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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Plaintiffs oppose Defendants' belatedly-filed and redundant Motion for Judgment on the Pleadings, ECF No. 195 ("Defendants' Rule 12(c) Motion for Judgment"). Submitted nearly three years after Plaintiffs filed their First Amended Complaint, ECF No. 7 ("FAC"), nearly a year and a half after Defendants filed their Answer, ECF No. 98 ("Answer"), and only five months before trial, Defendants' untimely Rule 12(c) Motion, which merely repeats arguments from previous motions, supports neither dismissal nor further delay in deciding these young Plaintiffs' urgent claims with a fully developed factual record.

Notwithstanding the requirements of Rule 11, Defendants brashly "reassert" that "they are entitled to judgment as a matter of law for the reasons set forth in their November 2015 motion to dismiss" which they "reincorporate" in their Rule 12(c) Motion. ECF 195 at 1, 6-7. In denying Defendants' Motion to Dismiss, this Court rejected those identical arguments under the same standard of review applicable here and the Ninth Circuit found no clear error in this Court's analysis, rendering Defendants' "reassertion" both improper and unnecessarily dilatory, with the effect of increasing the cost of litigation and harassing Plaintiffs. *Juliana v. United States*, 217 F.Supp.3d 1224 (2016); *In re United States*, 884 F.3d 830 (9th Cir. 2018). Defendants' assertion that the Ninth Circuit directed them to file a motion raising the *same* strictly legal issues under the *same* standard of review as their Rule 12(b) Motion to Dismiss, which the Ninth Circuit already ruled was denied without any clear error by this Court, is beyond logic. ECF 195 at 1. In finding that Defendants' satisfied *none* of the factors for mandamus, the Ninth Circuit did not issue any "directive" for Defendants to file duplicative and dilatory motions, but only stated that, as in all cases, Defendants would be able "to raise legal challenges to decisions made by the

district court *on a more fully developed record . . . .*" *In re United States*, 884 F.3d at 837 (emphasis added).

The only legal issue raised in Defendants' Rule 12(c) Motion not yet resolved by this Court is their unfounded (and frankly alarming) argument that the President should be dismissed because he is beyond all constitutional command and thus relief can never be awarded against him.[1] ECF 195 at 7 (Issue I). Defendants' recycled arguments that the Administrative Procedure Act ("APA") prevents any meaningful judicial review of Plaintiffs' constitutional claims and that, paradoxically, separation of powers principles prohibit this Court from checking the unconstitutional conduct of the executive branch have already been proffered in pre-trial motions and rejected by this Court and the Ninth Circuit. *Id.* (Issues II and III, respectively); ECF 212 at 2 ("Indeed, the District Court has already rejected this very argument in its order denying Defendants' Motion to Dismiss.").[2] Regarding Defendants' arguments on Issues I and III, this Court has also determined that it is premature to consider whether the Court will face any difficulties in fashioning relief so as to avoid separations of powers concerns. *Juliana*, 217 F.Supp. at 1242 ("[S]peculation about the difficulty of crafting a remedy could not support dismissal at this early stage.") (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

Defendants' arguments as to Issues I and III should be denied as premature, consistent with this Court's prior rulings and for the reasons set forth below. Defendants' Rule 12(c) Motion as to Issues II and III should also be denied because they have already been rejected by

[1] Plaintiffs note that, while Defendants have not previously sought the Presidents' dismissal, they have previously presented this argument both in their Motion to Certify Order for Interlocutory Appeal, ECF No. 120-1 at 17, and in their Writ Petition, Ninth Cir. Doc. 1-1 at 20-21.

[2] Although Judge Coffin made this statement with respect to Defendants' arguments regarding the APA, it is equally applicable to Defendants' separation of powers arguments, as demonstrated in Section III, *infra*.

this Court under the same standard of review applicable here, and by the Ninth Circuit on mandamus. Defendants' arguments with respect to Issue II are also foreclosed by clear Supreme Court and Ninth Circuit precedent, and would result in a violation of Plaintiffs' right to procedural due process.

STANDARD OF REVIEW

When reviewing a Rule 12(c) motion, the Court applies the same standard as a Rule 12(b)(6) motion, as the motions are "functionally identical." *Cafasso, U.S. ex rel v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). "It is axiomatic, as it is for motions under Rule 12(b)(6) . . . that for purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." 5C Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1368 (3d. ed. April 2018 Update). Judgment on the pleadings is proper only when "there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citation omitted).

ARGUMENT

I. A President's Unconstitutional Conduct is Subject to Judicial Review and Relief Against the President May Be Available Depending on the Merits

Defendants' argument that the President is beyond all constitutional command is not only alarming, it is contrary to clear Supreme Court precedent and anathema to the founding principles of our Nation in dissolving the political bands of monarchy. Declaration of Independence (rejecting "absolute Despotism" and "absolute Tyranny" by a single head of state). It is "long-settled" that "when the President takes official action, the Court has the authority to determine whether he has acted within the law," that "the President is subject to judicial process

in appropriate circumstances," and that the judiciary may even "severely burden the Executive Branch by reviewing the legality of the President's official conduct." *Clinton v. Jones*, 520 U.S. 681, 683, 705 (1997). Defendants' speculative concern that any relief that *might* be directed to the President would interfere with his constitutional duties is without merit:

> Insofar as a court orders a President . . . to act or refrain from action, it defines, or determines, or clarifies, the legal scope of an official duty . . . . [I]f the order itself is lawful[], it cannot impede, or obstruct, or interfere with the President's basic task – the lawful exercise of his Executive Authority.

Id. at 718 (Breyer, J., concurring). Further, speculation as to what relief may be available is premature and the President will suffer no prejudice merely by remaining a party to this suit as no discovery is sought against him. The only separation of powers concerns implicated at this stage of this case are Defendants' arguments that the President may infringe fundamental individual rights without consequence, like a despot.

Defendants improperly rely on the Supreme Court's statement in *Mississippi v. Johnson* that "in general, this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." 71 U.S. (4 Wall) 475, 499 (1866). *Mississippi* is best understood as an early application of the political question doctrine and does not stand for the proposition that the President is beyond injunctive relief. *Id.* at 498-99 (Considering "single point" of whether the Court could enjoin the President from enforcing acts of Congress in the volatile post-Civil War Reconstruction Era and concluding the question was "purely executive and political"); *see Baker v. Carr*, 369 U.S. 186, 224-26 & n. 52 (1962) (Reviewing *Mississippi* among "precedents as to what constitutes a nonjusticiable 'political question'").[3]

[3] *See also Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 614 (D.C. Cir. 1974) ("*NTEU*") ("[*Mississippi*] was dismissed on the ground that it presented a political question . . . ."). The Supreme Court confirmed this reading of *Mississippi* in *Georgia v. Stanton*, when it dismissed a

Indeed, the Supreme Court has *never* ruled that the President's constitutional violations are beyond injunction. To the contrary, Supreme Court precedent demonstrates that injunctive relief against the President is appropriate in certain circumstances. In *United States v. Nixon,* the Supreme Court affirmed a subpoena to the President for confidential records to be used in a criminal prosecution implicating the President himself. 418 U.S. 683 (1974). In *Boumediene v. Bush*, the Court upheld the judiciary's power to order the President to release prisoners held as enemy combatants. 553 U.S. 723, 771 (2008).[4] In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court affirmed an injunction prohibiting the Secretary of Commerce from implementing the President's order to seize steel mills. 343 U.S. 579 (1952). As the D.C. Circuit explained in *NTEU*:

> Justice Black, writing for the *Youngstown* majority, made it clear that the Court understood its affirmance to effectively restrain the President. There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party.

492 F.2d at 611; "[I]t would be exalting form over substance if the President's acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he and/or the Congress has delegated the performance of duties to federal officials subordinate to the President and one or more of them can be named as a defendant." *Id.*

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subsequent case seeking to enjoin the Secretary of War from enforcing the same acts of Congress as a political question. 73 U.S. 50 (1867).

[4] On remand, the district court denied a motion to dismiss the President pursuant to many of the same authorities Defendants cite in the instant case, *see* Gov't Mot. to Dismiss Improper Resp'ts, *Boumediene v. Bush,* 04-cv-01166 (D.D.C. Aug. 12, 2008), 2008 WL 5262160; Minute Order, *Boumediene v. Bush,* 04-cv-01166 (D.D.C. Nov. 10, 2008) (denying motion), and proceeded to grant habeas relief for five petitioners against respondents, including the President, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008); *see Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (reversing denial of remaining petition on appeal).

at 613. Lower courts routinely follow the Supreme Court's lead in recognizing judicial authority to enjoin the President's official acts.[5]

Defendants' reliance on the dicta in Justice O'Connor's plurality opinion in *Franklin v. Massachusetts* is similarly misplaced. 505 U.S. 788 (1992). A plurality opinion is non-precedential and, in any event, Justice O'Connor's analysis turned on considerations of judicial prudence, not judicial power, concluding that the Court "need not decide whether injunctive relief against the President was appropriate" because effective relief could be ordered against the Secretary of Commerce. *Id.* at 803. Further, as the plurality opinion suggested, at the very least "the President might be subject to a judicial injunction requiring the performance" of a non-discretionary duty. *Id.* at 803-803 (quoting *Mississippi*, 71 U.S. (4 Wall) at 499). Because the duty not to infringe the fundamental constitutional rights of individuals is not subject to Presidential discretion, injunctive relief may ultimately be deemed appropriate and necessary here. *Nurse v. U.S.*, 226 F.3d 996, 1002 (9th Cir. 2000) ("[T]he complaint alleges that policy-making defendants promulgated discriminatory, unconstitutional policies which they had no discretion to create. In general, governmental conduct cannot be discretionary if it violates a

[5] *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (Upholding injunctive relief in constitutional challenge to official Presidential action); *Freedom from Religion Found. Inc. v. Obama*, 691 F.Supp.2d 890, 908 (W.D. Wis. 2010) ("Defendants are…wrong to suggest that the President is immune from injunctive or declaratory relief.") *vacated on other grounds*, 641 F.3d 803 (7th Cir. 2011); *Mackie v. Bush*, 809 F. Supp. 144, 146 (D.D.C. 1993) (Preliminarily enjoining President from removing plaintiffs from government office), *vacated on mootness grounds sub nom. Mackie v. Clinton*, 10 F.3d 13 (D.C. Cir. 1993); *Knight First Amend. Inst. at Columbia University v. Trump*, 17 Civ. 5205 (NRB), 2018 WL 2327290, at *1 (S.D.N.Y. May 23, 2018) ("*Knight*") ("[W]e reject defendants' categorical assertion that injunctive relief cannot ever be awarded against the President….").

legal mandate."); *Knight*, 2018 WL 2327290 at *23 (Duty to remedy constitutional violations not discretionary).[6]

Irrespective of the propriety of injunctive relief, it is well established that courts may issue declaratory relief assessing the constitutionality of presidential conduct. In *Clinton v. City of New York*, the Supreme Court affirmed a declaratory judgment that President Clinton's use of a line-item veto violated the Constitution. 524 U.S. 417 (1998). Similarly, in *NTEU*, the D.C. Circuit declined to enjoin the President but issued a "declaration of law . . . that the President had a constitutional duty" to implement certain statutory provisions. 492 F.2d at 616.[7] Likewise, in *Hawaii v. Trump*, the Ninth Circuit vacated injunctive relief against the President but did not dismiss him from the case, which also sought declaratory relief. 859 F.3d 741 (9th Cir. 2017), *vacated as moot*, 874 F.3d 1112 (9th Cir. 2017). Similarly, in a challenge to the constitutionality of presidential action banning transgender military service, the Western District of Washington recently "conclude[d] that, not only [did the court] have jurisdiction to issue declaratory relief against the President," but that "such relief" was "most appropriate." *Karnoski v. Trump*, C17-1297-MJP, 2018 WL 1784464, at * 13 (W.D. Wash. April 13, 2018). Most recently, the

[6] Each of the other cases Defendants rely on as to Issue I is inapposite. In *Newdow v. Bush*, the court denied a preliminary injunction without deciding whether relief would ultimately be available because plaintiffs failed to establish a likelihood of success on the merits on numerous grounds. 355 F.Supp.2d 265, 291 (D.D.C. 2005). *Newdow v. Roberts* was dismissed because "[p]laintiffs failed to name…the president in their suit" and "injunctive relief against the defendants actually named would not prevent the claimed injury." 603 F.3d 1002, 1011, 1013 (D.C. Cir. 2010) *Nixon v. Fitzgerald* was dismissed on summary judgment because of presidential immunity against actions for damages. 457 U.S. 731 (1982). In *Swan v. Clinton*, a case involving only a statutory claim, the court found on review of summary judgment that injunctive relief against "subordinate officials" could "substantially redress [plaintiff's] injury." 100 F.3d 973, 979 (D.C. Cir. 1996). *Massachussetts v. Melon* did not even involve a question of relief against the President. 26 U.S. 447 (1923).

[7] Declaratory relief would be all the more appropriate here where the President's compliance with the Fifth Amendment, rather than a specific statute, is at issue.

Southern District of New York declared that President Trump's official actions violated the First Amendment rights of Twitter users. *Knight,* 2018 WL 2327290. All of these Article III opinions make clear that judgment on the pleadings cannot be awarded in favor of the President under Defendants' theory that relief against the President for constitutional violations is never appropriate.

Ultimately, the propriety of relief against the President depends on the circumstances and facts of the particular case, to be determined by whether the challenged Presidential conduct bears a causal relationship to Plaintiffs' injuries and whether complete relief can be afforded in the President's absence. *Compare Franklin*, 505 U.S. at 803 ("[T]he injury alleged is likely to be redressed by declaratory relief against the Secretary alone.") *with Clinton* 524 U.S. 417 (Declaratory relief issued where President's exercise of line-item veto directly at issue); *and with Karnoski*, 2018 WL 1784464, at *13 (Relief appropriate where claims focused on discriminatory executive action). Further, even if inferior officials ultimately may be responsible for remedying the constitutional violations at hand, it may be appropriate to include the President in the ordered relief if the President is ultimately responsible for ensuring that injunctive relief was carried out by his executive agencies and their Secretaries. *See Pouncil v. Tilton*, 704 F.3d 568, 576 (9th Cir. 2012) (Finding Secretary was "proper defendant on a claim for prospective injunctive relief . . . because he would be responsible for ensuring that injunctive relief was carried out, even if he was not personally involved in the decision giving rise to [the] claims").

Here, the historic and ongoing actions of past and current Presidents with respect to fossil fuel development and climate change are directly at issue. *See* FAC, ECF No. 7 at ¶ 99-101, 130, 180, 279. In addition to the actions of past Presidents, President Trump's official actions have caused and continue to substantially cause, contribute to, and exacerbate the urgency and

severity of the climate crisis underlying Plaintiffs' claims.[8] Whether these actions violate Plaintiffs' constitutional rights is a question for the merits antecedent to whether complete relief may be afforded in the President's absence. "[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation." *Milliken*, 433 U.S. at 280. Consistent with this principle, this Court has already determined that "speculation about the difficulty of crafting a remedy could not support dismissal at this early stage." *Juliana*, 217 F.Supp.3d at 1242 (citing *Baker*, 369 U.S. at 198). Accordingly, Defendants' arguments regarding relief against the President in this specific case are premature, particularly where the President will suffer no prejudice in remaining a party to this suit pending a determination on the merits as no discovery is sought against him. Should Defendants wish to expedite a conclusive determination as to whether any relief may issue against the President, they are free to stipulate to Presidential liability. Otherwise, their arguments as to Issue I of their Rule 12(c) Motion are premature at this early stage.

Defendant's position that the President is above the Constitution and the third branch of government cannot act as a constitutional check on his conduct would rewrite our Nation's Founding Documents. As we approach the Fourth of July, these Youth Plaintiffs hold up the Declaration of Independence as original precedent that our sovereign Nation's head of state must be subject to the laws of the land, including the U.S. Constitution:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and

[8] *See* ECF No. 208 at 15 n. 3 for a non-exclusive list of President Trump's actions in causing and contributing to the climate crisis.

> organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.[9]

II. Plaintiffs' Constitutional Claims Are Not Governed by the APA

A. This Court Has Already Ruled Against Defendants' Argument and Decided That the Fifth Amendment Provides the Right of Action for Plaintiffs' Claims

Equally unavailing is Defendants' argument that the APA "provides the sole mechanism" for Plaintiffs' challenge to the constitutionality of agency conduct. ECF No. 195 at 10. Defendants have belabored this argument numerous times before this Court in motions and before the Ninth Circuit in their Writ Petition. This Court, as affirmed by the Ninth Circuit under the "no clear error" standard, already rejected those arguments and held "it is the Fifth Amendment that provides the right of action" for Plaintiffs' claims. *Juliana*, 217 F.Supp. at 1261.[10] Judge Coffin confirmed this issue was disposed of in the Court's May 25, 2018 Order,

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[9] Some of those "Facts" included these, which are pertinent here:
He has refused his Assent to Laws, the most wholesome and necessary for the public good.
. . . He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.
. . . He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

[10] *See* ECF No. 208 at 5-14 (Excerpting and explaining the numerous instances in which the Parties have addressed Defendants' argument and this Court's and the Ninth Circuit's resolution

stating: "Indeed, the District Court has already rejected this very argument in its Order denying defendants' motion to dismiss." ECF No. 212 at 2. Thus, there is no need for the Court to revisit this issue under Defendants' Rule 12(c) Motion, which is governed by the same standard of review as the Rule 12(b) motion under which the Court resolved the issue. *Cafasso*, 637 F.3d at 1054 n. 4.[11]

B. Supreme Court and Ninth Circuit Precedent Establish that the APA is Not the Sole Means of Review of Constitutional Challenges to Agency Conduct

Even had this Court not already decided the issue, Defendants' argument is foreclosed by clear Supreme Court and Ninth Circuit precedent. The Supreme Court has ruled on several occasions that constitutional claims may be brought independently from APA claims and are not subject to the APA's limitations. In *Franklin*, a case "rais[ing] claims under both the APA and the Constitution," the Court reached the merits of the constitutional claims separately from its analysis of the APA claims, which the Court found were not viable for lack of "final agency action." 505 U.S. at 796-801, 803-806. Similarly, in *Webster v. Doe*, the Supreme Court held that a constitutional claim against an agency official was judicially reviewable even when it was not viable as an APA claim. 486 U.S. 592, 601, 603-05 (1998) (Holding the CIA Director's decision

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of the same). In their recent application to the Supreme Court for an extension of time, Defendants concede that they argued this issue to the Ninth Circuit, which found no clear error. ECF No. 211-1 at ¶ 3 ("The government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal, contending that the district court's order contravened fundamental limitations on judicial review imposed by…the Administrative Procedure Act….").

[11] In their Writ Petition, Defendants presented substantially similar arguments to those on pages 17-18 of their Motion regarding Plaintiffs' challenge to Section 201 of the Energy Policy Act and Department of Energy Order No. 3041, which was mandatorily issued thereunder. *See,* Pet. for Writ of Mandamus, 4 n. 1, *In re United States*, No. 17-71692 (9th Cir. June 9, 2017), Dkt. No. 1. As Plaintiffs explained in their response to these arguments on pages 13-18 of Plaintiffs' Answer to Defendants' Writ Petition, attached hereto as **Exhibit A**, Plaintiffs' challenge is properly before this Court. If Section 201 of the Energy Policy Act is unconstitutional, all orders issued under it, including DOE/FE Order No. 3041 (which is still in place), are also unconstitutional.

to discharge an employee was committed to agency discretion by statute and therefore not subject to review under the APA, but the employee's constitutional challenges to his termination were judicially reviewable and could proceed to discovery). Justice Scalia's lone dissent, in which he postulated in a final footnote that "if relief is not available under the APA it is not available at all" serves only to prove the *Webster* majority's rejection of Defendants' argument that all constitutional claims are subject to the strictures of the APA. *Id.* at 607 n. *.[12] No majority of the Supreme Court has ever agreed with Justice Scalia that the APA supersedes the Constitution, including the Fifth Amendment.

Moreover, Ninth Circuit precedent is also dispositive on this issue. *Presbyterian Church (U.S.A.) v. U.S.* makes clear that "§ 702 [of the APA] waives sovereign immunity not only for suits brought under § 702 itself, but for constitutional claims brought under the general federal-question jurisdiction statute, 28 U.S.C. § 1331." 870 F.2d 518, 525 n. 9 (9th Cir. 1989). The Ninth Circuit recently confirmed this principle in *Navajo Nation v. Dept. of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017) clarifying that: "Claims not grounded in the APA, like the constitutional claims in *Presbyterian Church* and *VCS I*, "do[ ] not depend on the cause of action found in the first sentence of § 702" and thus "§ 704's limitation [to "final agency action"] does not apply to them.") (citation omitted).

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[12] Defendants' reliance on *Jarita Mesa Livestock Grazing Ass'n v. U.S. Gen. Serv.*, 58 F.Supp. 3d 1191 (D.N.M. 2014) is misplaced. In addition to being a non-binding out-of-circuit district court opinion, *Jarita* relied solely, and erroneously, on Justice Scalia's dissent in *Webster* for its conclusion. *Id.* at 1237. Further, *Jarita* challenged singular agency actions, and also involved an APA challenge to the same final agency action challenged as unconstitutional under the APA. It did not, as here, involve the aggregate, systemic, and unconstitutional conduct of multiple federal agencies and individual officials across the federal government, a challenge not suited to the narrow strictures of the APA. The issue of whether a constitutional claim brought in the context of a singular final agency action against one federal agency, which was also brought under the APA, must be reviewed pursuant to the administrative record review provisions of the APA is not at issue in this litigation.

Defendants' assertions that the Supreme Court has never "adopted the position that the Constitution creates an across-the-board cause of action for all constitutional claims," ECF No. 195 at 11, is entirely irrelevant to this case, as is the fact that the "Supremacy Clause does not confer a cause of action." *Id.* (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1384 (2015)). Irrespective of whether any other constitutional provision creates a right of action, it is well-established that Plaintiffs may rest their claims "directly on the Due Process Clause of the Fifth Amendment." *Davis v. Passman*, 442 U.S. 228, 243-44 (1979); *see also Bolling v. Sharp*, 347 U.S. 497 (1954) (Remanding for grant of equitable relief in school desegregation case resting directly on the Fifth Amendment).

Defendants' reliance on inapposite cases[13] in which courts have declined to extend a right of action for *damages* for constitutional violations in the face of statutory remedial schemes is likewise wholly misplaced. In *Davis v. Passman* and its progeny, the Supreme Court explained that the distinction between equitable and monetary relief is of primary importance to the availability of a cause of action alleging violation of fundamental constitutional rights. In *Davis*, the Court recognized a private right of action for damages under the Fifth Amendment. 442 U.S. 228 (1979). In doing so, the Court first asked whether the Fifth Amendment provides a right of action, irrespective of the remedy sought, concluding a party may "rest[] her claim directly on the Due Process Clause . . . ." *Id.* at 243-244. Only then did the Court "consider whether a damages remedy is an appropriate form of relief." *Id.* at 244. The Court's subsequent jurisprudence on this issue focuses entirely on whether *monetary damages* are available, absent

[13] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Occupy Eugene v. U.S. Gen. Serv. Admin.*, No. 6:12-CV-02286-MC, 2013 WL 6331013 (D. Or. Dec. 3, 2013); *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116 (9th Cir. 2009).

statutory authorization, as a remedy for constitutional violations. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983).

Courts need not conduct a comparable inquiry as to the availability of a cause of action seeking equitable relief for violations of fundamental individual rights because such actions are and always have been available:

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . . Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

Bell v. Hood, 327 U.S. 678 (1946). The right of every citizen to injunctive relief from ongoing and prospective "official conduct prohibited" by the Constitution does not "depend on a decision by" the legislature "to afford him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief . . . ." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring). The Supreme Court confirmed this reasoning in *Ziglar v. Abbasi*, where plaintiffs sought money damages against "high executive officers," challenging "large-scale policy decisions" as violative of their Fifth Amendment substantive due process rights. 137 S.Ct. 1843, 1851-52, 1862 (2017). In response, the Court stated "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief." *Id*. at 1862.

Similarly misplaced is Defendants' reliance on equally inapposite cases concerning Congress' power to limit the authority of courts to redress violations of statutorily created rights[14] and cases concerning the limitations on actions brought under the APA.[15] Plaintiffs

[14] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378 (2015); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

neither premise their claims on violations of statutorily-granted rights nor bring their claims under the APA. As this Court has already acknowledged, the challenge by these young Plaintiffs to the continuing violation of their fundamental constitutional rights "rests directly on the Due Process Clause of the Fifth Amendment," *Juliana*, 217 F.Supp.3d at 1261 (citation omitted), and "it is the Fifth Amendment that provides the right of action." *Id.* Whether cases brought under the APA focus on discrete agency actions rather than programmatic action is irrelevant here. *See Ziglar* (Stating in direct Due Process challenge to "large-scale policy decisions" that "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief.") 137 S.Ct. at 1851-52, 1862; *see also Laird v. Tatum*, 408 U.S. 1, 14 (1972) (Where there is "actual present or immediately threatened injury resulting from unlawful government action," systemwide relief may be appropriate). Further, as this Court recognized: "federal courts retain broad authority 'to fashion practical remedies when confronted with complex and intractable constitutional violations.'" *Juliana*, 217 F.Supp.3d at 1241-42 (citing *Brown v. Plata*, 563 U.S. 493, 526 (2011)). Defendants' argument that the APA provides the sole means for courts to address constitutional challenge to agency conduct has already been rejected by this Court, is contrary to established Ninth Circuit and Supreme Court precedent, and is wholly without merit.

C. Limiting Plaintiffs' Constitutional Claims to the Strictures of the APA Would Violate Their Right to Procedural Due Process

Within the circumstances of this case, where Defendants' myriad systemic actions continuing over half a century threaten the fundamental rights of these young children, limiting Plaintiffs' claims to the strictures of the APA would violate Plaintiffs' procedural due process

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[15] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *San Luis Unit Food Producers v. United States*, 709 F.3d 798 (9th Cir. 2013); *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000). Defendants' reliance on these cases is further misplaced as each challenged the violation of statutory law through the APA.

right to meaningful review of their constitutional claims. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) (Limited judicial review procedures established by statute did not apply where they would foreclose "meaningful judicial review" of challenge to agency's pattern of unconstitutional conduct). As Chief Justice Marshall observed in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 (U.S. 1 Cranch) 137, 163 (1803). Courts are to "presume constitutional rights are to be enforced through the courts." *Davis*, 442 U.S. at 242. This presumption may be rebutted only by a "textually demonstrable *constitutional* commitment of [an] issue to a coordinate political department." *Id.* (citation omitted). Indeed, as the Supreme Court stated in *Exceptional Child Ctr., Inc.*, constitutional rights are "congressionally unalterable." 135 S.Ct. at 1383. Even assuming Congress were able to, "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster*, 486 U.S. at 603. This heightened showing "is required in part to avoid the 'serious constitutional questions' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (citations omitted).[16]

[16] Justice Scalia's dissent in *Webster*, on which Defendants' rely, argues that "[w]hile a right to review of agency action may be created by a . . . constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless *specifically* excluded." 486 U.S. at 607 n. *. Justice Scalia's dissent attempts to reverse the well-established principle requiring clear Congressional intent to limit constitutional claims before the constitutionality of such limitations will even be considered, and would instead require clear constitutional intent to overcome statutory limitations. This argument holds the statutory provisions of the APA above the Bill of Rights in the hierarchy of legal authorities, a prospect fundamentally contrary to the Constitution. In any case, the *Webster* majority clearly rejected Justice Scalia's reasoning, dismissing the plaintiff's APA claims and allowing his constitutional claims to proceed to discovery. 486 U.S. 592.

Here, the APA contains no clear statement of intent to "preclude review of constitutional claims." *Id.*[17] Even if the APA did contain such a statement, it would raise serious questions as to the constitutionality of such a restriction. Here, where Defendants' systemic actions over half a century threaten these young Plaintiffs' constitutional rights, precluding Plaintiffs' claims by or limiting them through the strictures of the APA would violate Plaintiffs' procedural due process right to "meaningful judicial review" of their constitutional claims. *McNary*, 498 U.S. at 496.

Determining whether procedural limitations, like those governing review of agency conduct in the APA, effectuate a violation of due process, requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Each of these factors favors Plaintiffs.

First, the private interest at stake is unquestionably of the highest constitutional importance because, as this Court has determined, "Plaintiffs have adequately alleged infringement" of their fundamental constitutional rights. *Juliana*, 217 F.Supp.3d at 1250.

[17] Nor, contrary to Defendants' erroneous assertion, does the legislative history of the APA evidence any such clear intent. The language quoted by Defendants on page 15 of their Motion, which itself does not evidence clear intent to preclude review of constitutional claims outside of the APA, is from a report that accompanied the Walter-Logan Bill, which President Roosevelt vetoed in 1940. S. Rep. No. 76-442 (May 17, 1939). That language does not appear, as Defendants imply, in the two reports that accompanied the bills that became the APA. Those reports emphasized that the APA's review provisions provide a "simplified statement of judicial review" affording "a remedy" rather than a *comprehensive* or *exhaustive* statement of judicial review providing for the *only* available remedy. S. Rep. No. 79-752, at 7 (Nov. 19, 1945); R. Rep. No. 79-1980, at 251 (May 3, 1946) (emphasis added). Neither report purports to provide the exclusive means of review of agency conduct for any claims, let alone constitutional claims.

Second, there is an absolute risk of erroneous deprivation of Plaintiffs' fundamental rights if Plaintiffs must plead their claims under and subject to the strictures of the APA. Defendants argue that: (1) Plaintiffs "must direct their challenges to circumscribed, discrete final agency action"; (2) Plaintiffs may not challenge Defendants' affirmative systemic constitutional violations; and (3) the "thousands of discrete agency actions" which, in part, comprise Defendants' systemic conduct, "must be challenged individually" in proceedings limited to the record for each challenged action. ECF No. 195 at 16-22. (citations omitted).

However, it is the systemic nature of Defendants' conduct and affirmative aggregate actions that is causing the profound harms and constitutional violations befalling Plaintiffs. FAC, ECF 7 at ¶¶ 5, 9, 129, 130, 163, 281-83, 289, 292, 294, 298, 301, 305-06, 309-10. To force Plaintiffs to individually challenge each of the "thousands" of agency actions which have contributed to Plaintiffs' injuries, including those dating from before these youth were born, would be a herculean, if not impossible, task. FAC, ECF 7 at ¶ 129 ("The vastness of our nation's fossil fuel enterprise renders it infeasible for Plaintiffs to challenge every instance of Defendants' violations, and, even if feasible, challenging each of Defendants' actions would overwhelm the Court."). Further, the limitation of review in each such challenge to the agency record for the particular contested action would foreclose consideration, review, and redress of the systemic nature of the constitutional violations at issue here. *See McNary*, 498 U.S. at 496 (Limiting review of agency's pattern of unconstitutional violations to administrative records would preclude meaningful review). Moreover, many of the discriminatory agency actions comprising Defendants' systemic constitutional violations were committed decades ago, before these young Plaintiffs could avail themselves of the APA's "timeliness and jurisdictional requirements" that Defendants reference in their Rule 12(c) Motion. ECF 195 at 21. *Armstrong*

v. Manzo, 380 U.S. 545, 552 (1965) (Procedural safeguards must be offered "at a meaningful time and in a meaningful manner."). While the APA may not permit challenges to "broad programmatic" or systemic agency action (*see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)), such challenges can undoubtedly proceed directly under the Fifth Amendment. *See, e.g. Ziglar,* 137 S. Ct. at 1862; *McNary*, 498 U.S. 479. To hold otherwise would subject Plaintiffs to more than a mere risk of erroneous deprivation of their rights, it would render such deprivation inevitable.

Third, the government's interest in administrative efficiency favors litigating Plaintiffs' claims as a single systemic challenge rather than a myriad of challenges to a vast multitude of individual agency actions, which would undoubtedly prove costly, inefficient, and unduly burdensome for all parties involved.

Thus, every *Eldridge* factor strongly favors proceeding with Plaintiffs' claims as pleaded in order to avoid a procedural due process violation. It is unimaginable in our divided system of government that the systemic and catastrophic constitutional violations at issue here could be placed beyond the Court's basic power and duty to safeguard individual fundamental rights. As Chief Justice Marshall famously stated, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury*, 5 (U.S. 1 Cranch) at 163.

III. This Court Has Already Decided That Separations of Powers Concerns Are Premature

Equally erroneous is Defendants' contention that the separation of powers prohibits this Court from adjudicating Plaintiffs' constitutional claims. If separation of powers concerns are at play in this early stage, it is because Defendants seek to deprive the judiciary of its constitutionally bestowed powers and obligations. The principle of separation of powers

mandates that the judiciary exercise its duty and authority under Article III to serve as a check and balance to Congress' legislative and the President's and agencies' executive powers where they are exercised to infringe the rights of individuals. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("[T]he declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty.")

As an initial matter, Defendants are wrong to suggest that "Plaintiffs fail to present this Court with a cognizable case and controversy because they seek an adjudication and relief that stretches far beyond anything which . . . any court in the country . . . has ever rendered judgment." ECF No. 195 at 23. The systemic nature of the constitutional violations at issue here do not remove this case from the competency and core role of the courts in the system of checks and balances. Federal courts have adjudicated constitutional challenges to systemic government conduct in many cases. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (Challenge to systemic racial injustice in school systems); *Brown v. Plata*, 563 U.S. 493 (2011) (Challenge to systemic conditions and mismanagement across state prison system). As this Court recognized in concluding that this case presents no political question, which is itself a separation of powers inquiry, "[e]very day, federal courts apply the legal standards governing due process to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards." *Juliana*, 217 F.Supp.3d at 1239.

Defendants focus their separation of powers arguments on the relief Plaintiffs request, claiming that it "crosses the line from adjudication into legislation and execution of the law." ECF No. 195 at 22-25. As an initial matter, Plaintiffs note that Defendants have already belabored this argument in prior motions. *See, e.g.* ECF No. 27 at 18 ("To provide the relief requested by Plaintiffs in this case, the Court would be required to make and enforce national

policy concerning energy . . . ."); ECF 57 at ("[A] court order requiring federal agencies to . . . prepare and implement a plan to phase out fossil fuel emissions would raise fundamental separation of powers issues."); ECF 74 at 33 ("Such an order would . . . raise profound separation of powers problems.").[18] Further, it is premature at this stage to speculate as to whether any relief that might ultimately ordered after a determination on the merits would implicate separation of powers concerns. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.")

As this Court stated in its November 10, 2016 Order denying Defendants' Motion to Dismiss:

> Should plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so. *Cf. S. Burlington Cnty. N.A.A.C.P. v. Mt. Laurel Twp.*, 336 A.2d 713, 734 (N.J. 1975) (leaving to municipality 'in the first instance at least' the determination of how to remedy the constitutional problems with a local zoning ordinance). That said, federal courts retain broad authority to 'fashion practical remedies when confronted with complex and intractable constitutional violation.' *Brown v. Plata*, 563 U.S. 493, 526 (2011). In any event, speculation about the difficulty of crafting a remedy could not support dismissal at this early stage.

Juliana, 217 F.Supp.3d at 1241-42 (citation omitted).

In arguing that Plaintiffs' requested relief would violate separation of powers principles and require the Court to step into areas of policy making and enforcement, Defendants continue to misunderstand and mischaracterize the relief Plaintiffs request. Plaintiffs do not ask this Court to order Defendants to adopt any specific policy or to take any specific action. Rather, they ask

[18] This Court also rejected substantially similar arguments in denying Intervenor Defendants' Motion to Dismiss. *See* Memo ISO Intervenor Defendants' Mot. To Dismiss, ECF No. 73 at 11-16.

this Court to determine whether Defendants' actions violate Plaintiffs' constitutional rights and to order Defendants to prepare and implement a plan of their own devising tiered towards reducing greenhouse gas emissions by rates necessary to safeguard Plaintiffs' constitutional rights and rectify Defendants' violation thereof. ECF No. 7, Prayer for Relief. The requested relief is consistent with the judiciary's broad authority to "fashion practical remedies when confronted with complex and intractable constitutional violation." *Brown v. Plata*, 563 U.S. 493, 526 (2011) (Approving court order requiring California to reduce state-wide prison population to no more than 137.5% of design capacity and leaving it to State to formulate and implement policy to reach compliance).

Defendants' invocation of the Opinion and Recommendations Clauses adds nothing of substance to the cumulative and premature arguments they repeat here. ECF No. 195 at 24. These provisions have never been interpreted by any court to preclude relief or judicial review.[19] Defendants' argument with respect to these provisions, created out of whole cloth, is equally unavailing because the relief Plaintiffs seek would not implicate the President's ability to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, nor the ability to "recommend to" Congress for "Consideration such Measures as he shall judge necessary and expedient." U.S. Cont. art II, § 3. No aspect of the relief requested would prevent the President from employing such provisions, whether in preparing and implementing a plan for transitioning to a constitutionally compliant national energy system, fulfilling any of his other constitutional duties, or otherwise. The President is free to call for opinions and issue recommendations on any subject he pleases, but he may not *implement* opinions and

[19] *Cheney v. U.S. District Court for D.C.*, a case seeking a mandamus order requiring disclosure of government records, did not even mention these clauses. 542 U.S. 367 (2004).

recommendations which infringe upon constitutionally protected fundamental rights. To the extent Defendants argue otherwise, it is because they seek to elevate the Opinions and Recommendations clauses above the Bill of Rights and place the President beyond constitutional command.

Defendants' reliance on *American Electric Power Co. v. Connecticut* is likewise misplaced. In that case, the Supreme Court affirmed the Second Circuit's ruling that claims seeking reductions of greenhouse gas emissions do not implicate a nonjusticiable political question, a holding directly contrary to Defendants' separation of powers arguments. *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 420 (2011). Further, the relief Plaintiffs seek is entirely consistent with Congress having designated the EPA as "best suited to serve as primary regulator of greenhouse gases," *id.* at 438, as it would merely require EPA to exercise its authority in a constitutionally compliant manner according to a plan of its own devising. At no point did the Supreme Court so much as insinuate Defendants' constitutionally untenable position that courts may not review the policies and actions of EPA with respect to greenhouse gas emissions for compliance with the Constitution.[20]

[20] Defendants' erroneously rely on *Women's Equity Action League v. Cavazos*, for their proposition that "there is neither constitutional nor statutory authority for the 'grand scale action plaintiffs delineate,' in which this Court is 'cast…as nationwide overseer or pacer of procedures government agencies use' to address climate change." ECF No. 195 at 25 (citing 906 F.2d 742, 744 (D.C. Cir. 1990). In *Women's Equity Action League*, the D.C. Circuit Court affirmed dismissal because it had already decided in a previous case that agency failure to timely process claims of discrimination by federally funded institutions does not violate constitutional rights. *Id.* at 751. *Free Enterprise Fund v. Public Company Accounting Oversight Board* held only that certain executive officers cannot be placed beyond the President's removal power. 561 U.S. 477 (2010). Similarly, *Lewis v. Casey* is inapposite here, standing only for the uncontroversial principle that that a plaintiff "who has been subject to injurious conduct of one kind" does not have standing to challenge unrelated harms "to which he has not been subject." 518 U.S. 343, 358 n.6 (1996). However, where there is "actual present or immediately threatened injury resulting from unlawful government action," systemwide relief may be appropriate and courts

Because "the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation," *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), it is entirely premature to speculate as to whether any relief that might be available following a determination on the merits would implicate separation of powers concerns. As with Defendants' argument regarding the APA, there is no need for the Court to revisit this issue under Defendants' Rule 12(c) Motion, which is governed by the same standard of review as the Rule 12(b) motion under which the Court previously resolved the issue. *Cafasso*, 637 F.3d at 1054 n. 4. If Defendants wish to stipulate to liability, only then would they be entitled to a conclusive determination at this early stage as to whether any relief that might be afforded will be appropriate. Otherwise, Defendants' arguments on this issue should be denied as premature consistent with this Court's previous determinations under the same standard of review.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Judgment on the Pleadings.

[*signature page follows*]

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may assert continuing jurisdiction to monitor executive compliance with constitutional commands. *Laird v. Tatum*, 408 U.S. 1, 14 (1972).

DATED this June 15, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2018, I served the foregoing Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings by the Electronic Court Filing (ECF) System on the following counsel for all parties.

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