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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-CV-01517-TC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants hereby move the Court for summary judgment on each of the four claims in Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, ¶¶ 277-310, ECF No. 7 ("Am. Compl.") pursuant to Federal Rule of Civil Procedure 56. As set forth fully in the accompanying memorandum of law, there is no genuine dispute as to any material fact on each claim and Defendants are entitled to judgment as a matter of law. The parties have conferred and Plaintiffs oppose this motion. *See* LR 7-1(a).

Dated: May 22, 2018

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Court of Appeals for the Ninth Circuit has observed that Plaintiffs' claims in this case may be too "broad to be legally sustainable," and that "some of the remedies the plaintiffs seek may not be available as redress." *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 836, 837 (9th Cir. 2018). The court of appeals accordingly instructed that "the district court needs to consider those issues further in the first instance," adding that "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that there is "no reason to assume this case will be any different." *Id.* at 838. In particular, the court noted that Defendants could reassert "a challenge to standing" and seek "summary judgment on the claims." *Id.* at 836, 838. The court emphasized that Defendants "retain the option of asking the district court to certify orders for interlocutory appeal … pursuant to 28 U.S.C. § 1292(b)," or "seeking mandamus." *Id.* at 838.

Defendants now move for "summary judgment on the claims." *In re United States*, 884 F.3d at 836. Defendants are entitled to summary judgment on any of three threshold grounds. First, Plaintiffs lack Article III standing to bring their claims. Although this Court found that Plaintiffs met the low bar of alleging sufficient facts to support standing at the motion-to-dismiss stage, *see Juliana v. United States*, 217 F. Supp. 3d 1224, 1242 (D. Or. 2016), Plaintiffs' allegations are no longer "presumed to embrace those specific facts that are necessary to support the claim" at the summary-judgment stage, *id.* (internal quotation marks and citation omitted). Without the benefit of that presumption, Plaintiffs fall far short of adequately alleging that Defendants' actions caused their asserted injuries or that this Court could issue any relief that would provide meaningful redress. And, even if they could meet that burden, there are additional legal bars to pursuing their claims. Second, Plaintiffs have not asserted a valid cause of action, because they have not complied with the requirements of the Administrative Procedure Act ("APA"), which Congress established as the exclusive mechanism for challenges to agency

action and inaction of the kind that underlies Plaintiffs' claims. Third, this Court lacks jurisdiction as a matter of law to adjudicate Plaintiffs' claims because Plaintiffs ask the Court to exercise authority that exceeds the scope of its power under Article III of the Constitution. Each of these threshold grounds independently warrants an entry of summary judgment for Defendants.

In addition, Defendants are entitled to summary judgment on the merits of Plaintiffs' claims. In denying Defendants' motion to dismiss, the Court recognized the existence of a substantive due process right under the Fifth Amendment "to a climate system capable of sustaining human life." *Juliana*, 217 F. Supp. 3d at 1250. The Court acknowledged that there is no precedent for such a due process right. *Id.* at 1262. That is because there is no such due process right. This is not a close question. Whatever the merits of the Court's decision on the motion to dismiss, the Court should consider the issue "further in the first instance," *United States v. U.S. Dist. Court for Dist. of Or*, 884 F.3d at 838, and reject as a matter of law Plaintiffs' baseless claim that the protection of due process in the Fifth Amendment creates a fundamental right to particular climate conditions that runs to every person in the United States. The Court should likewise further consider and reject as a matter of law Plaintiffs' invocation of claims based on federal public trust law, because the Supreme Court has confined public trust claims to state law. For these reasons too, the Court should grant judgment for the Defendants on all claims.

At a minimum, the Court should certify for interlocutory appeal any denial of Defendants' motion. *See* 28 U.S.C. § 1292(b); *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 838 (contemplating future certification). This motion plainly "involves [] controlling question[s] of law as to which there is substantial ground for difference of opinion," and "an

immediate appeal from" an order denying summary judgment would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). There is no sound basis for subjecting the United States to burdensome discovery and a 50-day trial when so many novel and potentially dispositive legal issues remain in doubt, especially because the process of discovery and trial would themselves violate fundamental statutory and constitutional principles. *See* Oral Arg. Recording at 5:49-5:51, *United States v. U.S. Dist. Court for Dist. of Or.*, No. 17-71692 (9th Cir. Dec. 11, 2017), https://www.ca9.uscourts.gov/media/ (Berzon, J., suggesting that "many judges would have" certified for interlocutory appeal the denial of Defendants' motion to dismiss).

I. BACKGROUND

Plaintiffs, twenty-one individuals of majority age or minors proceeding through guardians *ad* litem, a non-profit organization, and Dr. James Hansen, acting as guardian for future generations, sued President Barack Obama and numerous Executive Branch agencies supervised by his appointees, alleging that these Executive officials and agencies contributed to climate change in violation of rights Plaintiffs assert under the Fifth and Ninth Amendments to the Constitution and a supposed federal public trust doctrine. Specifically, Plaintiffs have alleged that Defendants (now President Donald Trump and officials in his Administration) have, through action and inaction, enabled the combustion of fossil fuels, which release greenhouse gases into the atmosphere. Plaintiffs further have alleged that Defendants have known, at least since the 1960s, that greenhouse gas emissions from fossil fuels destabilize the climate. And they have alleged that the effects of that destabilization have injured them and will continue to do so.

Defendants moved to dismiss the Complaint under Rule 12(b)(1), for failure to allege sufficiently the elements of standing, and under Rule 12(b)(6), for failure to state a claim for

violations under the Fifth Amendment, the Ninth Amendment, and the public trust doctrine. ECF No. 27. This Court denied Defendants' motion, holding that Plaintiffs plausibly alleged Article III standing under the minimal showing required at the motion-to-dismiss stage, *Juliana*, 217 F. Supp. 3d at 1242-48; that the Fifth Amendment's Due Process Clause includes a previously undiscovered and sweeping right to "a climate system capable of sustaining human life[,]" *id.* at 1250; and that a public trust doctrine applies to the federal government and, at a minimum, its ownership of submerged lands. *Id.* at 1255-56, 1259. This Court's order did not address Defendants' arguments concerning Plaintiffs' Equal Protection claim under the Fifth Amendment or Plaintiffs' Ninth Amendment claim.

After the Court denied Defendants' motion to stay this litigation and to certify its order on the motion to dismiss for interlocutory appeal, Defendants petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus. The Ninth Circuit stayed this litigation pending consideration of Defendants' petition, but ultimately denied the petition for mandamus. The court of appeals expressed skepticism about the breadth of Plaintiffs' claims and requested remedies, but determined that mandamus relief was premature because Defendants still "have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims." *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 836. It observed that Defendants would not be precluded "from reasserting a challenge to standing, particularly as to redressability." *Id.* It also directed that this Court "needs to consider" issues regarding the scope of claims and remedies "further in the first instance," and contemplated that Plaintiffs' claims and remedies would be "vastly narrowed" as litigation proceeds. *Id.* at 838. The Court also noted the availability of interlocutory appeal and mandamus to challenge future rulings by this Court. *Id.*

II. STANDARD ON MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, summary judgment is merited when "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id*. at 324.

When ruling on a motion for summary judgment (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (footnote omitted).

III. ARGUMENT

Summary judgment is appropriate because there are no material facts in genuine dispute. Under the legal standard that applies at the summary judgment stage, Plaintiffs do not have standing, have not asserted a valid cause of action, and ask this Court to exceed its authority under Article III. Even setting aside those threshold defects, Plaintiffs' claims on the merits fail as a matter of law. For any or all of those reasons, the Court should end this fundamentally misguided case by entering judgment for Defendants.

A. Plaintiffs' claims fail at the threshold due to their lack of standing, their failure to identify a viable right of action, and limitations on the Court's Article III authority.

1. Plaintiffs lack Article III standing.

Article III of the Constitution restricts the jurisdiction of the federal courts to "cases" and "controversies" "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); U.S. CONST. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (alterations and citation omitted). One aspect of that limitation is the requirement that the party invoking the power of a federal court establish its standing. In order to do so, Plaintiffs must prove that (1) they "have suffered an injury in fact," *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted) (omissions and brackets in original).

"[E]ach element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Bennett v. Spear*, 520 U.S. 154, 167–68 (1997) (quoting *Def's of Wildlife*, 504 U.S. at 561). Thus, while "general factual allegations" can be sufficient at the pleadings stage, *see Juliana*, 217 F. Supp. 3d at 1242, Plaintiffs "must set forth by affidavit or other evidence specific facts to survive a motion for

summary judgment," *Bennett*, 520 U.S. at 168 (internal quotation marks and citation omitted); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Moreover, "[i]n keeping with the purpose of th[e] doctrine," a court's standing inquiry must be "especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Plaintiffs cannot bear their burden to prove any of these three requirements here.

a. Plaintiffs have generalized grievances, not particularized harm.

As the Supreme Court has repeatedly recognized, a "generalized grievance" is not a "concrete and particularized" injury sufficient to satisfy the first prong of the standing analysis. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); *Cuno*, 547 U.S. at 344-46; *Defs. of Wildlife*, 504 U.S. at 573-74. For that reason, "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974). Rather, the plaintiff generally "must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (internal quotation marks omitted).

The injuries that Plaintiffs claim are not particular to them or cognizable for purposes of Article III. Rather, they involve generalized phenomena on a global scale. To the extent that climate-related injuries affect Plaintiffs, they do so no more than they affect any other person in their communities, in the United States, or the world at large. Federal courts have repeatedly

held that injuries predicated on the general harms of climate change do not suffice for purposes of standing. *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 475-79 (D.C. Cir. 2009); *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), *aff'd sub nom., Wildearth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013); *Amigos Bravos v U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118 (D.N.M. 2011); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01:11-cv-41, 2011 WL 3321296 (E.D. Va. July 29, 2011). The same result is compelled here.

At the motion-to-dismiss stage, the Court relied on Plaintiffs' allegations of harm to the environment caused by projected droughts, increased wildfires and flooding, and increased temperatures to find the first prong of Article III standing was satisfied. *See Juliana*, 217 F. Supp. 3d at 1242-44 (finding the Plaintiffs' allegations sufficient to show that their injuries are "ongoing or likely to recur"). Defendants continue to believe that Plaintiffs' allegations of injury fail as a matter of law. But even if those allegations were sufficient to show a concrete and particularized injury at that early stage, Plaintiffs cannot rest on those allegations at summary judgment. They "must set forth by affidavit or other evidence specific facts," *Bennett*, 520 U.S. at 168, to prove that any future injuries on which they based their claims are not only concrete and particularized to them, but "certainly impending." *Clapper*, 568 U.S. 409; *see id.* ("[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." (citation omitted)). And they must connect each claim of injury to a discrete and specifically identified agency action or failure to act that they contend violates federal law. They cannot assert a judicially

cognizable injury caused by the undifferentiated actions of the United States as a whole. *See Cuno*, 547 U.S. at 353 ("[S]tanding is not dispensed in gross.").[1]

b. The injuries that Plaintiffs claim cannot be traced to particular government actions.

Moreover, even if Plaintiffs' asserted injuries were sufficiently particularized—and in addition to the failure to link their asserted injuries to specific agency action—they cannot show that the government policies they challenge, in broad and undifferentiated terms, caused those injuries. *See Lujan*, 504 U.S. at 560. Plaintiffs principally complain of government policies and the regulation (or lack thereof) of private parties not before the Court. To be sure, the fact that their alleged harms "may have resulted indirectly does not in itself preclude standing." *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975). But it makes it "substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Id.* at 505; *Defs. of Wildlife*, 504 U.S. at 562 ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."). Plaintiffs cannot possibly make that showing.

Among their widely scattered objections, for example, Plaintiffs claim that the United States subsidizes the fossil fuel industry. Am. Compl. ¶¶ 171-78. But Plaintiffs have presented no evidence establishing a causal link between the amorphously-described policy decisions and the specific harms that they allege, as opposed to the independent actions by private persons both

[1] The Court also relied on a declaration from plaintiff Jayden F. concerning flooding that occurred nearly two years ago, in August 2016. Even if the plaintiff could prove causation and redressability for the harms caused to her home by the flooding, *see infra*, that harm would not support Plaintiffs' request for injunctive and other prospective relief. See *Juliana*, 217 F. Supp. 3d at 1244 ("Because plaintiffs seek injunctive relief, they must show their injuries are 'ongoing or likely to recur.'").

within and outside the United States (nor have they provided any proof that their harms would be redressed by an order against such subsidization). Plaintiffs can offer only speculation whether, in the absence of such subsidization, third parties in the fossil fuel industry would alter their behavior in a manner that would affect the Plaintiffs in a particularized and concrete way. *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976) (holding that plaintiffs challenging tax subsidies for hospitals serving indigent customers lacked standing where they could only speculate on whether a change in policy would "result in [the plaintiffs] receiving the hospital services they desire"). "A federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits." *Id.* at 46.

The Ninth Circuit's decision in *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (2013), is directly on point. In *Bellon*, the Ninth Circuit rejected an attempt to link alleged climate injuries to a state agency's allegedly insufficient regulation of private parties. The court in *Bellon* found that "simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing." *Id.* at 1142-43 (citation and internal quotation marks omitted). It concluded that "[b]ecause a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries, the causal chain is too tenuous to support standing." *Id.* at 1144 (citation omitted). *A fortiori* that is so here.

At the motion-to-dismiss stage, this Court distinguished *Bellon* on the ground that (1) it was decided on a motion for summary judgment, not a motion to dismiss; and (2) Plaintiffs challenge more than the regulation of five oil refineries in Washington State, but the regulation

and subsidization of all or nearly all contributors of greenhouse gases throughout the nation. *See Juliana*, 217 F. Supp. 3d at 1245-46. The first distinction no longer holds. While the Court accepted the Plaintiffs' "conclusory" allegations of a causal chain between the vague allegations of federal action and inaction in the complaint and their injuries, *id.* at 1246, Plaintiffs now must present specific evidence to support those allegations. And although Plaintiffs have submitted 17 of 18 expert reports, the evidence in those reports does not come close to meeting that burden. *See, e.g.*, Declaration of Harold R. Wanless Decl., ¶¶ 1-63, ECF No. 206-2 (describing global impacts of climate change).

As for the Court's second distinction, Plaintiffs cannot overcome the fundamental requirements of Article III by basing their claims on the federal government's energy "policy" as an undifferentiated whole. Plaintiffs cannot manufacture standing by aggregating a series of distinct (but unidentified) federal actions taken by different agencies pursuant to distinct Acts of Congress. That sprawling endeavor—which under Plaintiffs theory could be triggered time and again by any person in the United States—is not remotely a "case" or "controversy" over which the Constitution vests jurisdiction in Article III courts. Article III requires that a plaintiff identify with particularity the specific government action or inaction that is the cause of the injury alleged, and that it establish standing for each challenged administrative action. As the Supreme Court has stated:

> If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996) (emphasis omitted) (citing *Blum v. Yaretsky*, 457 U.S. 991, 998-99 (1982)); *see also Allen*, 468 U.S. at 759-60. Because Plaintiffs do not even identify any specific government action (with one exception over which the Court lacks

jurisdiction, *see* n.7 *infra*), they do not adequately allege a causal connection between a specific action taken by a defendant and the climate injuries they claim.

c. Plaintiffs' alleged injuries cannot be redressed by the Court.

Finally, Plaintiffs lack standing because they cannot establish that it is likely that the injuries they assert could be redressed by an order from this Court. There is no standing where "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative[.]" *Allen*, 468 U.S. at 752. Here, there is no possible redress because the remedies Plaintiffs seek are beyond the Court's authority to provide. *See* Defs.' Mot. for J. on the Pleadings 22-25, ECF No. 195. To the extent that Plaintiffs seek to compel a defendant agency to exercise the authority and discretion it possesses under its organic statute, Plaintiffs have failed to identify any such specific actions, and the Court in any event lacks authority to direct an agency to exercise that discretion in any particular way; it may compel only ministerial action. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (discussing historical limitations of mandamus remedy). To the extent that Plaintiffs seek action beyond the defendant agencies' existing authority under their organic statutes, the Court lacks authority to require agencies to take such actions, *see La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power on it"), *superseded by statute on other grounds by Metrophones Telecomms., Inc. v. Global Crossings Telecomms., Inc.*, 423 F.3d 1056 (9th Cir. 2005), or to require Congress to enact new laws.

In light of these limitations on the Court's authority, Plaintiffs have not even begun to articulate a remedy that this Court could award or that could move the needle on the complex phenomenon of global climate change, much less likely redress their alleged injuries. *See Bellon*, 732 F.3d at 1147 (finding no redressability where Plaintiffs failed to prove that the

remedies within the Court's authority "would likely reduce the pollution causing Plaintiffs' injuries"). Consider, for example, the collision between the proposed relief and the Clean Air Act. Following the Supreme Court's holding in *Massachusetts v. EPA*, EPA determined that it should regulate greenhouse gases pursuant to the Clean Air Act. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Responding to many of the concerns asserted by Plaintiffs here, such as "coastal inundation and erosion caused by melting icecaps and rising sea levels," *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 416 (2011) (citing 74 Fed. Reg. at 66524-35) (footnote omitted) ("*AEP*"), EPA has promulgated regulations concerning greenhouse gas emissions from mobile sources;[2] new or modified "[m]ajor [greenhouse gas] emitting facilities";[3] and new, modified, and existing fossil-fuel fired power plants.[4] Without seeking review of any of those discrete actions through prescribed procedures under the Clean Air Act, Plaintiffs ask the Court to direct the EPA to take additional, largely unspecified, actions to further address Plaintiffs' concerns. But they fail to identify either any deficiencies in the actions already taken or to point to any specific actions that EPA is authorized to take that would address

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[2] *See, e.g.*, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012); Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478 (Oct. 25, 2016); cf. Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated to Endanger Public Health and Welfare, 81 Fed. Reg. 54,422 (Aug. 15, 2016).

[3] *See AEP*, 564 U.S. at 417 (quoting 42 U.S.C. § 7475(a)(4)); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

[4] Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

that concern—or that they could challenge in this suit rather than in a court of appeals, in which Congress has vested jurisdiction to review many EPA actions. *See* 42 U.S.C. § 7607(b).

At the motion-to-dismiss stage, the Court assumed that it had the authority to "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." *Juliana*, 217 F. Supp. 3d at 1247. And it reasoned that "[i]f plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO_2 and slow climate change, then plaintiffs' requested relief would redress their injuries." *Id.* But neither the Plaintiffs nor the Court cited to any legal authority that would justify such an expansive usurping of legislative and executive authority—as further explained below, no such authority exists. *See infra* Part III(A)(3). That alone is sufficient reason to find that Plaintiffs have failed to establish Article III standing. And, even if they could overcome that obstacle, Plaintiffs may no longer rely on their mere allegations that (1) Defendants have control over a quarter of the planet's greenhouse gas emissions, (2) the Defendants may exercise that authority to reduce atmospheric CO_2 and slow climate change, and (3) the reduction within Defendants' authority to effect would likely redress Plaintiffs' concrete and particularized injuries. Because Plaintiffs cannot meet that burden, Defendants are entitled to summary judgment on all of Plaintiffs' claims.

2. Plaintiffs may not bring claims in the absence of a statutory right of action.

Even if they could establish Article III standing, Plaintiffs have not identified a valid right of action, which is an independent legal requirement. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *Navajo Nation v. Dep't*

of the Interior, 876 F.3d 1144, 1168 (9th Cir. 2017). Summary judgment is warranted on this basis too.

Defendants did not raise the absence of a valid cause of action in their motion to dismiss, and this Court understandably did not independently address the issue. The Court stated in passing that "the Fifth Amendment . . . provides the right of action" for both the due process and the public trust claims, relying on cases implying a right of action for money damages against federal officers. *Juliana*, 217 F. Supp. 3d at 1261 (citing *Davis*, 442 U.S. at 245, and *Carlson v. Green*, 446 U.S. 14, 18 (1980)); *see also* May 10, 2018, Hrg. Tr. 19:10 (Magistrate Judge Coffin describing Plaintiffs' cause of action as "analogous to a *Bivens* action"). But the *Bivens* line of cases—which includes *Davis* and *Carlson*, is plainly inapplicable here—because Plaintiffs are not seeking money damages. Even if this Court were to look (erroneously) to the *Bivens* line of cases as a potential source of a cause of action, Plaintiffs could not locate one. As the Supreme Court recently explained, "*Bivens*, *Davis*, and *Carlson* … represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). And "it is possible that the analysis in [those] three *Bivens* cases might have been different if they were decided today," because "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1856-57 (citation omitted); *see id.* at 1857 (citing long line of recent cases declining to imply right of action under *Bivens*). Specifically, the Court has explained that "the context is new" for purposes of the *Bivens* analysis if "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id.* at 1859. Plaintiffs' claim here is clearly "different in a meaningful way . . ." from any previous *Bivens* case. *Id.* Indeed, as this Court has recognized, Plaintiffs' claim is unprecedented. *Juliana*, 217 F. Supp. 3d at 1262. And especially given that

"a *Bivens* action is not 'a proper vehicle for altering an entity's policy,'" Plaintiffs' suit here is clearly not cognizable under the *Bivens* line of cases. *Abbasi*, 137 S. Ct. at 1860 (citation omitted).

Plaintiffs instead suggest that the Constitution itself provides a right of action to seek injunctive relief against any alleged deprivation of constitutional rights. *See* Am. Compl. ¶ 13. But no such generic constitutional right of action exists. Indeed, the Supreme Court recently held that "the Supremacy Clause does not confer a right of action," a decision that would make no sense if Plaintiffs were right that constitutional claims are automatically cognizable. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).[5]

As the Court explained in *Armstrong*, federal courts have equitable authority in some circumstances "to enjoin unlawful executive action." 135 S. Ct. at 1385; *see, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Critically, however, that equitable power is "subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (citation omitted).

Here, the APA provides "express . . . statutory limitations" that "foreclose" an equitable cause of action to enforce Plaintiffs' asserted constitutional claims, *Armstrong*, 135 S. Ct. at 1385, outside of the provisions for judicial review in the APA itself. Section 702 of the APA provides: "A person suffering legal wrong because of agency action, or adversely affected or

[5] Plaintiffs cite *Obergefell v. Hodges* in describing the right of action they rely upon, Am. Compl. ¶ 13, but that was an action against state officials pursuant to 42 U.S.C. § 1983. *See* 135 S. Ct. 2584, 2593 (2015).

aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity," among other legal defects, *id.* § 706(2), and to "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1). The APA thus provides a "comprehensive remedial scheme" for "persons adversely affected or aggrieved by agency action." *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) (some quotation and citation omitted).

Plaintiffs claim that a large number of unspecified agency actions and inactions violate their constitutional rights, and that places the substance of their challenge squarely within the exclusive scope of the APA. 5 U.S.C. §§ 702, 706; *see, e.g.*, Am. Compl. ¶¶ 5, 7, 12, 163, 292, 298, 305. Because the APA provides a "carefully crafted and intricate remedial scheme" for challenging agency action, the courts may not supplement it with one of their own creation. *Seminole Tribe*, 517 U.S. at 73-74 (citation omitted). The APA accordingly "describes the exclusive mechanism . . . by which the federal district courts may review" challenges to agency action of the kind that underlie Plaintiffs' claims here. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1220 (D.N.M. 2014); *see also Occupy Eugene v. U.S. Gen. Serv. Admin.*, No. 6:12-CV-02286-MC, 2013 WL 6331013, at *6 (D. Or. Dec. 3, 2013) (dismissing constitutional claims against federal officials because APA provides appropriate remedy).

Because the APA provides the sole mechanism for Plaintiffs to bring their claims, they must comply with the APA's requirements for judicial review.[6] Of particular relevance here, they must direct their challenges to "circumscribed, discrete" final agency action, rather than launching a "broad programmatic attack" on agency policies in general. *Norton*, 542 U.S. at 62, 64; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 891; *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 801-06 (9th Cir. 2013).

Aside from their allegations directed at the Department of Energy's Order No. 3041,[7] Plaintiffs have not identified any discrete, final agency actions as required to assert a valid challenge under the APA. *See Norton*, 542 U.S. at 62-64 (2004); *Lujan*, 497 U.S. at 891; *San Luis Unit Food Producers*, 709 F.3d at 801-06. Instead, Plaintiffs cast their claims as a

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[6] Other statutes, such as Section 307 of the Clean Air Act, may also provide relevant rights of action to challenge agency actions that regulate or otherwise relate to greenhouse gas emission. But Plaintiffs do not invoke any such statutory rights of action.

[7] The Court lacks jurisdiction to review Plaintiffs' claims concerning Order No. 3041. That order granted approval for the export of liquefied natural gas to nations with free trade agreements in effect, from a proposed liquefaction facility and export terminal in Coos Bay, Oregon. DOE/FE Order No. 3041, ECF No. 27-2. The Department of Energy issued this order pursuant to section 201 of the Energy Policy Act of 1992, which provides that the exportation of natural gas to "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such . . . exportation shall be granted without modification or delay." 15 U.S.C. § 717b(c). Though not stated as a separate claim, Plaintiffs allege that section 201 is unconstitutional on its face. Am. Compl. ¶ 288. This Court cannot rule on the any claim concerning Order No. 3041 or on the constitutionality of the section 201, however, because such import/export approvals are reviewable, if at all, exclusively in the courts of appeals. *See* 15 U.S.C. § 717r(b) ("Any party . . . aggrieved by an order issued by the Commission . . . may obtain a review of such order in the court of appeals for the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia."). As the Supreme Court explained in reviewing the nearly identical judicial review provision of the Federal Power Act, that judicial review process represents "the specific, complete, and exclusive mode for judicial review of the Commission's orders." *City of Tacoma v. Taxpayers*, 357 U.S. 334, 336 (1958); *see Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (provision vesting review in a court of appeals barred district court jurisdiction over facial challenge to constitutionality of a statute).

challenge to "affirmative aggregate actions" by the Defendant agencies that "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels." Am. Compl. ¶¶ 1, 5. But this challenge to "aggregate actions" is precisely the kind of sweeping "programmatic" challenge that the Supreme Court foreclosed in *Lujan*. 497 U.S. at 891. Plaintiffs challenge the actions of eight federal agencies and the President without identifying those actions in any specific or meaningful way. *See, e.g.*, Am. Compl. ¶¶ 5, 7, 12, 279-80. Plaintiffs' challenge to "affirmative aggregate actions" is unreviewable under the principles announced in *Norton* and *Lujan*. *See San Luis Unit Food Producers*, 709 F.3d at 803-06 (rejecting farmers' suit to compel the Bureau of Reclamation to provide more water to irrigation districts because it "amount[s] to a broad programmatic attack on the way the Bureau generally operates the Central Valley Project").

The APA's requirement that Plaintiffs challenge discrete "agency actions" serves to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. It is hard to imagine a suit that more squarely implicates those concerns than this one, in which Plaintiffs ask this Court to direct the development and implementation of environmental and energy policy for the entire United States Government and for the entire Nation. Such a request is precisely what the Supreme Court foreclosed when it explained that the APA prevents a challenger from seeking "wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 891. "[M]ore sweeping actions" are the province of "the other branches" of government. *Id.*

3. Plaintiffs ask the Court to exercise authority that exceeds the scope of its power under Article III of the Constitution.

Even assuming for purposes of argument that Plaintiffs have standing and a valid right of action, there is another and even more fundamental defect with this suit. The suit itself and the relief sought are broader than this Court can entertain under Article III.

Article III vests federal courts created by Congress with "[t]he judicial Power of the United States." The judicial power is "one to render dispositive judgments" in "Cases or Controversies" as defined by Article III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (quotation and citation omitted). The "[j]udicial power" can "come into play only in matters that were the traditional concern of the courts at Westminster[,]" and only when those matters arise "in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (citation omitted); *see Stern v. Marshall*, 564 U.S. 462, 485 (2011). "The necessary restrictions on [a court's] jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills." *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring).

At its most basic level, Plaintiffs' suit is not a Case or Controversy cognizable under Article III. It is instead an attempt to make energy and environmental policy through the courts rather than through the political Branches entrusted by the Constitution with policy making authority. "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Id*. at 132 (Thomas, J., concurring). One of those things is "running Executive Branch agencies." *Id.* at 133. As a unanimous Supreme Court recently explained in a case involving proposed regulation of greenhouse gas emissions, an expert environmental agency is "surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case

injunctions." *AEP*, 564 U.S. at 428. Among other reasons, "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." *Id.* (internal citation omitted). Yet those are precisely the steps that Defendants ask this Court to take in adjudicating their claim, and they are irreconcilable with Article III.

More specifically, Plaintiffs attempt to invoke the equitable powers of the Court to hear and resolve this case. But a federal court's equitable powers are "subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945); *see also, e.g.*, *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (same). "Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." *Grupo Mexicano*, 527 U.S. at 318 (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)). The controlling question is whether "the relief [Plaintiffs] requested here was traditionally accorded by courts of equity." *Id.*

The answer to that question here is plainly no. Plaintiffs ask the Court to review and assess the entirety of the Executive Branch's programs and policies relating to climate change—including actions that the Executive Branch has not taken—and then to determine the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate. *See, e.g.*, Am Compl. ¶¶ 277-310. And they ask the Court to do so under the Due Process

Clause, a provision designed to protect discrete individual rights, not to furnish a vehicle for restructuring the operations of the Executive Branch with respect to broad policies affecting every person in the country. No federal court, nor any court at Westminster or any other court exercising equity powers, has ever used its "traditional equitable authority" to perform such a review. And for good reason: The Constitution commits the power to oversee the Executive Branch, draw on its expertise, and formulate policy programs to the President, not to Article III courts. See U.S. CONST. art. II, § 2, cl. 1, art. II, § 3; *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004).

The relief that Plaintiffs seek is just as expansive and also well beyond what traditional equitable authority can countenance. The Complaint asks the Court to:

> 6. Order Defendants to prepare a consumption-based inventory of U.S. CO_2 emissions;
>
> 7. Order Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend;
>
> 8. Retain jurisdiction over this action to monitor and enforce Defendants' compliance with the national remedial plan and all associated orders of this Court; and
>
> 9. Grant such other and further relief as the Court deems just and proper.

Am. Compl. 94.

That novel relief is dramatically beyond any concept of equity "exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano*, 527 U.S. at 318. The high-water mark for the federal courts' traditional equitable authority has arguably been in institutional reform cases, such as the school desegregation cases, where the Supreme Court has noted the broad equitable authority of federal courts. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1,

16 (1971). But even those claims pale in comparison to Plaintiffs' claims and requested relief. Plaintiffs in those cases sought injunctions against particular school districts for particular constitutional violations. The courts then directed injunctions at the institutions and required particular actions to remedy the violations. Plaintiffs here seek to challenge the Executive Branch's policies relating to climate change over decades and ask the Court to take control of that policy-making. They ask the Court to require the Executive Branch to address the problem of climate change in proffered ways, without regard to agency authority and responsibility as established by Congress. *Cf., e.g., AEP*, 564 U.S. at 424 (holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants"). This suit thus goes well beyond this prior high-water mark for equitable authority, placing the Court in a policy-making role removed from its institutional competence.

In sum, the court's Article III "judicial power," as limited by the "traditional scope of equity," does not allow this Court to enter the requested orders, which would put the Court in control of a climate policy for the United States. No court has ever issued an injunction of this reach, and traditional equitable authority does not go nearly so far.

* * *

At bottom, this lawsuit is an effort to use "the judicial process … to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citations omitted). Instead of asking the Court to address "specifically identifiable Government violations of law," Plaintiffs ask this Court to assess the constitutionality of the entirety of federal policies. *Allen v. Wright*, 468 U.S. 737, 459 (1984) (citations omitted), abrogated in non-relevant part by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Article III does

not allow for suits that seek "broad-scale investigation" into government functions, because this "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action . . . ." *Laird v. Tatum*, 408 U.S. 1, 14-15 (1972). "[A] federal court . . . is not the proper forum to press general complaints about the way in which government goes about its business." *Allen*, 468 U.S. at 760. That is all the more true when the Executive action pertains to a highly complex matter like global climate change that is uniquely suited to redress by the political branches. The Court should accordingly dismiss the case as not justiciable under Article III principles.

B. Plaintiffs' claims fail as a matter of law.

Each of Plaintiffs' remaining claims—the Fifth Amendment substantive due process claim and the public trust doctrine claim—present pure legal questions for which there are no disputed material issues of fact. Defendants respectfully request the Court to enter summary judgment in Defendants' favor on both claims.[8]

[8] In addition to their Due Process and "public trust" claims, Plaintiffs originally asserted a claim under the Ninth Amendment. Am. Compl. ¶¶ 302-306. However, "the [N]inth [A]mendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim," *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986), and "through its 'penumbra' or otherwise, embodies no legally assertable right to a healthful environment." *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 535 (S.D. Tex. 1972). *See generally* U.S. Mot. to Dismiss 21 n.9 (ECF No. 27) (collecting cases).

Plaintiffs also contended that they are a protected class whose fundamental rights are being infringed by the Defendants' actions, and that the Court must therefore apply strict scrutiny to those actions. Am. Compl. ¶¶ 292, 294, 297. Plaintiffs' alleged Equal Protection violation fails because "[r]ational basis review applies to the claim of age-based discrimination because age is not a suspect class." *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008); accord *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)). And this Court already held "that defendants' affirmative actions would survive rational basis review." *Juliana*, 217 F. Supp. 3d at 1249. In ruling on Defendants' motion to dismiss all four claims, the Court concluded that only Plaintiffs' due process and public trust claims alleged a plausible cause of action. Accordingly, the Equal Protection and Ninth Amendment Claims are no longer at issue.

1. A judicially enforceable right to a climate system capable of sustaining human life cannot be found in the Due Process Clause.

The Supreme Court has instructed courts considering novel due process claims to "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed" into judicial policy preferences, and lest important issues be placed "outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720-21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). This Court's recognition of an "unenumerated fundamental right" to "a climate system capable of sustaining human life," *Juliana*, 217 F. Supp. 3d at 1250, threatens to wrest fundamental policy issues of energy development and environmental regulation from "the arena of public debate and legislative action," *Glucksberg*, 521 U.S. at 720, into the supervision of the federal courts—indeed, here, into a single district court.

As Defendants noted in earlier briefing, in no other case has a court found a fundamental right remotely comparable to a right to a particular "climate system," or to other aspects of the physical environment. This Court's reliance on *Obergefell*, is misplaced, because there is no relationship between a personal and circumscribed right to same-sex marriage and an alleged right to a climate system capable of sustaining human life that apparently would run to every individual in the United States. Unlike the right recognized in *Obergefell*, the right to a climate-system capable of sustaining human life has no relationship to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," 135 S. Ct. at 2597 (citation omitted), or any right as "fundamental as a matter of history

and tradition" as the right to marry, *id.* at 2602. This is not a close question. Plaintiffs' baseless claim has no place in an Article III court.

Also unavailing is Plaintiffs' state-created danger claim. As a general matter, the "[Due Process] clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). Thus, the Due Process Clause imposes no affirmative duty to protect a citizen who is not in state custody. Courts have recognized a limited exception to this general rule when state authority is affirmatively employed in a manner that distinctly injures a particular citizen or renders him more vulnerable to injury from another source than he or she would have been in the absence of state intervention.

The limited due process right the Ninth Circuit has recognized in state-created danger cases is grounded in the particular duty a governmental body takes on when it has control over a particular individual's person and places him or her in imminent peril. *See, e.g., Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (holding that a cause of action for due process violation arose where officers "took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 9-1-1 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; then they locked the door and left him there alone . . . after they had examined him and found him to be in serious medical need"); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (due process cause of action arose where

officer arrested a female driver, impounded the car, and left driver by the side of the road at night in a high-crime area).

At the motion-to-dismiss, even while declining to dismiss Plaintiffs' claims based on the state-created danger doctrine, the Court acknowledged that the "stringent standards" of that narrow doctrine "pose[d] a significant challenge for plaintiffs in this very lawsuit." *Juliana*, 217 F. Supp. 3d at 1252. The Court rested on its obligation to accept Plaintiffs' allegations as true on a motion to dismiss and concluded that "[q]uestions about difficulty of proof . . . must be left for another day." *Id.* Even accepting that Plaintiffs plausibly alleged a claim under the state-created-danger doctrine, however, before subjecting Defendants to a 50-day trial, it is incumbent on the Court to hold Plaintiffs to the requirement to demonstrate that they satisfy the "stringent standards" of that narrow exception. There is no basis for such a conclusion. All of the cases awarding relief under a state-created danger theory involved a clear and present danger of imminent physical harm to a specific plaintiff with whom the government had a distinct relationship, an overt government act that proximately caused the dangerous situation, deliberate indifference by the government to the particular plaintiff's safety, and subsequent physical harm or loss of life. None of those circumstances are present here.

2. The public trust doctrine applies to the states' ownership of submerged lands, not to the federal government's regulation of the atmosphere.

Defendants acknowledge that this Court found unpersuasive the D.C. district court and the D.C. Circuit's recent analysis of an asserted federal public trust doctrine in the context of greenhouse gases. *Juliana*, 217 F. Supp. 3d at 1254-55 (citing *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd*, 561 F. App'x 7 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 774 (2014)). Defendants submit, however, that those courts properly found that there is no public trust doctrine that "impose[s] duties on the federal government." 863 F. Supp. 2d at 13. And

these cases correctly point out that the Supreme Court recently reaffirmed that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012).

Plaintiffs rely on *Illinois Central Railroad. v. Illinois*, 146 U.S. 387 (1892), for the proposition that the United States is charged with a duty to protect asserted public trust resources. Pls.' Resp. 32, ECF No. 41 (quoting Ill. Cent., 146 U.S. at 435). But as the Supreme Court has stated, *Illinois Central* was "necessarily a statement of Illinois law," not federal law. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (quoting *Appleby v. City of N.Y.*, 271 U.S. 364, 395 (1926)). In addition, as the Ninth Circuit recognized in *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012), *PPL Montana* is only the latest in a line of Supreme Court cases that have "repeatedly recognized" that the concept of a public trust doctrine pertains only to "the state's sovereign duties and powers," the "contours of which are determined by the states, not by the United States Constitution." *Id.*

The holdings in these cases are consistent with the Property Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]" U.S. CONST. art. IV, § 3, cl. 2. In *Kleppe v. New Mexico*, the Supreme Court held that "[t]he power over the public land thus entrusted to Congress is without limitations." 426 U.S. 529, 539 (1976) (quoting *United States v. City & Cty. of S.F.*, 310 U.S. 16, 29 (1940)); *see also Alabama v. Texas*, 347 U.S. 272, 273 (1954). Because the Constitution makes Congress's power over federal property plenary, that power is not subject to, or in any way constrained by, any common law public trust doctrine.

This Court previously rejected the United States' reliance on *Kleppe v. New Mexico*. *See Juliana*, 217 F. Supp. 3d at 1259. Despite conceding that Congress's "power over public lands" is "without limitations[,]" this Court emphasized that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved[.]" *Id.* (quoting *Kleppe*, 426 U.S. at 539). This Court concluded on that basis that *Kleppe* did not necessarily foreclose the Plaintiffs' common law public trust claims. *Id.* But as the Tenth Circuit has recently explained, the uncertainty to which the *Kleppe* Court was referring "appears to concern not power over federal land but power over property outside federal land." *See United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1212-13 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 84 (2017). Consistent with *County of Otero*, nothing in *Kleppe* supports the view that Congress's power over its own property could be limited by court-fashioned common law. *Id.*

Even if a public trust claim could be brought to constrain the United States, any such claim to would be improper in light of the Clean Air Act. The Clean Air Act defines the scope of EPA's duties to regulate greenhouse gas emissions and the extent to which federal courts may enforce those duties. In *AEP*, the Supreme Court held that plaintiffs seeking to limit greenhouse gas emissions may not do so under a common law theory, but must instead do so pursuant to the specific causes of action the Clean Air Act provides where the Act "speaks directly to the question at issue." 564 U.S. at 424. That is because "Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions" and left it to the agency to determine the "appropriate amount of regulation in any particular greenhouse gas-producing sector" after making an "informed assessment of the competing interests." *Id.* at 427-28. The Court found that it would be improper to conclude "that federal judges may set limits on greenhouse gas emissions in [the] face of a law empowering EPA to set the same limits." *Id.* at

429. *See also Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853, 856 (9th Cir. 2012) (affirming the dismissal of an Alaskan native village's claims against major emitters of CO_2 on the ground that *AEP* "determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources," thereby "displac[ing] federal common law"). For these reasons, this Court should enter judgment in Defendants' favor on Plaintiffs' public trust doctrine claim.

C. If the Court denies Defendants' motion, it should certify its decision for interlocutory appeal under 28 U.S.C. § 1292(b)

At a minimum, the Court should certify for interlocutory appeal any denial of Defendants' motion. *See* 28 U.S.C. § 1292(b); *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 838 (contemplating future certification). This motion plainly "involves [] controlling question[s] of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from" an order denying summary judgment would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). There is no sound basis for subjecting the United States to burdensome discovery and a 50-day trial, which would itself violate fundamental statutory and constitutional limitations, when so many novel and potentially dispositive legal issues remain in doubt. *See* Oral Arg. Recording at 5:49-5:51, *United States v. U.S. Dist. Court for Dist. of Or.*, No. 17-71692 (9th Cir. Dec. 11, 2017), https://www.ca9.uscourts.gov/media/ (Berzon, J., suggesting that "many judges would have" certified for interlocutory appeal the denial of Defendants' motion to dismiss).

CONCLUSION

There are no material factual issues in dispute, and Defendants are therefore entitled to summary judgment on all claims. For the foregoing reasons, the Court should enter summary judgment in favor of Defendants on each of Plaintiffs' claims.

Dated: May 22, 2018

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 22, 2018 I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

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