCOY
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org
E-mail: jwm@pacificlegal.org

Attorneys for Plaintiffs/Counterclaim-Defendants - Petitioners Duarte Nursery, Inc., and John Duarte

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Duarte Nursery, Inc., and its President, John Duarte (collectively "Duarte"), respectfully petition this Court for a writ of mandamus directed to the United States District Court for the Eastern District of California, directing the District Court to stay proceedings in *Duarte Nursery v. United States Army Corps of Engineers*, No. 2:13-cv-02095-KJM-DB, 2017 WL 2721988 (E.D. Cal. June 23, 2017), which is set for a penalty trial starting August 15, 2017, until this Court issues its mandate in *United States v. Robertson*, Ninth Circuit Case No. 16-30178, set for oral argument in this Court on August 29, 2017, in which this Court is addressing a controlling issue of law applicable to the trial below.

Mandamus is proper because the District Court's denial of Duarte's stay motion is effectively unreviewable on appeal, Duarte will be prejudiced in an unremediable way by having to proceed to trial when a controlling legal issue is in question and this Court will decide the question shortly, the District Court clearly erred in applying inapplicable legal standards to Duarte's motion, and the controlling legal issue is one of first impression in the Ninth Circuit.

Duarte faces claims by the Government that shallowly plowing previously plowed farmland to plant wheat violated the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (CWA), and a demand from the United States for a civil penalty of $2.8 million,

plus tens of millions more worth of injunctive relief.[1] Central to this case is the scope of "navigable waters" under the CWA that are purportedly present on the farmland that Duarte plowed.[2] That issue was most recently addressed by the Supreme Court of the United States in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, Justice Scalia issued a four-justice plurality decision, and Justice Kennedy concurred in the judgment, based on a broader reading of the CWA. The plurality and Justice Kennedy applied different tests for determining the jurisdictional scope of the CWA. Following *Rapanos*, this Court held that Justice Kennedy's opinion, articulating what has become known as the "significant nexus" test, was the controlling opinion in *Rapanos. N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007). In this case, the District Court, following *City of Healdsburg*, applied Justice Kennedy's "significant nexus" test on its way to granting summary judgment for the United States on Duarte's liability for plowing.

[1] The CWA generally prohibits the "discharge" of a "pollutant" by any person from a "point source" into "navigable waters" without a permit. Despite regulations prescribing that plowing to produce a crop is never a "discharge," 33 C.F.R. § 323.4(a)(1)(iii)(D), the United States argues, and the District Court has agreed, that Duarte's plowing violated the Act.

[2] In *United States Army Corps of Engineers v. Hawkes Co.*, Justice Kennedy, concurring in the judgment, noted that "the reach and systemic consequences of the Clean Water Act remain a cause for concern," noted that the Act is notoriously unclear, and "the consequences to landowners even for inadvertent violations can be crushing." 136 S. Ct 1807, 1816 (2016) (Kennedy, J., concurring).

Recently, this Court, sitting en banc, clarified its approach to interpreting split decisions from the Supreme Court. *United States v. Davis*, 825 F.3d 1014, 1021 (9th Cir. 2016). The standard for interpreting split decisions was addressed by the Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977), and in *Davis*, this Court recognized that "[o]ur cases interpreting *Marks* have not been a model of clarity." 825 F.3d at 1021. Thus, in *Davis*, this Court took the opportunity to clarify and alter its approach to interpreting fractured decisions of the Supreme Court.

As a result of *Davis*, litigants have recently questioned the continued validity of this Court's prior decisions which interpret split Supreme Court decisions, including *City of Healdsburg*. Pending before this Court is *United States v. Robertson*, a criminal case involving alleged violations of the Clean Water Act. *Robertson* squarely presents the question of whether *United States v. Davis* undermines *City of Healdsburg*. In the words of the government's brief in the case:

> Robertson's case is the first in this Court to present the question of whether the government may continue to establish jurisdiction over "waters of the United States" using Justice Kennedy's concurring opinion in *Rapanos*, as this Court has held since *City of Healdsburg*, or whether *Davis* implicitly overruled *City of Healdsburg*, leaving this Court to consider how *Rapanos* applies in this Circuit.

United States Response Brief in *Robertson*, at 19; *Robertson*, Docket No. 32 at 29. *Robertson* is scheduled for oral argument on August 29, 2017. *Robertson*, Docket No. 57.

Below in Duarte's case, the United States moved for summary judgment as to jurisdiction under the Act on the sole ground that portions of Duarte's property are "navigable waters" because they have a "significant nexus" with downstream navigable-in-fact waters, including the Sacramento River.[3] The District Court in turn relied exclusively on *City of Healdsburg* to grant the United States' motion for summary judgment and to rule that Duarte was liable under the Clean Water Act. The court set a trial on the remaining issues in the case, including remedies under the Act. A controlling issue in the pending trial is how many acres of "navigable waters" Duarte plowed, and this question turns on what the proper legal test for identifying such waters is; the *Robertson* case will provide an answer to that question.

On April 18, 2017, Duarte requested a brief stay of the trial until this Court issues its decision in *United States v. Robertson*. Duarte argued that they would be prejudiced by expending the time and resources on a trial while a controlling legal issue in that trial is in question and will be determined, without significant delay, by the outcome of *Robertson*. The government failed to prove that there is any ongoing harm that would need to be immediately resolved or that would be irreparable in the event proceedings were stayed.

[3] The United States' summary judgment motion did not assert that Duarte plowed in any relatively permanent or continuously flowing waters, facts which would have to be established to satisfy the plurality opinion in *Rapanos*.

On June 23rd, the District Court entered an order denying Duarte's motion. Order, ECF 289.[4] Despite the lack of evidence to support the government's arguments of harm, the district court took the government's claims at face value and determined that the government would be prejudiced in the event of the stay. Furthermore, the District Court applied an incorrect and more stringent standard in resolving Duarte's motion to stay and treated Duarte's motion as a motion to stay judgment pending appeal. As a result, Duarte seeks a writ of mandamus from this Court.

In *Bauman v. United States District Court*, this Court laid out five factors this Court considers when issuing a writ of mandamus. 557 F.2d 650 (9th Cir. 1977) (whether the petitioner has no other means to obtain the desired relief; whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; whether the district court order is clearly erroneous as a matter of law; whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; whether the district court's order raises new and important problems or issues of first impression). Satisfaction of all five factors, however, is not required and this Court often takes a flexible approach when applying them. *Admiral Ins. Co. v. United States Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1491 (9th Cir. 1989).

[4] All ECF references are to the District Court docket below. *Duarte Nursery, Inc. v. United States Army Corps of Engineers*, No. 2:13-cv-02095-KJM-DB, 2017 WL 2721988 (E.D. Cal. June 23, 2017).

In fact, this Court has issued a writ ordering a district court to stay discovery proceedings even when the petitioner failed to show that the district court had clearly erred. *Medhekar v. United States Dist. Court for the N. Dist. of Cal.*, 99 F.3d 325, 326 (9th Cir. 1996).

As further demonstrated below, a writ of mandamus is appropriate and necessary to ensure judicial efficiency and avoid prejudice to Duarte. A brief stay of proceedings will ensure that the parties and court's time are not wasted, avoid prejudice to Duarte, and not result in any prejudice to the government. However, the District Court ignored these considerations and improperly applied irrelevant considerations in its analysis. Accordingly, Duarte now seeks relief from this Court.

RELIEF SOUGHT

Pursuant to 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21, Duarte respectfully requests this Court issue a writ of mandamus directing the District Court below to stay further proceedings until this Court issues its mandate in *United States v. Robertson*. Trial is scheduled to commence August 15, 2017.[5]

ISSUE PRESENTED

Whether supervisory mandamus is proper to direct a district court to stay trial proceedings when a controlling issue of law in the case will be decided shortly by

[5] Exhibits are to be exchanged July 14, and on July 31, the parties are to disclose witness order, exchange demonstrative exhibits, file their trial briefs, and the government is to provide expert witness direct testimony in the form of declarations.

this Court and, absent a stay, one of the parties will be greatly prejudiced, and where the district court clearly erred in the standard applied in denying the stay.

STATEMENT OF THE CASE[6]

In November and December of 2012, Duarte Nursery, through a contractor, plowed a 450 acre parcel of farmland near Red Bluff, California (the Property), and planted a winter wheat crop on it. The contractor plowed an average of 4 to 7 inches deep, and avoided several obvious water features on the property, but shallowly plowed through less-evident vernal pools and swales. An employee of the U.S. Army Corps of Engineers (Corps) drove past while the plowing was underway and determined that the plowing violated the Clean Water Act.

In February 2013, the Army Corps ordered Duarte to cease all work in any water of the United States on the Property. Duarte wrote the Corps in response, denying liability for the plowing, requesting a hearing and all available information on which the Corps' order was based, and offering to cooperate in further investigation once the agency provided the requested information. *See* Duarte Points and Authorities in Support of Motion for Summary Judgment on Due Process Claims, ECF 136-1 at 13-17, *and* Duarte Separate Statement of Undisputed Facts on

[6] The procedural history is provided in part to point out that this litigation has been pending for almost four years, which is necessary to properly balance the potential harms that would result or be avoided from a brief stay of proceedings.

Due Process Claim, ECF 136-2; Exhibit 36 (Duarte response to Corps cease and desist order) at ECF 116-5 (cited in ECF 136-2 at 4, fact #24).

Corps staff internally dismissed this letter as "a ranting fishing expedition," and then purged the investigation file to prevent disclosure under the Freedom of Information Act. ECF 15 (Deposition of Matthew Kelley) at 240:15 – 241:25, 244:8 – 246:4; Exhibit 37 at ECF 116-5. The Corps' official response to Duarte's letter provided almost none of the information Duarte had requested. The Corps withheld its entire investigation file, and provided no details on how the Corps claimed Duarte had violated the CWA. The Corps made no response to Duarte's specific requests as to the scope of the cease and desist order, and did not offer or provide a hearing. Exhibit 38 at ECF 116-6.

In October 2013, Duarte sued the Corps for violating Duarte's procedural due process rights in the U.S. District Court for the Eastern District of California. On May 7, 2014, the United States filed an answer and a civil enforcement action against Duarte, as a counterclaim in Duarte's pending suit against the Corps. Second Amended Complaint, ¶¶ 81-85, ECF 90 at 14-15.

During discovery, Duarte obtained evidence to allege the facts required to support a First Amendment retaliation claim against the Corps and the United States. On July 7, 2015, Duarte moved to amend. ECF 80. On September 2, 2015, the

District Court granted leave to amend, finding that "[t]he claim is [] legally sufficient and amendment would not be futile." ECF 89 at 6:17-18.

On October 23, 2015, both Duarte and the government moved for summary judgment on whether Duarte's plowing violated the CWA. ECF 127 (Duarte motion); ECF 139 (government's motion). The government's motion relied on the "significant nexus" test from Justice Kennedy's lone concurrence in *Rapanos* to argue that the Property contains "navigable waters." ECF 139-1 at 17-19.

On June 10, 2016, the District Court granted the government summary judgment on liability under the CWA.[7] ECF 195. The court's finding as to the presence of "navigable waters" was that the United States had proven that wetlands on the Property are waters of the United States, relying exclusively on Justice Kennedy's "significant nexus test" set forth in *Rapanos*, per this Court's decision in *City of Healdsburg*. ECF 195 at 29-31.

On June 13, 2016, Duarte moved for reconsideration, and in the alternative for certification of the liability order for interlocutory appeal. ECF 196. Immediately after that motion was filed, this Court issued its en banc decision in *Davis*. Duarte

[7] The District Court also granted the government summary judgment on Duarte's Due Process claims, and dismissed Duarte's First Amendment retaliation claim on the ground of sovereign immunity. Duarte filed a notice of appeal from the dismissal of their retaliation claim, on the ground that it was a collateral order. This Court granted the United States' motion to dismiss that appeal. *See Duarte Nursery, Inc. and John Duarte v. United States Army Corps of Engineers, et al.*, Ninth Circuit Case No. 16-16325.

filed the *Davis* case with the District Court as supplemental authority in support of its pending motions to reconsider or certify, on the ground that it undermined *City of Healdsburg*. ECF 198.

On August 16, 2016, the District Court issued an order determining that this case is related to the more recently filed action of *United States v. LaPant,* No. 2:16-cv-01498-KJM-DB, which involves similar allegations by the United States against owners and operators of farmland next door to the Duarte Nursery Property, occurring during roughly the same time period. ECF 246.

The District Court took Duarte's motions to reconsider and certify under submission without oral argument on June 27, 2016. ECF 205. On August 30, 2016, a minute order issued, stating the court's preparation to "grant a certificate of interlocutory appeal on the question of whether the 'significant nexus test' articulated in the *Rapanos* concurrence remains applicable." ECF 257. The same minute order directed the parties to confer and be prepared to discuss, at the September 2, 2016, hearing, "whether the entire case should be stayed pending appeal of the significant nexus question." ECF 257.

At the September 2, 2016, hearing, counsel for the United States agreed that if the "significant nexus question" were certified for interlocutory appeal, then a stay of all District Court proceedings was appropriate until the issuance of the Ninth Circuit's mandate in the interlocutory appeal. ECF 263 at 15:9-17.

On March 24, 2017, the District Court denied the motion to certify the June 10, 2016, Order for interlocutory appeal. ECF 267. The court ruled that the "significant nexus test" issue did not meet the second prong of the applicable test for certification, because the Court of Appeals had spoken in *City of Healdsburg* on the applicability of the significant nexus test, and it was speculative how the Ninth Circuit would apply *Davis* to *City of Healdsburg*. ECF 267 at 15-16. On March 30, 2017, the District Court set this case for trial of penalty issues for the week of August 14, 2017. ECF 268.[8] The United States' proposed judgment seeks $2.8 million in civil penalties, the purchase of at least 66 acres of off-site wetland mitigation credits, and certain restoration work on the Property. ECF 278-1.

Shortly following the March 24, 2017, ruling, Duarte's counsel became aware of *Robertson*. On April 18, 2017, Duarte filed a motion to stay proceedings until this Court issues its decision in *Robertson*. On May 19, 2017, the District Court heard oral argument on Duarte's motion to stay, along with a similar motion to stay filed in *United States v. Lapant*. At the hearing, the District Court indicated that it would deny the motion and issue an order to that effect. Reporter's Transcript, Motions to Stay (Friday, May 19, 2017), ECF 279 at 37 (hereinafter "Reporter's Transcript").[9]

[8] The District Court has subsequently confirmed that trial, on Clean Water Act civil penalties and injunctive relief against Duarte, will commence August 15, 2017, and continue through at least August 31, 2017.

[9] A copy of the Reporter's Transcript is included, *infra*.

The court indicated that the time for filing a petition for a writ would run from the date the order was issued. *Id*. at 38. The District Court entered its motion denying the stay on June 23, 2017. Order, ECF 289.[10]

In this Petition, Duarte respectfully requests this Court issue a writ of mandamus directing the District Court to stay proceedings below until the Ninth Circuit issues its mandate in *United States v. Robertson*.

LEGAL STANDARD

In deciding whether to issue a writ, this Court considers:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression. Related considerations include: whether the injury alleged by petitioners, although not correctable on appeal, is the kind that justifies invocation of our mandamus authority; whether the petition presents an issue of law which may repeatedly evade appellate review; and whether there are other compelling factors relating to the efficient and orderly administration of the district courts.

In re Cement Antitrust Litig. (MDL No. 296), 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Ariz. v. United States Dist. Court for Dist. of Ariz.*, 459 U.S. 1191, (1983), and *supplemented sub nom. State of Ariz. v. United States Dist. Court for Dist. of Ariz.*, 709 F.2d 521 (9th Cir. 1983) (internal citations omitted).

[10] A copy of the Order is included, *infra*.

"Satisfaction of all five factors is not required." *Admiral Ins. Co.*, 881 F.2d at 1491. Instead, the factors "serve as guidelines, a point of departure for [the] analysis of the propriety of mandamus relief." *Id.* The application of the *Bauman* factors are especially flexible in supervisory mandamus cases, *i.e.* those cases which implicate the duty of appellate courts to exercise supervisory control of the district courts in order to insure proper judicial administration. *In re Cement Antitrust Litig.*, 688 F.2d at 1301, 1304-05.

When a case, like the instant case, implicates that supervisory duty, "[c]ertain concepts relat[ed] to the traditional use of mandamus are not necessarily applicable . . . or, at the least, are applied differently." *In re Cement Antitrust Litig.*, 688 F.2d at 1301. This different approach is appropriate because "in supervisory mandamus cases involving questions of law of major importance to the [] district courts, the purpose of our review . . . is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner." *Id.* at 1307.

This flexible approach even applies to the third *Bauman* factor of whether the district court's order is clearly erroneous as a matter of law. While an absence of clear error ordinarily defeats a petition for writ of mandamus, in supervisory mandamus cases, there is "no legitimate reason for refraining from exercising our supervisory authority where we can determine that an error has been made but

cannot, for whatever reason, characterize the error as 'clearly' erroneous." *In re Cement Antitrust Litig.*, 688 F.2d at 1307; *see also San Jose Mercury News, Inc. v. United States District Court*, 187 F.3d 1096, 1100 (9th Cir. 1999) (when a mandamus petition "raises an important issue of first impression [] a petitioner need show only ordinary (as opposed to clear) error." (internal quotations omitted)). Accordingly, when applying the *Bauman* factor, this Court must take a flexible approach to the factors.

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of mandamus because, in considering the important issue of first impression whether *Davis* undermines *City of Healdsburg*, the District Court erred in denying Duarte's motion to stay proceedings. The District Court's error has caused, and continues to cause, significant prejudice to Duarte. On the other hand, a stay would cause no prejudice to the United States or to the court. In fact, Duarte requests only a brief stay until this Court resolves, in another pending case that will be argued 53 days from now, an issue of first impression that may be dispositive to this case. Therefore, a writ directing the district court to stay proceedings would ensure efficient use of judicial resources in this and other related cases, prevent further prejudice to Duarte, and not prejudice any other party.

I

DUARTE HAS NO OTHER ADEQUATE MEANS AND, ABSENT A WRIT, WILL BE PREJUDICED IN A WAY NOT CORRECTABLE ON APPEAL

Duarte satisfies the first *Bauman* factor because the District Court's order denying Duarte's motion to stay is not immediately appealable. The refusal to stay litigation cannot be certified under Fed. R. Civ. P. 54(b) or 28 U.S.C. § 1292(b). *Medhekar*, 99 F.3d at 326 ("Petitioners have satisfied the first *Bauman* factor, in that the district court's published opinion denying their motion to stay the disclosure requirements under the Act is not immediately appealable."). Thus, mandamus is the only avenue for review of the District Court's order denying Duarte's motion to stay. *Id*.

Duarte also satisfies the second *Bauman* factor because the lack of a stay immensely prejudices Duarte. If Duarte is denied a stay, they would suffer the inequity of having to go through a penalty trial over the United States' demanded $2.8 million civil penalty, while the underlying rule of decision on liability is both in question and being resolved by this Court. *Clayton v. Synchrony Bank*, 219 F. Supp. 3d 1006, 1010 (E.D. Cal. 2016) (stay granted pending D.C. Circuit resolution of the definition of key term in case); *Wessel v. Sisto*, No. CIV S-08-1082 WBS KJM P, 2009 WL 2949031 (E.D. Cal. Sept. 14, 2009) (habeas proceeding stayed pending Ninth Circuit en banc rehearing of key precedent). This inequity more than

outweighs any minor harm to the United States that might result from a brief stay pending resolution of this controlling legal issue in the *Robertson* case at the Ninth Circuit. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268-69 (9th Cir. 1962) (delay in ability to collect damages, where delay would further resolution of key issues in case, favors grant of stay).

II

THE DISTRICT COURT CLEARLY ERRED IN DENYING DUARTE'S MOTION TO STAY

As to the third *Bauman* factor, this Court should issue a writ of mandamus because the District Court clearly erred in denying Duarte's motion to stay. The District Court failed to properly analyze the considerations that weigh in favor of granting a stay, and denied the stay despite the injuries to Duarte and the harms to judicial time and resources. Furthermore, the District Court incorrectly applied additional, and more stringent, standards that were not applicable to Duarte's motion.

In ruling on a motion to stay, a district court must exercise its discretion soundly, and "the competing interests which will be affected by the granting or refusal to grant a stay *must* be weighed." *CMAX*, 300 F.2d at 268 (emphasis added). The interests courts in this Circuit consider in reviewing an order to stay proceedings in the trial court are (1) the possible damage that may result from granting the stay,

(2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)).

A stay of trial court proceedings pending the resolution of a controlling issue of law is appropriate. *Clayton*, 219 F. Supp. 3d 1006 (stay granted pending the D.C. Circuit's resolution of the definition of "automated telephone dialing system" under 47 U.S.C. § 227(a)(1)). *See also Wessel*, 2009 WL 2949031 (habeas proceeding stayed pending Ninth Circuit en banc rehearing of key case); *Morgan Tire of Sacramento, Inc. v. Goodyear Tire & Rubber Co.*, No. 2:15-CV-00133-KJM-AC, 2015 WL 3623369 (E.D. Cal. June 9, 2015) (granting unopposed stay pending Ninth Circuit review by petition for writ of mandamus from order transferring case); *Dameron Hosp. Ass' n v. State Farm Mut. Auto. Ins. Co.*, No. 2:12-cv-02246-KJM-AC, 2013 WL 5718886 (E.D. Cal. Oct. 15, 2013) (stay granted while legal issue of first impression in state-law-based claim pending in California Court of Appeal); *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2013 WL 411474 (E.D. Cal. Jan. 29, 2013) (granting jointly requested stay pending appeal of preliminary injunction ruling in Ninth Circuit).

A. The District Court Did Not Properly Balance the Harms To Duarte with the Lack of Harm to the Government

In purportedly weighing the balance of harms that would result from a stay, the District Court misanalysed the relevant factors and reached conclusions that were not supported by evidence. As a result, the court's analysis improperly undervalued the prejudice to Duarte and greatly exaggerated the potential problems with granting a stay. By failing to properly weigh the interests at issue, the District Court erred in denying Duarte's motion for stay.

In reaching its conclusions regarding the balance of harm, the District Court primarily relied on a misinterpretation of this Court's decision in *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005). Order, ECF 289 at 4. The District Court concluded that having to defend a suit did not constitute prejudice. *Id.* (citing *Lockyer*, 398 F.3d at 1112). In *Lockyer*, however, this Court actually stated that "being required to defend a suit; *without more*," does not constitute hardship or inequity. *Lockyer*, 398 F.3d at 1112 (emphasis added). This is not a case of Duarte merely having to defend a suit, the prejudice is increased because Duarte must defend a suit *while the controlling issue of law is in doubt*. Courts routinely stay litigation while controlling issues of law are in doubt. *Wessel*, 2009 WL 2949031; *Morgan Tire of Sacramento*, 2015 WL 3623369; *Dameron Hosp. Ass'n*, 2013 WL 5718886; *Pickup*, 2013 WL 411474.

Furthermore, the *Lockyer* court concluded that having to defend a suit did not constitute hardship to one party in that case because there was more than "just a 'fair possibility' of harm" to the other party. 398 F.3d at 1112. Nothing in the opinion strictly states that having to defend a suit can never constitute sufficient prejudice to support a motion to stay. Instead, the weight of the harm absent a stay will depend on the potential prejudice to the party opposing the stay. *See id.*

Here, unlike in *Lockyer*, the potential prejudice to the government is de minimis. The remaining issues to be tried include only the amount, if any, of a civil penalty and any other injunctive relief sought by the government, subject to the equitable factors to be considered under the CWA. A delay in an award of a civil penalty is generally not considered "possible damage" when reviewing a motion to stay. *CMAX*, 300 F.2d at 268; *see also Lockyer*, 398 F.3d at 1110-11 (analyzing cases).

As to the government's requested injunctive relief, there is no evidence that a stay will prevent resolution of any ongoing and future harm. *Cf. Lockyer*, 398 F.3d at 1111-12 (stay inappropriate where suit seeks to enjoin *ongoing and future* harm). The Corps has never identified any time sensitive corrective measures required by Duarte Nursery's plowing, so delaying the penalty trial would not result in any purported damage to any waters of the United States. In fact, the Army Corps ordered Duarte to "cease all work" in any waters of the United States back in

February of 2013, and has never modified that order during these proceedings. Duarte has complied with the cease and desist order for the past four years and four months.

Moreover, if there were any time-sensitive actions that the government thought Duarte's plowing required, presumably the government would have identified them sometime during the 52 months since it began this enforcement. Instead, there is no ongoing or threatened action which the United States claims violates the Clean Water Act. ECF 195 at 11 (cease and desist letter directed towards plowing in November and December of 2012). In fact, at the hearing on Duarte's motion to stay, the government conceded that the ability to implement corrective measures will not be affected by any delay in the proceedings. Reporter's Transcript, ECF 279 at 10 ("I think [the ability to fully restore] will be the same now as it is a year from now . . . ."). Additionally, the government recognized that "it's true that [Duarte and Duarte Nursery] haven't engaged in further activities that would be violations." *Id*. at 9. Therefore, a stay of the remaining trial proceedings would not result in any damage to the government's purported interests. And, the government is not seeking any relief that remedies ongoing or future harm.

Further, the government previously tacitly conceded that a stay of proceedings would not prejudice its interest. During a September 2, 2016, hearing at the District Court, counsel for the United States conceded that if the District Court were to certify

the significant nexus issue for interlocutory appeal based on the *Davis* decision, a stay of all proceedings in the District Court would be appropriate until this Court issued its mandate. ECF 263 at 15:9-17 (transcript of hearing). Although the District Court chose not to certify the question, the government's position regarding a stay last September demonstrates the lack of government harm implicated by a stay.

Despite these previous statements from the government, the District Court still determined that the balance of harms weighed in its favor. *See* Order, ECF at 4. The District Court based its decision solely on the fact that the United States "contended ongoing and future harm," without analyzing or even identifying any evidence to support that contention. *Id*. The court did not actually determine that there is "ongoing and future harm," and based its order on statements by the government that are contradicted by earlier statements.

A review of the record demonstrates that the government will not suffer any prejudice in the event of the stay. The purported harm alleged by the government has already happened, and the injunctive relief requested can happen at any time in the future. The government's actions and previous admissions demonstrate that fact. ECF 263 at 15:9-17. The government did not request a preliminary injunction to address any purported ongoing harms at the Property, and had previously indicated that a stay of its requested relief pending appeal would be appropriate. Therefore, it

is clear that the balance of harms substantially weighs in Duarte's favor, and the District Court erred in its analysis.

B. The District Court Did Not Properly Consider Judicial Resources That Would Be Preserved By a Stay

Furthermore, in denying Duarte's motion to stay, the District Court erred in evaluating the judicial resources implicated by a stay. Without a stay, the parties' and the court's valuable time and resources may be wasted. Staying proceedings will ensure that the court's time is not wasted and that it will not have to conduct further duplicative proceedings resulting from this Court's decision in *Robertson*.

The District Court previously denied Duarte's motion for reconsideration based on the liability issue on the ground that *United States v. Davis* does not undermine *City of Healdsburg*, despite the court's earlier indication that clarification of that question would be beneficial to this litigation. *See* ECF 257, ECF 267. Due to *Robertson*, this Court will now quickly provide that clarification. Thus, resolution of the question by this Court in *Robertson*, before a penalty trial in *Duarte Nursery*, would allow the District Court to proceed to trial, if this Court affirms *City of Healdsburg*, or, if this Court holds that the Kennedy test is no longer the law of the Circuit, proceed to reconsideration of the liability order, without the intervening use of judicial resources for both a trial and an appeal in this case.

Since oral argument in *Robertson* is set for August 29, 2017 (before the trial in Duarte is even set to conclude on August 31, 2017), a stay would not delay

proceedings in this case for more than a few months, and certainly not more than a reasonable time. *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979); *Clayton*, 219 F. Supp. 3d at 1011. And, as this Court said in *CMAX*, a stay pending resolution of the significant nexus issue in *Robertson* would not only assist the orderly administration of justice in this case, but in the related cases in *United States v. LaPant* as well. *CMAX*, 300 F.2d at 269 ("In the interests of uniform treatment of like suits there is much to be said for delaying the frontrunner.").

The District Court, however, did not properly consider the potential misuse of judicial resources. Instead, it based its decision on its legal opinion that *Davis* and *Robertson* do not affect *City of Healdsburg*. Order, ECF 289 at 5. A district court's estimate of how a legal issue will be resolved by this Court is not an appropriate factor in exercising discretion to deny a stay. *See Clayton*, 219 F. Supp. 3d 1006 (no discussion of likely outcome of appellate court decision); *Wessel*, 2009 WL 2949031 (same). Based on this improper assessment, the District Court miscalculated both the balance of harms to the parties and the judicial resources implicated by the stay. *Id*. Only this Court, can determine in *Robertson* whether *City of Healdsburg* remains good law after *Davis*. And if this Court does overturn *City of Healdsburg*, then much time and many resources will be wasted. But even if the District Court's prediction is correct, and this Court reaffirms *City of Healdsburg*, a stay will still ensure efficient use of judicial resources, with minimal delay in trial. Accordingly, the

District Court erred in its determination that a stay will not preserve judicial resources.

C. The District Court Applied Factors Not Applicable to Duarte's Motion to Stay

The District Court further erred by treating Duarte's motion to stay a pending proceeding as a motion to stay pending appeal. A motion for a stay pending appeal is more analogous to a motion for an injunction. *See Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Therefore, in deciding such a motion, the court determines the likelihood of success on appeal. *Id*. On the other hand, likelihood of success on the merits of an appeal is not a consideration in deciding a motion for a stay in an ongoing case. *See CMAX*, 300 F.2d at 268. Despite this fact, the District Court engaged in a long discussion about the merits of *Robertson*, and denied Duarte's motion to stay "because it is not at all clear that the court's reliance on *Rapanos* stands on shaky ground." Order, ECF 289 at 4. Furthermore, in its order, the Court relied *on Nken v. Holder*, 556 U.S. 418 (2009), a case dealing with a motion to stay pending appeal. Order, ECF 289 at 3; *see Nken*, 556 U.S. at 428. Because Duarte is not seeking a stay pending appeal, the District Court clearly erred in assessing the potential outcome of *Robertson* when it considered Duarte's motion.

Moreover, even if the District Court could treat Duarte's motion as requesting a stay pending appeal, the District Court still misapplied the factors. A party seeking a stay pending appeal needs to show "'(1) whether the stay applicant has made a

strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Leiva-Perez*, 640 F.3d at 964 (internal quotations and citations omitted). In assessing the first prong, the applicant need not show that he is more likely than not to succeed on the merits. *Id*. at 966. Instead, depending on the strength of the other factors, he needs to only demonstrate that he has a substantial case on the merits. *Id*. at 966-67.

Even under this tougher test, Duarte has made a showing that a stay is appropriate. As demonstrated above, the balance of harms weighs greatly in Duarte's favor. Furthermore, the public interest also weighs in favor of granting a stay because a stay would result in the efficient use of judicial resources. Not only will *Robertson* resolve underlying issues in this case, it will affect ongoing litigation in other cases such as *United States v. LaPant*. Because Duarte has made a strong showing in the other factors, he did not need to demonstrate that it is more likely than not that this Court will overturn *City of Healdsburg*. *Cf. Leiva-Perez*, 640 F.3d at 967-68. Instead, he only needs to demonstrate that *Robertson* raises a substantial case for overturning *City of Healdsburg. Leiva-Perez*, 640 F.3d at 968.

It is clear that *Robertson* raises a substantial issue about how to interpret the fractured *Rapanos* decision. The government's attorneys in *Robertson* admit that the

issue in that case is whether *City of Healdsburg* is still good law following *Davis*. U.S. Response Brief in *Robertson*, at 19; *Robertson*, Docket No. 32 at 29. As a result, the *Robertson* panel is not bound by any previous Circuit precedent. The District Court itself recognized this fact, and admitted that *Robertson* could upend the standard to be applied in CWA cases. Order, ECF 289 at 5 ("If the Ninth Circuit does reverse course in *Robertson* . . . ."). Therefore, it is irrelevant whether a certain outcome in *Robertson* is likely, because "'serious legal questions are raised'" in *Robertson* and those serious questions are enough to satisfy the standards for granting a stay pending appeal. *Leiva-Perez*, 640 F.3d 967-68 (quoting *Abbassi v. I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998)). Accordingly, Duarte demonstrated the need for a stay even under a more stringent test, and the District Court erred in denying his request for a stay.

III

A WRIT OF MANDAMUS IS NEEDED TO ENSURE EFFICIENT OPERATION OF THE DISTRICT COURTS

The other *Bauman* Factors, as well as other considerations, also weigh in favor of issuing a writ of mandamus. As to factors four and five, this Court has recognized that "[i]t is unlikely that both of these factors would be present where a petition for mandamus presents a single issue . . . ." *In re Cement Antitrust Litig.*, 688 F.2d at 1304. This is true because it is nearly impossible for a court to make an oft repeated

error about a question of first impression. *Id*. Therefore, this Court will normally assess the need for a writ based on one of these two factors. *See id*.

This case involves an issue of law of first impression. *See* U.S. Response Brief in *Robertson*, at 19; *Robertson*, Docket No. 32 at 29. That issue of first impression is controlling in this case, both to the issues already litigated (whether the Duarte Property contains navigable waters in the first instance) and the issues yet to be resolved (how many acres of navigable waters were plowed). Furthermore, as mentioned above, the issue is controlling in another related case, *United States v. LaPant*, before the U.S. District Court for the Eastern District of California. *See Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir.), *cert. denied*, 422 U.S. 1008 (1975) (review by mandamus appropriate "where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible"). Accordingly, it is appropriate for this Court to exercise its supervisory mandamus authority to "resolve a significant question of first impression where the failure to do so may adversely affect the efficient operation of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d at 1304 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964); *Richey*, 510 F.2d at 1243; 9 J. Moore, *Moore's Federal Practice*, P 110.28 at 312-13 (2d ed. 1982)).

Duarte is not requesting, in this Petition, that this Court answer the unresolved question of whether *City of Healdsburg* remains good law. That request is unnecessary because this Court will soon resolve that question in *Robertson*. What is necessary, however, is the request that this Court act to ensure efficient use of judicial resources. If this Court refuses to exercise its supervisory mandamus authority, then it will neglect its "duty . . . to exercise supervisory control of the district courts in order to insure proper judicial administration." *In re Cement Antitrust Litig.*, 688 F.2d at 1304.

As demonstrated above, absent a stay, the parties and the court will expend much time and many resources preparing for and conducting a trial, while a controlling issue of law that determines what evidence is necessary for that trial is in question and being decided by this Court. If this Court overrules *City of Healdsburg*, all of that energy would have been wasted litigating the wrong issues. At worst, this Court will reaffirm *City of Healdsburg*, and Duarte's trial will be slightly delayed and no parties will be prejudiced.

The District Court stated that "the consideration of the orderly course of justice cautions against granting a stay." Order, ECF 289 at 5. But the orderly course of justice will not be upended by a short delay in trial. In fact, because oral argument in *Robertson* is scheduled for August 29, and the trial in this case is scheduled to start August 15, and last until August 31, *Robertson* will almost certainly be

submitted to this Court before the penalty trial below will be submitted to the District Court.[11] Based on this Court's historical practice, it is likely that this Court will issue a decision in *Robertson* within a few months of oral argument. *See The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit*, June, 2017 ed., at 102 (criminal cases in general get first priority).[12]

Furthermore, litigating the incorrect issues, or under questionable legal standards, does not promote the "orderly course of justice." Order, ECF 289 at 5. The District Court argued that if this Court overrules *City of Healdsburg* in *Robertson*, then Duarte could rely on *Robertson* on appeal. In the District Court's view, having this Court resolve an appeal to reverse a clearly erroneous District Court decision, for the sole reason of avoiding a brief stay of trial, is an efficient use of both the district court's and this Court's resources. That is clearly not the case; a stay of proceedings will better promote efficient use of judicial resources.

Finally, because mandamus is necessary to ensure judicial efficiency, it is irrelevant whether the District Court's order denying Duarte's motion to stay was "clearly" erroneous. *In re Cement Antitrust Litigation*, 688 F.2d at 1307. The need for the "clearly" erroneous standard is to avoid counterproductive interference with

[11] It is possible that it will be extended beyond August 31.
[12] http://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf.

the district court's litigation. *Id*. That concern is diminished in supervisory mandamus cases where this Court determines that a writ of mandamus will productively assist the District Court in operating in an orderly and efficient manner. *Id.* That is the case here, where this Court's action is needed to prevent inefficient use of the parties and judicial resources. Accordingly, this Court should grant Duarte's Petition and issue a writ of mandamus.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus directing the district court to stay further proceedings until this Court issues its mandate in *United States v. Robertson*.

DATED: July 7, 2017.

Respectfully submitted,

ANTHONY L. FRANÇOIS
JEFFREY W. MCCOY
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org
E-mail: jwm@pacificlegal.org

Attorneys for Plaintiffs/Counterclaim-Defendants - Petitioners Duarte Nursery, Inc., and John Duarte

STATEMENT OF RELATED CASES

Duarte Nursery, Inc. and John Duarte v. United States Army Corps of Engineers, et al., Ninth Circuit Case No. 16-16325, a previous appeal arising out of the instant case, was dismissed by this Court on September 22, 2016.

United States v. Robertson, Ninth Circuit Case No. 16-30178, which includes common issues of law, is set for oral argument in this Court on August 29, 2017.

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, I electronically filed the foregoing PETITION FOR WRIT OF MANDAMUS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that On July 7, 2017, true copies of the foregoing PETITION FOR WRIT OF MANDAMUS were placed in envelopes addressed to:

M. REED HOPPER
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814

DAVID M. IVESTER
PETER PROWS
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104

GARY H. BAISE
OFW Law
600 New Hampshire Avenue, NW, Suite 500
Washington, D.C. 20037

GERALD E. BRUNN
Law Offices of Brunn & Flynn
928 12th Street, Suite 200
Modesto, CA 95354

MATTHEW J. GOLDMAN
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

JEFFREY H. WOOD
Acting Assistant Attorney General
ANDREW J. DOYLE
JOHN THOMAS H. DO
SAMARA M. SPENCE
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044

PHILLIP A. TALBERT
Acting United States Attorney
GREGORY T. BRODERICK
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814

JUDGE KIMBERLY J. MUELLER
U.S. District Court for the Eastern District of California
Robert T. Matsui United States Courthouse
501 I Street, Room 4-200
Courtroom 3, 15th Floor
Sacramento, CA 95814

s/ Anthony L. François
ANTHONY L. FRANÇOIS

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the length requirements of Fed. R. App. P. 21(d) and 9th Cir. R. 21-2(c), excluding the parts of the documented exempted by Fed. R. App. P. 21(a)(2)(C) and Fed. R. App. P. 32(f):

   [X] this document does not exceed 30 pages.

2. This document complies with the form requirements of Fed. R. App. P. 32(c)(2), the typeface requirements of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this document has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman, 14 point font.

DATED: July 7, 2017.

s/ Anthony L. François
ANTHONY L. FRANÇOIS