No. 18-_____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, et al.,
Real Parties in Interest.

On Petition for a Writ of Mandamus to the United States District Court
for the District of Oregon (No. 6:15-cv-1517-TC)

PETITION FOR A WRIT OF MANDAMUS AND EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL UNDER CIRCUIT RULE 27-3

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3(a), I hereby certify that to avoid irreparable harm to Petitioners United States of America, et al. (the government), relief is needed in less than 21 days' time.

1. Regarding Circuit Rule 27-3(a)(1), the government notified both the Clerk and counsel for Real Parties in Interest (Plaintiffs) on Tuesday, July 3 of its intention to file this mandamus petition and emergency motion. The just-finalized petition and motion are being served simultaneously with filing both via the district court's CM/ECF system and via e-mail to the counsel's below-stated addresses.

2. Regarding Circuit Rule 27-3(a)(3)(i), counsel are as follows:

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3. Regarding Circuit Rule 27-3(a)(3)(ii), the facts showing the existence and nature of the claimed emergency are set forth in detail below in the Statement of the Case (pp. 12-16) and in Part III of the Argument (pp. 51-54). In brief, the government respectfully requests emergency relief in this matter because it faces impending deadlines to identify its expert witnesses (July 12) and to produce expert reports rebutting Plaintiffs' 18 expert witnesses (August 13), as well as other mounting burdens to prepare for a trial scheduled for October 29 and estimated to last approximately 50 trial days.

4. Regarding Circuit Rule 27-3(a)(3)(iii), Plaintiffs' counsel were notified through e-mails sent on July 3 and July 4, and further through a telephone conference held on July 4, of the government's intended filing of this mandamus petition and emergency motion. Counsel are being served with the just-finalized petition and

motion simultaneously with filing both via the district court's CM/ECF system and via e-mail to the counsel's above-stated addresses.

5. Regarding Circuit Rule 27-3(a)(3)(4), as set forth in the Statement of the Case below (pp. 11-12, 15-16), the government has sought—and been denied—relief from the district court. Indeed, District Judge Aiken's affirmance on Friday, June 29 of Magistrate Judge Coffin's order denying Defendants' Motion for a Protective Order and for a Stay of All Discovery, *see* Exhibits 6 and 7 hereto, is the precipitating event for the instant filing. The government is simultaneously filing in the district court a Motion for a Stay Pending a Petition for a Writ of Mandamus.

s/ Eric Grant
Eric Grant

Counsel for Petitioners

TABLE OF CONTENTS

Page

CIRCUIT RULE 27-3 CERTIFICATE i

TABLE OF AUTHORITIES vi

INTRODUCTION AND RELIEF SOUGHT 1

STATEMENT OF JURISDICTION 5

STATEMENT OF THE ISSUE 5

STATEMENT OF THE CASE 5

STANDARD OF REVIEW 16

REASONS FOR GRANTING THE WRIT 18

I. This case should be dismissed. 20

A. Plaintiffs' claims are not justiciable 20

1. Plaintiffs lack Article III standing 20

2. Even aside from standing, this is not a "case" or "controversy" within the meaning of Article III 25

B. Plaintiffs must challenge specified agency actions or inactions under the APA and based on the administrative record. 29

C. Plaintiffs' claims are frivolous. 34

1. The Due Process Clause does not create a judicially enforceable right to a particular climate composition 35

2. No federal public trust doctrine limits the federal government's authority to regulate greenhouse gases 37

Page

D. The government has no other means of obtaining relief from unconstitutional and improper discovery and trial 41

1. Requiring agencies to make factual assessments and take policy positions in discovery and trial conflicts with the APA's provisions regulating rulemaking and adjudication 43

2. Discovery and trial would violate the separation of powers 45

II. At a minimum, discovery and trial should be stayed pending consideration of the government's dispositive motions 48

III. The Court should stay discovery and trial pending resolution of this petition 51

CONCLUSION 54

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Alec L. ex rel. Loorz v. McCarthy,
561 Fed. Appx. 7 (D.C. Cir.),
cert. denied, 135 S. Ct. 774 (2014)....................40

American Elec. Power Co. v. Connecticut,
564 U.S. 410 (2011).................... 29, 39-40, 44, 47

Armstrong v. Exceptional Child Ctr., Inc.,
135 S. Ct. 1378 (2015).................... 33-34

Bauman v. U.S. Dist. Ct.,
557 F.2d 650 (9th Cir. 1977) 17

Center for Biological Diversity v. U.S. Dep't of Interior,
563 F.3d 466 (D.C. Cir. 2009)....................22

Cheney v. U.S. Dist. Ct.,
542 U.S. 367 (2004).................... 16-17, 27, 41, 48

Chiayu Chang v. U.S. Citizenship & Immigration Servs.,
254 F. Supp. 3d 160 (D.D.C. 2017)....................32

Christensen v. U.S. Dist. Ct.,
844 F.2d 694 (9th Cir. 1988) 17

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2012)....................21

Consolidated Gas Supply Corp. v. FERC,
611 F.2d 951 (4th Cir. 1979) 6

Credit Suisse v. U.S. Dist. Ct.,
130 F.3d 1342 (9th Cir. 1997) 16-17, 41-42

Page

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006).. 20-22

DeShaney v. Winnebago County Dep't of Soc. Servs.,
489 U.S. 189 (1989)..37

Dickinson v. Zurko,
527 U.S. 150 (1999)..45

Evans v. Salazar,
No. C08-0372-JCC,
2010 WL 11565108 (W.D. Wash. July 7, 2010)..33

Ex parte Peru,
318 U.S. 578 (1943)..16

Flast v. Cohen,
392 U.S. 83 (1968)..47

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (1985)..31

Franklin v. Massachusetts,
505 U.S. 788 (1992)..10

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010)..33

Gladstone Realtors v. Vill. of Bellwood,
441 U.S. 91 (1979)..21

Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.,
527 U.S. 308 (1999)..27

Guarantee Trust Co. v. York,
326 U.S. 99 (1945)..27

Harvard Pilgrim Health Care of New England v. Thompson,
318 F. Supp. 2d 1 (D.R.I. 2004) 32

Page

Hilton v. Braunskill,
481 U.S. 770 (1987)....................52

In re Cement Antitrust Litig.,
688 F.2d 1297 (9th Cir. 1982)....................17

In re SEC ex rel. Glotzer,
374 F.3d 184 (2d Cir. 2004)....................44

In re United States,
138 S. Ct. 443 (2017)....................50

In re United States,
884 F.3d 830 (9th Cir. 2018)....................2

Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.,
58 F. Supp. 3d 1191 (D.N.M. 2014).................... 32-33

Jarvis v. Regan,
833 F.2d 149 (9th Cir. 1987)....................49

Juliana v. United States,
217 F. Supp. 3d 1224 (D. Or. 2016)....................6

Ketcham v. U.S. Nat'l Park Serv.,
No. 16-CV-00017-SWS,
2016 WL 4268346 (D. Wyo. Mar. 29, 2016)....................32

Kleppe v. New Mexico,
426 U.S. 529 (1976)....................39

LaBuy v. Howes Leather Co.,
352 U.S. 249 (1957)....................17

Lance v. Coffman,
549 U.S. 437 (2007)....................21

Leiva-Perez v. Holder,
640 F.3d 962 (9th Cir. 2011)....................52

Page

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
134 S. Ct. 1377 (2014)..21

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986)..25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).. 20-23

Lujan v. National Wildlife Fed'n,
497 U.S. 871 (1990)..31

Missouri v. Jenkins,
515 U.S. 70 (1995)..26, 28

Moore v. City of E. Cleveland,
431 U.S. 494 (1977)..35

National Audubon Soc'y v. Super. Ct.,
33 Cal. 3d 419 (1983) 38

National Broad. Co. v. United States,
319 U.S. 190 (1943)..45

Native Vill. of Kivalina v. ExxonMobil Corp.,
696 F.3d 849 (9th Cir. 2012) 40

Nken v. Holder,
556 U.S. 418 (2009)..52

Northern Arapaho Tribe v. Ashe,
92 F. Supp. 3d 1160 (D. Wyo. 2015) 32

Norton v. Southern Utah Wilderness All.,
542 U.S. 55 (2004)... 24, 31-32

Ninilchik Traditional Council v. United States,
227 F.3d 1186 (9th Cir. 2000) 45

Page

Obergefell v. Hodges,
135 S. Ct. 2584 (2015)....................36

Penilla v. City of Huntington Park,
115 F.3d 707 (9th Cir. 1997)....................37

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015).................... 43-44

Perry v. Schwarzenegger,
591 F.3d 1147 (9th Cir. 2009)....................17

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).................... 25-26

PPL Montana, LLC v. Montana,
565 U.S. 576 (2012).................... 37-38, 40

Public Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989)....................48

Raines v. Byrd,
521 U.S. 811 (1997)....................20

Rutman Wine Co. v. E. & J. Gallo Winery,
829 F.2d 729 (9th Cir. 1987)....................49

San Luis Unit Food Producers v. United States,
709 F.3d 798 (9th Cir. 2013)....................31

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974)....................21

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996)....................33

Simon v. Eastern Kentucky Welfare Rights Org.,
426 U.S. 26 (1976)....................23

Page

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998)..41

Stern v. Marshall,
564 U.S. 462 (2011)..26

Strandberg v. City of Helena,
791 F.2d 744 (9th Cir. 1986) 35

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971)..28

Tagg Bros. & Moorhead v. United States,
280 U.S. 420 (1930)..45

Unemployment Comp. Comm'n v. Aragon,
329 U.S. 143 (1946)..45

United States v. 32.42 Acres of Land,
683 F.3d 1030 (9th Cir. 2012) 38

United States v. Bd. of County Comm'rs,
843 F.3d 1208 (10th Cir. 2016),
cert. denied, 138 S. Ct. 84 (2017)..39

United States v. Carlo Bianchi & Co.,
373 U.S. 709 (1963)..45

United States v. City & County of San Francisco,
310 U.S. 16 (1940)..39

United States v. Flores-Villar,
536 F.3d 990 (9th Cir. 2008) 34

United States v. Nixon,
418 U.S. 683 (1974)..46

Vermont Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000)..26

Page

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.,
435 U.S. 519 (1978)...43

Warth v. Seldin,
422 U.S. 490 (1975)...22

Washington Environmental Council v. Bellon,
732 F.3d 1131 (2013) 24-25

Washington v. Glucksberg,
521 U.S. 702 (1997)...35

Webster v. Doe,
486 U.S. 592 (1988)..30, 32

Western Radio Servs. Co. v. U.S. Forest Serv.,
578 F.3d 1116 (9th Cir. 2009) 30

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)..22

Wood v. McEwen,
644 F.2d 797 (9th Cir. 1981) 49

Wong Yang Sung v. McGrath,
339 U.S. 33, *modified*, 339 U.S. 908 (1950) 43

Wood v. Ostrander,
879 F.2d 583 (9th Cir. 1989) 37

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952)...46

Page

Constitutional Provisions, Statutes, and Court Rules

U.S. Const.

art. II, § 1 .... 12, 46

art. II, § 2, cl. 1 .... 27, 46

art. II, § 3 .... 12, 27, 47, 53

art. III, § 2, cl. 1 20

art. IV, § 3, cl. 2 38

Natural Gas Act, 15 U.S.C. § 717r 6

Administrative Procedure Act

5 U.S.C. § 551 .... 31, 43

5 U.S.C. § 553 44

5 U.S.C. § 554 43-44

5 U.S.C. § 701 31

5 U.S.C. § 702 29-31

5 U.S.C. § 704 .... 29, 31

5 U.S.C. § 706 30-32

28 U.S.C. § 1292 .... 51, 54

All Writs Act, 28 U.S.C. § 1651 .... 4-5, 51

Fed. R. App. 8 52

Fed. R. App. P. 21 .... 5, 52

Page

9th Cir. R. 27-3 ....i-iii

9th Cir. General Order 6.8 51

Fed. R. Civ. P. 30 43

Legislative Materials

S. Rep. No. 76-442 (1939) 34

S. Rep. No. 79-752 (1945) 34

H. Rep. No. 79-1980 (1946) 34

Other Authorities

Audio Recording of Oral Argument,
In re United States,
No. 17-71692 (9th Cir. Dec. 11, 2017),
https://www.ca9.uscourts.gov/media/
view.php?pk_id=0000031810 8

Joseph Story, *Commentaries on the Constitution of the United States*
(Ronald D. Rotunda & John E. Nowak eds., Carolina Acad.
Press 1987) (1833)..47

Draw #youthvgov, Youth v. Gov, https://www.youthvgov.org/artist-
search/ (last visited July 3, 2018). 1

INTRODUCTION AND RELIEF SOUGHT

This suit is a fundamentally misguided attempt to redirect federal environmental and energy policies through the courts rather than the political process. Without identifying any specific agency action or inaction (save one), Plaintiffs allege that the "affirmative aggregate acts" of Defendants—the President, the Executive Office of the President, the Environmental Protection Agency, and the Departments of Agriculture, Commerce, Defense, Energy, Interior, State, and Transportation—for the past 50 years in the area of fossil fuel production and use are causing a "dangerous climate system" and systematically violating their asserted substantive due process rights. Plaintiffs ask the district court to address these alleged wrongs by ordering the President and defendant agencies to prepare and implement a national remedial plan and by retaining jurisdiction indefinitely to ensure compliance. Remarkably, the district court has allowed this improper suit to proceed for nearly three years over the repeated objections of the United States and has now set aside 50 trial days this fall for Plaintiffs' requested "Trial of the Century."[1]

The last time this case was before this Court, the Court recognized that "some of plaintiffs' claims as currently pleaded are quite broad, and some of the remedies

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[1] *Draw #youthvgov*, Youth v. Gov, https://www.youthvgov.org/artist-search/ (last visited July 3, 2018).

the plaintiffs seek may not be available as redress." Exhibit 2 at 17 (available at *In re United States*, 884 F.3d 830 (9th Cir. 2018)). Ultimately, however, the Court declined to grant mandamus relief and direct dismissal, noting that the government might be able to avoid threatened harms by "seek[ing] protective orders," moving to "dismiss the President as a party," and requesting "summary judgment on the claims." *Id.* at 11, 13, 14. The Court observed that "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that it had "no reason to assume this case will be any different." *Id.* at 17. The Court also noted that, on remand, Defendants could "raise and litigate any legal objections they have," including by "seeking mandamus in the future" or "asking the district court to certify orders for interlocutory appeal of later rulings." *Id.* at 15, 17.

The government heeded the Court's direction. On remand, as contemplated by this Court's order, the government moved for judgment on the pleadings. That motion reasserted the government's prior arguments for dismissal; requested dismissal of the President as a party; and argued that under the Administrative Procedure Act (APA), Plaintiffs' claims must be dismissed unless Plaintiffs amend them to challenge specific agency actions or inactions. The government also sought a protective order from all discovery, explaining that Plaintiffs' claims must proceed against specific agency actions or inactions and be reviewed on the administrative record of those actions; and that, in any event, the discovery and trial contemplated

by Plaintiffs would violate the APA's comprehensive regulation of agency decisionmaking and the separation of powers. Finally, the government moved for summary judgment on various grounds, including that even if Plaintiffs' allegations could survive a motion to dismiss, Plaintiffs could not carry their burden of proving that Defendants' conduct caused their asserted injuries.

For their part, Plaintiffs opposed dismissing the President, refused to narrow their claims in any respect or identify specific agency actions or inactions they sought to challenge, opposed the government's request for a protective order, and asked the district court to delay deciding either of the government's dispositive motions until after the trial. As for the district court, it promptly announced that trial would begin on October 29, 2018 and would be expected to last for approximately 50 trial days. It denied the government's motion for a protective order; granted Plaintiffs extensions to oppose the government's motion for judgment on the pleadings and motion for summary judgment; and refused to stay discovery while it resolves the government's dispositive motions. The trial begins in less than four months' time, and the accelerating burdens of discovery and trial preparation—including depositions of Plaintiffs' 18 expert witnesses and preparation of rebuttal expert reports on the wide-ranging topics on which Plaintiffs' experts opine—are growing more intense.

It is time for this ill-conceived suit to end. Plaintiffs' implausible and far-reaching constitutional claims are procedurally defective and substantively frivolous. And the similarly unprecedented proceedings contemplated by the district court would violate bedrock limitations on agency decisionmaking imposed by the APA and intrude on the executive authority to consider and formulate federal policy, in violation of the separation of powers. This Court should exercise its authority under the All Writs Act, 28 U.S.C. § 1651, to instruct the district court to dismiss this case now. At a minimum, it should direct the district court to stay further discovery and trial until the government's pending dispositive motions are resolved, in keeping with the Supreme Court's recent directions in another suit asserting constitutional claims against agency action. Finally, the government respectfully requests that the Court immediately stay all discovery and trial pending this Court's consideration of this petition for mandamus.

Given the impending obligations related to the government's experts and the rapidly approaching trial date, the government respectfully requests an expedited ruling from this Court on this request for a stay and an immediate administrative stay while the Court considers the government's stay request. Absent relief from this Court on the government's stay request or mandamus petition by Monday, July 16, the government will have little choice but to seek further relief from the Supreme Court.

STATEMENT OF JURISDICTION

This Court has authority to issue a writ of mandamus pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

Whether this Court should exercise its authority under the All Writs Act, 28 U.S.C. § 1651, to order the dismissal of this action against the President and multiple federal agencies that seeks to redirect federal environmental and energy policies through civil litigation to phase out fossil fuel emissions.

STATEMENT OF THE CASE

1. Twenty-one minor individuals, an organization known as Earth Guardians, and future generations (by and through their self-appointed guardian Dr. James Hansen) filed this suit in 2015 against President Obama, the Executive Office of the President, and numerous Cabinet-level Executive agencies, 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 an asserted federal public trust doctrine. Plaintiffs allege that Defendants (now President Trump and officials in his Administration) have, through action and inaction, enabled the combustion of fossil fuels, which release greenhouse gases into the atmosphere. With one exception, Plaintiffs do not identify or challenge any specific agency actions, such as agency orders, permits, adjudications, or

rulemakings, or even any failure to undertake any specific required actions.[2] Instead, they challenge what they term the federal government's "aggregate actions," ECF No. 7, ¶ 129, which they assert have caused "climate instability" that injures their prospects for long and healthy lives, *id.* ¶ 288.

Plaintiffs ask the district court to declare that they have rights under the Constitution to a particular climate system and to enjoin the Executive Branch to "prepare a consumption-based inventory of U.S. CO_2 emissions" and to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." ECF No. 7 at 94. In addition, they ask the court to retain jurisdiction for an indefinite period of time to monitor the government's compliance with this "national remedial plan." *Id.*

2. In November 2016, the district court denied the government's motion to dismiss Plaintiffs' claims for lack of jurisdiction and failure to state a claim. Exhibit 1 (ECF No. 83) (available at *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016)). The court found that Plaintiffs had established Article III standing by adequately alleging that they had been harmed by the effects of climate change,

[2] The exception is a challenge to the Department of Energy's 2011 authorization, pursuant to Section 201 of the Energy Policy Act, of the export of liquefied natural gas from a terminal in Coos Bay, Oregon. ECF No. 7, ¶ 193. This claim is indisputably beyond the district court's jurisdiction because the courts of appeals have exclusive jurisdiction to review such authorizations. *See* 15 U.S.C. § 717r(b); *Consolidated Gas Supply Corp. v. FERC,* 611 F.2d 951, 957 (4th Cir. 1979).

through increased droughts, wildfires, and flooding, *id.* at 19-21; that Defendants' regulation of (and failure to further regulate) fossil fuels caused Plaintiffs' injuries, *id.* at 22-26; and that the court could redress those injuries by "order[ing] Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system," *id.* at 28 (quoting ECF No. 7, ¶ 12).

The district court also concluded that Plaintiffs had stated a claim under the Fifth Amendment's Due Process Clause and a federal public trust doctrine. *Id.* at 28-51. The court found in the Fifth Amendment's protection against the deprivation of "life, liberty, or property, without due process of law" a previously unrecognized fundamental right to a "climate system capable of sustaining human life," and the court determined that Plaintiffs had adequately alleged infringement of that fundamental right. *Id.* at 32. The court further determined that Plaintiffs had adequately stated a claim under a federal public trust doctrine, which it held imposes a judicially enforceable prohibition on the federal government against "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." *Id.* at 37 (internal quotation marks omitted). Plaintiffs'

claims under this doctrine, the court concluded, are also "properly categorized as substantive due process claims." *Id.* at 51.

The district court subsequently denied the government's motion to certify for interlocutory appeal the court's order denying the motion to dismiss. ECF No. 172.

3. The government petitioned this Court for a writ of mandamus ordering dismissal, contending that the district court's order denying the motion to dismiss contravened fundamental limitations on judicial review imposed by Article III of the Constitution and clearly erred in recognizing a sweeping new fundamental right to certain climate conditions under the Due Process Clause. The government further requested a stay of the litigation pending the Court's consideration of the mandamus petition.

The Court granted the government's request for a stay and, at oral argument on the government's petition, the panel expressed skepticism about the breadth and merits of Plaintiffs' claims. As Judge Berzon put it, "I would hope that if this case did go forward, that it would be pared down and focused and directed at particular orders and agencies." Audio Recording of Oral Argument 11:23-11:33, *In re United States*, No. 17-71692 (9th Cir. Dec. 11, 2017), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000031810.

The Court, however, ultimately "decline[d] to exercise [its] discretion to grant mandamus relief at [that] stage of the litigation." Exhibit 2 at 17. In its decision,

the Court reiterated that "some of plaintiffs' claims as currently pleaded are quite broad, and some of the remedies plaintiffs seek may not be available as redress." *Id.*; *see also id.* at 14 (stating that it "well may be" that plaintiffs' claims are "too broad to be legally sustainable"). The Court reasoned, however, that "the district court needs to consider those issues further in the first instance." *Id.* at 17. The Court "underscore[d] that this case is at a very early stage, and that the defendants have ample opportunity to raise legal challenges to decisions made by the district court on a more fully developed record, including decisions as to whether to focus the litigation on specific governmental decisions and orders." *Id.* at 15. The Court observed that "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that it had "no reason to assume this case will be any different." *Id.* at 17. And the Court stated that Defendants could continue to "raise and litigate any legal objections they have," *id.* at 15, including by challenging future discovery orders, moving to "dismiss the President as a party," "reasserting a challenge to standing, particularly as to redressability," "seeking mandamus in the future," or "asking the district court to certify orders for interlocutory appeal of later rulings." *Id.* at 12, 13, 17.

4. On remand, the government filed a series of motions in the district court as contemplated by this Court's decision.

On May 9, 2018, the government filed a motion for judgment on the pleadings, ECF No. 195, reiterating its prior arguments for dismissal—that Plaintiffs lack standing and their novel assertion of judicially enforceable fundamental rights to a particular climate system lacks any support in the Constitution or this Nation's history and tradition—to permit the district court (as this Court contemplated) to "consider those issues further." Exhibit 2 at 17. In addition, the government offered three new grounds for dismissing some or all of Plaintiffs' claims. First, the government asked the district court to dismiss the President because a federal court has "no jurisdiction" to "enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (internal quotation marks omitted). Second, the government argued that Plaintiffs had failed to identify a private right of action to assert its claims. The APA, the government explained, provides the mechanism for challenging federal administrative actions and alleged failures to act of the kind that underlie Plaintiffs' claims, and the APA requires litigants to challenge discrete, identified agency actions or alleged failures to act. Unless Plaintiffs amend their claims to "focus the litigation on specific governmental decisions and orders," Exhibit 2 at 15, the government argued, they fail as a matter of law. Third, the government contended that, even if Plaintiffs could bring this action outside the APA, their asserted claims and requested relief violate the constitutional separation of powers by effectively requiring the district court to usurp

the role of the President in calling on the expertise and resources of the Executive Branch to formulate the nation's environmental and energy policy and to make recommendations to Congress concerning changes to laws governing those policies.

On the same day, the government also filed a motion for a protective order barring all discovery or, at a minimum, a stay of all discovery pending resolution of its motion for judgment on the pleadings and its forthcoming motion for summary judgment. ECF No. 196. The government argued that, because this case may only proceed under the APA, judicial review must be based on the administrative record of specifically identified actions or decisions challenged by Plaintiffs, and therefore no discovery is proper. In addition, the government argued that, even if review were not otherwise limited to the administrative record of specific agency actions, discovery in this case would be independently barred by the procedural requirements that the APA imposes on agency decisionmaking.

Those requirements, the government explained, prohibit agencies from making factual assessments and statements on the numerous complex and controversial policy issues implicated by this case through discovery requests and individual deponents in a suit brought by a few members of the public, rather than through the relevant orderly procedures of agency decisionmaking required by the APA with public input from other stakeholders and members of the public. Finally, the government contended that discovery in this case aimed at developing and

implementing a comprehensive, government-wide climate policy, outside the substantive and procedural framework of the existing organic statutes of the defendant agencies and the APA, would violate the separation of powers by invading the President's exclusive constitutional authority to supervise the Executive Branch, require the opinions of his principal officers, and formulate legislative and policy recommendations. *See* U.S. Const. art. II, §§ 1, 3. The government argued that, at a minimum, the district court should stay all discovery until the court ruled on the government's pending motion for a judgment on the pleadings and its forthcoming motion for summary judgment, the granting of which would either eliminate any occasion for discovery or substantially affect its scope.

On May 22, 2018, the government filed a motion for summary judgment, arguing that (1) Plaintiffs lack standing both as a matter of law and as judged against the evidentiary record; (2) Plaintiffs have failed to identify a right of action for their claims apart from the APA and have not satisfied the APA's requirement to identify discrete agency actions or inactions that they challenge; and (3) Plaintiffs' claims fail on the merits. ECF No. 207. In addition, the government contended that it was entitled to summary judgment because, even aside from Plaintiffs' lack of standing, this suit is not a case or controversy within the meaning of Article III.

5. In the meantime, both Plaintiffs and the district court have wholly failed to narrow or focus the claims in this case. Immediately upon remand, the district

court ordered the parties to proceed with discovery, and it set an opening trial date of October 29, 2018. ECF Nos. 181, 189, 192. The court indicated its expectation that the trial will last for approximately 50 trial days—i.e., with yearend holidays, until well into 2019. *See, e.g.*, Exhibit 3 at 8:1 (Coffin, J.) (estimating "five weeks per side in essence"). The court has repeatedly made clear that it has no intention of delaying trial. *See, e.g.*, Exhibit 5 at 16:2-4 (Aiken, J.) ("[A]s we have talked about in this case before, we are not delaying trial at this point. We are moving forward."); *id*. at 17:17 ("[W]e have got a trial date and we are moving forward."); Exhibit 4 at 27:22-24 (Coffin, J.) ("October 29, 2018, trial starts unless some higher court says no."); ECF No. 239 (Aiken, J.) (denying request to extend the trial date for the same period as extension of time for Plaintiffs to oppose summary judgment).

At the same time, the court extended the deadline for Plaintiffs to respond to the government's motion for judgment on the pleadings to June 15, 2018, ECF No. 210, and set argument for the motion for July 18, 2018, ECF No. 214. It similarly extended the deadline for Plaintiffs to respond to the government's motion for summary judgment until June 28, 2018. ECF No. 240. The government filed a motion requesting that the district court also set argument on the motion for summary judgment for the July 18 hearing—a request that Plaintiffs have opposed. ECF No. 305. The court has not yet ruled on that request.

Plaintiffs, meanwhile, have publicly promised the "Trial of the Century," and their conduct reflects those intentions. In April 2018, Plaintiffs served the government with 17 expert reports. In May 2018, Plaintiffs served 248 Requests for Admissions (RFAs) and Federal Rule 30(b)(6) deposition notices on two agency defendants, namely, the Department of Agriculture and the Department of the Interior. These RFAs are broad in scope, seeking admissions dating back to the 1960s on topics such as whether, in the agencies' views, certain resources are "at risk"; and admissions concerning "cultural services" such as "spiritual renewal and[] aesthetic enjoyment." *See*, *e.g.*, ECF No. 194-3 at 16-17; ECF No. 194-4 at 29. Among the topics noticed for the Rule 30(b)(6) depositions, Plaintiffs demanded that the United States designate a witness to express the defendant agencies' official positions on "any analysis or evaluation" related to "atmospheric CO2 concentrations, climate change targets, or greenhouse gas emissions" that "would avoid endangerment of human health and welfare for current and future generations," as well as on the role of the agencies in implementing President Trump's energy policy. ECF No. 196-1 at 6 (Federal Rule 30(b)(6) notice of deposition of Department of Interior); ECF No. 196-2 at 6 (Federal Rule 30(b)(6) notice of deposition of Department of Agriculture).

In June 2018, Plaintiffs served similar RFAs and noticed nearly identical Rule 30(b)(6) depositions of representatives from the Department of Energy and the

Department of Defense. When the government sought a protective order with respect to the May RFAs and deposition notices on multiple grounds, Plaintiffs refused to withdraw the requests but asked the district court to hold the government's responses in abeyance, while Plaintiffs seek to obtain the same information through contention interrogatories and requests for judicial notice. ECF No. 247.

6. On May 25, 2018, Magistrate Judge Coffin denied the government's motion for a protective order for all discovery or, at a minimum, a stay of all discovery pending resolution of the government's motions for judgment on the pleadings and summary judgment. Exhibit 6 (ECF No. 212). Judge Coffin determined that the Complaint does not assert claims arising under the APA because the claims are "based on alleged violations of constitutional rights." *Id.* at 2. He expressed the view that the district court had already rejected Defendants' argument that Plaintiffs must bring their claims under the APA. *Id.* And he refused to grant a protective order based on the separation of powers, ruling instead that "[s]hould a specific discovery request arise during discovery in this case that implicates a claim of privilege the government wishes to assert, the government may file a motion for a protective order directed at any such specific request." *Id.* at 3. Judge Coffin denied the government's request for a stay of discovery without explanation. *Id.*

On Friday, June 29, the district court summarily affirmed Magistrate Judge Coffin's order, stating that it had "carefully reviewed [that] order in light of [the

government's] objections" and "conclude[d] that the order is not clearly erroneous or contrary to law." Exhibit 7 (ECF No. 300) at 2. The court provided no additional explanation for its decision. Again without explanation, the court further "decline[d] to certify [its] decision for interlocutory appeal under 28 U.S.C. § 1292(b)." *Id.* Meanwhile, the government's trial preparation burdens continue, as the October trial date fast approaches. Among other obligations, the government is required to disclose its experts by July 12 and provide expert reports to Plaintiffs by August 13. ECF No. 192.

STANDARD OF REVIEW

Mandamus is an "extraordinary" remedy traditionally used "to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381 (2004) (brackets and internal quotation marks omitted). Mandamus relief may appropriately be granted to correct errors beyond those fitting nicely within the "technical definition of jurisdiction," but also errors "amounting to a judicial usurpation of power" or a "clear abuse of discretion." *Id.* For example, mandamus has been used "to restrain a lower court when its actions would threaten the separation of powers," *Cheney,* 542 U.S. at 381; *see also Ex parte Peru*, 318 U.S. 578, 588 (1943); to prevent unlawful discovery on meritless claims, *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997); and to ensure that the judicial system operates in an

orderly, efficient manner, *In re Cement Antitrust Litig.,* 688 F.2d 1297, 1307 (9th Cir. 1982); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957).

This Court considers a petition for a writ of mandamus by applying the five *Bauman* factors: (1) whether the petitioner has no other means to obtain the desired relief; (2) whether, absent relief, the petitioner will be prejudiced in a manner not correctable on appeal; (3) whether the district court has clearly erred as a matter of law; (4) whether the district court has committed an oft repeated error or manifested a persistent disregard of the federal rules; and (5) whether the petition presents new and important problems or issues of first impression. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2009) (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)).[3] Not every factor is relevant in every case, and the writ may issue even if some of the factors point in different directions. *Christensen v. U.S. Dist. Ct.*, 844 F.2d 694, 697 (9th Cir. 1988); *see also Credit Suisse*, 130 F.3d at 1345 ("In fact, rarely will a case arise where all these guidelines point in the same direction or where each guideline is even relevant or applicable.").

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[3] The Supreme Court has identified three requirements for mandamus relief—(1) the party seeking relief has no other adequate means of relief; (2) the right to relief is clear and undisputable; and (3) issuing the writ is appropriate in the circumstances —which overlap substantially with the *Bauman* factors and are also satisfied here for the reasons discussed. *See Cheney*, 542 U.S. at 380-81.

REASONS FOR GRANTING THE WRIT

The Court should exercise its authority under the All Writs Act to instruct the district court to dismiss this extraordinarily misguided case for at least three independent reasons. First and most fundamentally, this attempt to establish national climate policy through litigation is not remotely a case or controversy cognizable in an Article III court. Plaintiffs cannot establish Article III standing to assert generalized grievances related to the global phenomenon of climate change, none of which can be fairly traced to any particular action or inaction by Defendants or redressed by any order within the authority of a federal court to issue. And, even if they could establish standing, Plaintiffs' claims seeking development and implementation of a national plan to remedy climate change (to be overseen, perhaps for the balance of this century, by a single district court) are simply not of the sort that a federal court is empowered to hear and decide. Second, even if this suit were to proceed, it would have to be targeted at specifically identified agency actions or alleged failures to act and be based on the administrative record for those actions. The APA provides the exclusive right of action for challenging an agency's action or failure to act with respect to regulatory requirements and standards, and the APA does not permit the sort of broad, programmatic attack on agency policies made by Plaintiffs here. Third and finally, Plaintiffs' claims of a fundamental right to a

particular climate system and a never-before-recognized public trust obligation on the federal government are frivolous.

Without disagreeing with any of these contentions, this Court declined to grant mandamus relief the last time the suit was before the Court, because it concluded that the government might be able to obtain relief—or at least vastly narrow the claims in this case—through other means. Despite the government's extensive efforts to adhere to the roadmap outlined by this Court, it is now clear that the district court has not followed that directive. With full-blown discovery against eight Executive agencies looming and a 50-day trial quickly approaching, the district court has refused to stay discovery while it considers the government's multiple pending motions and has made clear that the October 29 trial date will not budge without intervention from a higher court. The time for such intervention is now. At a minimum, the Court should stay discovery and trial pending the district court's resolution of the government's pending dispositive motions for judgment on the pleadings and for summary judgment, so that this Court has an opportunity to review resolution of those motions—through interlocutory certification or mandamus—before the government is subjected to wide-ranging and impermissible discovery and a 50-day trial that is beyond the jurisdiction of the district court to conduct.

I. This case should be dismissed.

A. Plaintiffs' claims are not justiciable.

The Supreme Court has reiterated that "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) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)); *see also* U.S. Const. art. III, § 2, cl. 1. This suit fails to qualify as a "case" or "controversy" within the meaning of Article III for two independent reasons.

1. Plaintiffs lack Article III standing.

Perhaps the most familiar aspect of the case-or-controversy limitation is the requirement that the party invoking the power of a federal court establish 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. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted) (omissions and brackets in

original). The purpose of the standing doctrine is "to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2012). "In keeping with that purpose," a court's 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." *Id.* Plaintiffs cannot establish any of the standing requirements here.

First, Plaintiffs assert generalized grievances, not particularized harms. 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); *DaimlerChrysler Corp.*, 547 U.S. at 344-46; *Defenders 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); *see also Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979).

The injuries that Plaintiffs claim are not particular to them or cognizable for purposes of Article III. Rather, they involve the diffuse effects of a generalized

phenomenon on a global scale. To the extent that climate-related injuries affect Plaintiffs, the effects are the same as those felt by any other person in their communities, in the United States, or throughout the world at large. *See DaimlerChrysler Corp.*, 547 U.S. at 353 ("[S]tanding is not dispensed in gross."). Federal courts have repeatedly held that injuries predicated on the general harms of climate change do not suffice for purposes of standing. *Center for Biological Diversity v. U.S. Dep't of 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). The same result is compelled here.

Second, Plaintiffs cannot show that the government policies they challenge—expressed in broad and undifferentiated terms, rather than directed to discrete agency actions—caused their asserted injuries. *See Defenders of Wildlife*, 504 U.S. at 560. Plaintiffs principally complain of the government's regulation (or lack thereof) of private parties not before the district court. When a plaintiff's alleged harms may have been caused directly by the conduct of parties other than the defendants (and only indirectly by the defendants), however, it is "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." *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975); *see also Defenders*

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 make that heightened showing. Among their widely scattered objections, for example, Plaintiffs claim that the United States subsidizes the fossil fuel industry. ECF No. 7, ¶¶ 171-78. But Plaintiffs cannot establish 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 within and outside the United States (nor any proof that their harms would be redressed by an order against such subsidization). Rather, they offer only speculation that, in the absence of such subsidization, third parties in the fossil fuel industry would alter their behavior in a manner that would affect Plaintiffs in a particularized and concrete way. *See, e.g.*, *Simon v. Eastern Kentucky 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 [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.

This Court's decision in *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (2013), is directly on point. In *Bellon*, the Court rejected an attempt to link alleged climate injuries to a state agency's allegedly insufficient regulation of private parties. It 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). The Court 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). So too here.

Third, Plaintiffs cannot establish that it is likely that their asserted injuries could be redressed by an order from a federal court. 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 district court in any event lacks authority to direct an agency to exercise that discretion in any particular way. *See Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (*SUWA*) (discussing historical limitations of mandamus remedy). To the extent that Plaintiffs seek action beyond the defendant agencies' existing authority under their organic statutes, the district court

lacks authority to require agencies to take such actions or to require Congress to enact new laws. *See Louisiana 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 upon it.").

Plaintiffs have not even begun to articulate a remedy that a federal court could award that is consistent with these limitations on its authority and 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 district court's authority "would likely reduce the pollution causing Plaintiffs' injuries"). The district 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." Exhibit 1 (quoting ECF No. 7, ¶ 94). But neither Plaintiffs nor the court cited any legal authority that would permit such a usurpation of legislative and executive authority by an Article III court.

2. Even aside from standing, this is not a "case" or "controversy" within the meaning of Article III.

Even if Plaintiffs could somehow establish standing, this suit is not one that a federal court could entertain consistent with the Constitution. Article III vests federal courts created by Congress with the "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) (internal quotation marks omitted). It 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.'" *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (internal quotation marks omitted); *see also Stern v. Marshall*, 564 U.S. 462, 485 (2011). As such, 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).

Plaintiffs' suit is not a case or controversy cognizable under Article III. 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 even ones that are beyond the authority of Executive Branch agencies to take—and then to undertake to pass upon the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate. *See, e.g.*, ECF No. 7, ¶¶ 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 and the United States Government at large with respect to broad policies

affecting all persons throughout the country. No federal court, nor any court at Westminster, has ever purported to use the "judicial power" 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; *id.* art. II, § 3; *cf. Cheney*, 542 U.S. at 385.

Plaintiffs appeal to the district court's equitable powers as justifying the review they seek in 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." *Guarantee Trust Co. 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 (internal quotation marks omitted). The controlling question is whether "the relief [Plaintiffs] requested here was traditionally accorded by courts of equity," *id*. at 319, and the answer is plainly no. As noted, among other things, Plaintiffs ask the district court to order the President and the defendant agencies "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 to "[r]etain jurisdiction over this action to monitor and enforce Defendants' compliance with the national remedial plan." ECF No. 7 at 94. That novel relief is dramatically beyond any traditional concept of equity.

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 found the equitable authority of federal courts sufficiently broad to address the discrete constitutional claims at issue there. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). But even those claims paled in comparison to Plaintiffs' claims and requested relief. The plaintiffs in those cases sought injunctions against particular school districts for particular constitutional violations distinctly experienced by particular individuals. The courts then directed injunctions at the institutions and required particular actions to remedy the violations. Plaintiffs here challenge Congress' and the Executive Branch's policies relating to climate change across the Government and across the Nation over decades, and allegedly affecting the population at large, and ask the district court to take control of that entire range of policy-making.

"There simply are certain things that courts, in order to remain courts, cannot and should not do." *Jenkins*, 515 U.S. 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." *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (*AEP*). 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.* (citation omitted). Yet those are precisely the steps that would be required to adjudicate Plaintiffs' claims, and they are irreconcilable with Article III.

B. Plaintiffs must challenge specified agency actions or inactions under the APA and based on the administrative record.

Even if this suit could proceed within the boundaries of Article III, it would have to be targeted at specifically identified agency actions or alleged failures to act, and review would have to be based on the administrative record for those actions. The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Review is presumptively limited to "final agency action," *id.* § 704, and the statute 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," *id.* § 706(2), and to "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1). The statute also waives the United States' sovereign immunity to allow such a suit. *Id.* § 702. In so doing, the APA provides a "comprehensive remedial scheme" for "persons adversely affected by agency action" or alleged failure to act with respect to regulatory requirements and standards, permitting, and other administrative measures. *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009); *see also Webster v. Doe*, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting) (explaining that the APA "is an umbrella statute governing judicial review of all federal agency action" and that "if review is not available under the APA it is not available at all").

Plaintiffs allege that a large number of (mostly unspecified) "agency action[s]" and inactions are "contrary to constitutional right." 5 U.S.C. §§ 702, 706. They allege, in various forms, that "Defendants have knowingly endangered plaintiffs' health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion, and by subsidizing and promoting this fossil fuel exploitation." ECF No. 7, ¶ 280. And they allege Defendants have done so through a series of broad and unspecified agency actions: the leasing of lands for mineral

development; the permitting of oil and gas wells, coal mines, pipelines, and power plants; the development of management plans for federal lands; and the implementation of rulemakings that govern mineral development, to name a few. *See, e.g.*, *id.* ¶¶ 5, 7, 12, 163, 292, 298, 305. Each of the individual agency decisions implicitly challenged by Plaintiffs—each lease, each permit, each rulemaking, each management plan—is a separate "agency action." 5 U.S.C. §§ 551(13), 701, 702, 704, 706. Plaintiffs' claims are therefore reviewable, if at all, only under the APA and on the basis of the administrative record for each of those specific actions. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.").

As currently formulated, however, Plaintiffs' claims cannot proceed under the APA, because the Act allows only for challenges to "circumscribed, discrete" final agency action, not the sort of "broad programmatic attack" on agency policies that Plaintiffs assert here. *SUWA*, 542 U.S. at 62, 64; *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 801-06 (9th Cir. 2013); 5 U.S.C. §§ 702, 704. Plaintiffs expressly cast their claims as a challenge to "affirmative aggregate actions" by the numerous defendant agencies that "permitted, encouraged, and otherwise enabled continued

exploitation, production, and combustion of fossil fuels." ECF No. 7, ¶¶ 1, 5. But a challenge to "aggregate actions" is the antithesis of the "*discrete* agency action" that the Supreme Court has explained must be challenged under the APA. *SUWA*, 542 U.S. at 64.

Contrary to Magistrate Judge Coffin's reasoning (which the district court declined to disturb), there is nothing talismanic about Plaintiffs' assertion of constitutional claims. Section 706 of the APA expressly states that judicial review extends to alleged constitutional violations: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . *contrary to constitutional right*, power, privilege, or immunity." 5 U.S.C. § 706(2)(B) (emphasis added); *see also Webster*, 486 U.S. at 603-04 (holding that Due Process Clause and Equal Protection Clause claims may proceed under APA judicial review provisions). Federal courts have therefore repeatedly rejected attempts by plaintiffs to circumvent the APA's limitations on judicial review by asserting constitutional claims. *See, e.g.*, *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017); *Ketcham v. U.S. Nat'l Park Serv.*, No. 16-CV-00017-SWS, 2016 WL 4268346, at *1 (D. Wyo. Mar. 29, 2016); *Northern Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1174 (D. Wyo. 2015); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 8 (D.R.I. 2004); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F.

Supp. 3d 1191, 1199, 1237 (D.N.M. 2014); *Evans v. Salazar*, No. C08-0372-JCC, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010).

Plaintiffs appear to suggest that they can evade the APA's limitations because the Constitution itself provides the right of action for constitutional claims. ECF No. 7, ¶ 13 ("This action . . . is authorized by Article III, Section 2, which extends the federal judicial power to all cases arising in equity under the Constitution."). But the Supreme Court has never held that the Constitution itself provides an across-the-board right of action for all constitutional claims—and especially for the sweeping constitutional claims that Plaintiffs advance here and the sweeping relief they seek. Indeed, the Court recently decided that "the Supremacy Clause does not confer a right of action," a decision that would make no sense if petitioner were correct that constitutional claims are automatically cognizable. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). Federal courts do have equitable authority in some circumstances "to enjoin unlawful executive action." *Id.* at 1385; *see also, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). But 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 Florida v. Florida*, 517 U.S. 44, 74 (1996). Here,

even if a court's equitable authority could ever encompass a case of this sort, *but see supra* Section I.A.2 (pp. 27-29), the APA provides "express . . . statutory limitations" that "foreclose," *Armstrong*, 135 S. Ct. at 1381, Plaintiffs' asserted constitutional claims against the broad and unspecified "aggregate actions" of the federal government as a whole.[4]

C. Plaintiffs' claims are frivolous.

Finally, even if a court could reach the merits of Plaintiffs' constitutional theories, they plainly fail. In denying the government's motion to dismiss, the district court concluded that Plaintiffs stated two related constitutional claims based on substantive due process: (1) a previously unidentified judicially enforceable fundamental right to "a climate system capable of sustaining human life"; and (2) a federal public trust doctrine to the same effect. Both claims are frivolous.[5]

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[4] Indeed, the legislative history of the APA confirms Congress's intent that the statute provide the exclusive means of "judicial review of *all* administrative rules and of *all* administrative decisions and orders," including review of alleged constitutional violations. S. Rep. No. 76-442, at 6 (1939) (emphasis added); S. Rep. No. 79-752, at 26 (1945); H. Rep. No. 79-1980, at 42 (1946).

[5] In addition to their "fundamental right" and "public trust" claims, Plaintiffs also asserted claims under the equal protection component of the Fifth Amendment based on the government's alleged discrimination against the "separate suspect classes" of "children and future generations," ECF No. 7, ¶ 294; *see also id.* ¶¶ 290-301; and under the unenumerated rights preserved by the Ninth Amendment, *id.* ¶¶ 302-06. To the extent these claims are distinct from their other claims, not even the district court found them viable. Rightly so: "age is not a suspect class," *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008), and "the [N]inth [A]mendment has

1. The Due Process Clause does not create a judicially enforceable right to a particular climate composition.

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)). The district court's recognition of an "unenumerated fundamental right" to "a climate system capable of sustaining human life," Exhibit 1 at 31-32, has no basis in this Nation's history or tradition and 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.

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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).

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. The district court relied on the Supreme Court's recognition of a fundamental right to same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). It should go without saying that there is no relationship between a personal and circumscribed right to same-sex marriage and the alleged right to a climate system capable of sustaining human life that apparently would run to every individual in the United States. The fundamental right recognized by the district court has no relationship to "certain personal choices central to individual dignity and autonomy," *id.* at 2597 (citation omitted), or any right as "fundamental as a matter of history and tradition" as the right to marry recognized in *Obergefell*, *id.* at 2602. Nor was the *Obergefell* Court's recognition of that narrow right an invitation to abandon the cautious approach to recognizing new fundamental rights that is demanded by the Court's prior decisions.

Plaintiffs' state-created danger theory is equally flawed. 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 County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989). As a general matter, the Due Process Clause thus imposes no affirmative duty to protect a person who is not in state custody, and the limited exception recognized by this Court (circumstances in which a governmental body has control over a particular individual's person and places him in imminent peril) has no application here. *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).

2. No federal public trust doctrine limits the federal government's authority to regulate greenhouse gases.

Plaintiffs' public trust claim fares no better. The roots of a public trust doctrine "trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). Where it applies, the doctrine generally holds that the sovereign "owns all of its

navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." *National Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d 419, 434 (1983). As trustee, the sovereign has an obligation to "protect the people's common heritage of streams, lakes, marshlands and tidelands." *Id.* at 441.

Plaintiffs attempt to invoke that doctrine to impose judicially enforceable, extra-statutory obligations on the federal government's regulation of the fossil fuel industry and its alleged effects on the atmosphere. Plaintiffs fail to identify a single decision applying a public trust doctrine in this novel manner. But even if such a non-constitutional doctrine could ever limit a sovereign's regulation of private parties, Plaintiffs' claim is unavailing because, as the Supreme Court and this Court have "repeatedly recognized," any such doctrine is purely a matter of *state* law and pertains only to a *state's* sovereign duties and power. *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012); *see also, e.g.*, *PPL Montana*, 565 U.S. at 603 ("[T]he public trust doctrine remains a matter of state law."). With respect to the federal government, the Property Clause of the Constitution vests Congress with the "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. And that "power over the public land thus entrusted to Congress is without

limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. City & County of San Francisco*, 310 U.S. 16, 29 (1940)).[6]

Moreover, even if a common law public trust doctrine could ever constrain the federal government's protection of the atmosphere, it has been displaced by the Clean Air Act. That 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 and substantive standards 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."

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[6] In denying the government's motion to dismiss, the district court rejected the government's reliance on *Kleppe v. New Mexico*, reasoning that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved." Exhibit 1 at 48 (quoting *Kleppe*, 426 U.S. at 539). The uncertainty to which the *Kleppe* Court was referring "concern[s] not power over federal land but power over property outside federal land." *United States v. Bd. of County Comm'rs*, 843 F.3d 1208, 1212-13 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 84 (2017). Nothing in *Kleppe* supports the view that Congress's power over its *own* property could be limited by judge-made common law. *Id.*

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 a 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"). The Supreme Court's reasoning applies with equal force here.

Indeed, the D.C. Circuit rejected a nearly identical public trust claim as "insubstantial, implausible, [and] completely devoid of merit" in a recent suit brought in the District of Columbia by some of the same individuals who are Plaintiffs and their counsel here. *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 8 (D.C. Cir.), *cert. denied*, 135 S. Ct. 774 (2014). In *Alec L.*, the plaintiffs alleged that several Executive Branch departments and agencies had violated their alleged fiduciary duties to preserve and protect the atmosphere as a commonly shared public resource under the public trust doctrine. The district court dismissed the complaint, and the D.C. Circuit summarily affirmed. *Id.* at 7. Relying on *PPL Montana*, 565 U.S. at 603-04, the court determined that "the public trust doctrine remains a matter of state law" and therefore could not provide even a basis for federal court subject-matter jurisdiction. *Alec L.*, 561 Fed. Appx. at 8; *see also id.* ("Dismissal for lack of

subject-matter jurisdiction because of the inadequacy of [a] federal claim is proper . . . when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy'" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998))).

D. The government has no other means of obtaining relief from unconstitutional and improper discovery and trial.

Mandamus is an appropriate remedy to correct the district court's egregious errors because the government has no adequate means to obtain relief from the court's refusal to dismiss this case and to prevent the impending discovery and trial that would themselves violate constitutional and statutory limits on agency decisionmaking.

Both the Supreme Court and this Court have previously concluded that similar concerns warrant immediate intervention. In *Cheney*, the Supreme Court concluded that "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." 542 U.S. at 382; *see also id.* (recognizing the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties"). And in *Credit Suisse*, this Court granted mandamus relief where a district court refused to dismiss a case against the Swiss bank and then compelled the bank to

respond to discovery requests that would have violated Swiss banking-secrecy and other laws. *See* 130 F.3d at 1346 ("Requiring the Banks to choose between being in contempt of court and violating Swiss law clearly constitutes severe prejudice that could not be remedied on direct appeal.").

Here, as of last Friday, the district court has now denied a protective order from discovery. As a result, defendant agencies must now proceed with burdensome discovery in advance of an imminent 50-day trial while, at the same time, violating the procedures imposed by the APA on agency decisionmaking and the separation of powers. Requiring federal agencies to articulate factual assessments and positions on national environmental and energy policy through depositions, requests for admissions, and other private discovery devices—and ultimately at a 50-day trial—is flatly barred by the APA's rules requiring a challenge to be directed to specific agency actions based on record review. Imposing such requirements would also violate the APA's carefully reticulated scheme for agencies to make factual assessments and policy determinations through rulemaking and adjudication in matters within their jurisdiction and is fundamentally inconsistent with the constitutional separation of powers. Such discovery and trial "clearly constitutes severe prejudice that could not be remedied on appeal." *Credit Suisse*, 130 F.3d at 1346.

1. Requiring agencies to make factual assessments and take policy positions in discovery and trial conflicts with the APA's provisions regulating rulemaking and adjudication.

The APA sets forth a "comprehensive regulation of procedures" for agency decision-making. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36, *modified*, 339 U.S. 908 (1950); *see also* 5 U.S.C. §§ 551-554. "Time and again," the Supreme Court has explained that the APA establishes the exclusive procedural requirements for agency decisionmaking, and courts are not free to alter those requirements. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (internal quotation marks and citation omitted); *see also Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 546 (1978). To require agencies to comply with discovery seeking official positions on matters of factual assessment and questions of policy and then participate in a 50-day trial to create an "enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2," ECF No. 7 at 94, would impermissibly conflict with the procedures prescribed by the APA and deprive the public of the ability to provide input where the APA's rulemaking provisions or agency procedures require.

In pending discovery requests, for example, Plaintiffs seek to depose under Federal Rule 30(b)(6) an official representative of the Department of Transportation on the agencies' official positions on the agency's "role in implementing President Trump's America First Energy Strategy, including President Trump's Executive

Order to Create Energy Independence," ECF No. 217-6 at 6, and have the agency "admi[t]" propositions such as "[p]etroleum use in the transportation sector in the United States is expected to remain at about 13.5 million barrels per day through 2040 and beyond," ECF No. 217-9 at 19. If discovery proceeds in this case, the agencies' official statements and conclusions on such topics would be offered without public input from other stakeholders or any of the relevant orderly procedures of agency decisionmaking contemplated by the APA. *See* 5 U.S.C. §§ 553, 554. Those and similar required responses to discovery thus would be in direct contravention of Congress's judgment in the APA and the agencies' respective organic statutes to vest such determinations in the agencies' administrative processes in the first instance. Indeed, beyond discovery, a trial on such matters directly in court against the defendant agencies (much less the President) would be fundamentally inconsistent with the APA and the agencies' organic statutes.

Just as a court cannot expand the APA's procedural requirements, *see Perez*, 135 S. Ct. at 1207, it likewise cannot authorize their violation. *See, e.g.*, *In re SEC ex rel. Glotzer*, 374 F.3d 184, 188-92 (2d Cir. 2004) (refusing to authorize discovery request directed at federal agency that violated APA requirements); *cf. AEP*, 564 U.S. at 428 (noting, in rejecting climate change-related claim, that courts "may not . . . issue rules under notice-and-comment procedures"). Absent intervention from this Court, the district court's denial of a protective order will have just that effect.

2. Discovery and trial would violate the separation of powers.

Discovery and trial in this case would also violate the Constitution's separation of powers. Even before the enactment of the APA, the Supreme Court recognized that permitting an agency's "findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal," *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444 (1930), a step that would improperly allow the court to "usurp[] the agency's function," *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946); *see also National Broad. Co. v. United States*, 319 U.S. 190, 227 (1943) (stating that the "court below correctly held that its inquiry was limited to review of the evidence before the Commission" in a challenge to agency action under the First Amendment). Moreover, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed," the Supreme Court "has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *see also Dickinson v. Zurko*, 527 U.S. 150, 155 (1999); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000) (explaining that APA judicial review provisions "function[] as a default judicial review standard").

Limiting review to the agency record of agency action, limited by the scope of the agency's authority conferred by Congress in its organic statute, reflects

fundamental separation-of-powers principles. This suit, in which Plaintiffs seek discovery in aid of requiring the defendant agencies (and the President) to develop and implement a comprehensive, government-wide climate policy, wholly outside the congressionally prescribed statutory framework, runs roughshod over those principles. It violates the vesting of the "legislative Power" in Congress to the extent it would require agencies to transgress the substantive and procedural constraints imposed on them by statute. And to the extent it seeks to require the President and Executive agencies to develop and implement such policies, it violates the Constitution's vesting of "executive Power . . . in a President of the United States." U.S. Const. art. II, § 1.

As part of the executive power, the "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974). That principle is also reflected in the Opinion Clause of the Constitution, which vests in the President the exclusive power to "require the Opinion . . . 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; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 n.9 (1952) (Jackson, J., concurring) (describing President's power under the Opinion Clause). The Recommendations Clause of the

Constitution similarly vests the President with power to "recommend to" Congress for "Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Like the Opinion Clause, the Recommendations Clause presupposes that the President "must possess more extensive sources of information" than the other branches. Joseph Story, *Commentaries on the Constitution of the United States* § 807 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833).

By contrast, courts exercising the judicial power "may not commission scientific studies or convene groups of experts for advice," and accordingly "lack the scientific, economic, and technological resources an agency can utilize in coping with" complex policy problems. *AEP*, 564 U.S. at 428. Just as the President may not compel an advisory opinion from a court on a question of law, *see, e.g., Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968), a court may not compel the opinion of an executive official on a question of policy. Similarly, because the President's duty requires him to recommend only what "*he* shall judge necessary and expedient," U.S. Const. art. II, § 3 (emphasis added), the Constitution makes clear that this exclusively executive power must remain free from interference. The Supreme Court accordingly has rejected discovery demands that "threaten substantial intrusions on the process by which those in closest operational proximity to the

President advise the President." *Cheney*, 542 U.S. at 381 (internal quotation marks and citation omitted).

Plaintiffs seek to probe the views of federal agencies concerning questions of national environmental and energy policy and to require them to make factual and predictive judgments outside the scope of governing procedures and authority. Allowing Plaintiffs to exploit the civil litigation system to marshal the policy positions of federal agencies would displace the President in his superintendence of the Executive Branch and encroach on his exclusive authority to elicit the views of federal agencies in formulating national policies for addressing important issues of general concern. Congress may not "encroach[] upon a power that the text of the Constitution commits in explicit terms to the President," *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring), and neither may the federal judiciary. The Court should grant mandamus relief to prevent the irreparable harm that would be caused by such intrusions.

II. At a minimum, discovery and trial should be stayed pending consideration of the government's dispositive motions.

At a minimum, the Court should direct the district court to stay discovery and trial pending resolution of the government's motion for judgment on the pleadings and its motion for summary judgment, giving this Court an opportunity for interlocutory review. The government's motion for judgment on the pleadings is currently set for hearing before the district court on July 18. Under the court's local

rules, the government's motion for summary judgment will be fully briefed and ripe for hearing on the same date, and the government has asked the court to hear argument on that motion on July 18 as well. *See* ECF No. 305. A favorable ruling on either motion would terminate the litigation, or substantially narrow it to allow challenges only to specifically identifiable agency action, thus eliminating any occasion for discovery or trial. At the very least, such a ruling would substantially affect the scope of any trial or discovery. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (finding district court did not abuse its discretion in staying discovery pending resolution of a motion to dismiss when the motion did not raise factual issues).

A full or partial grant of those motions could remove the need for the government to identify experts and produce the expert reports that are due in the coming weeks, or substantially reduce the scope of such reports to whatever claims might conceivably survive and permit a court to require such efforts. This Court has frequently affirmed similar stays of discovery while dispositive motions are pending, where the only alleged harm would be the unwarranted burden of discovery. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("It is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery."); *Wood v. McEwen*, 644 F.2d 797, 801-02 (9th Cir. 1981) (upholding

grant of protective order suspending discovery where the legal sufficiency of plaintiff's complaint was challenged). A stay is plainly warranted here where the discovery and subsequent trial would violate constitutional and statutory requirements applicable to the defendant agencies.

In similar circumstances, the Supreme Court recently held that this Court erred in denying the government's petition for a writ of mandamus against district court orders that would have required the government to produce certain materials before the district court had resolved the government's threshold arguments for dismissal. *See In re United States*, 138 S. Ct. 443 (2017). In that case, the district court refused to stay all discovery until it resolved the government's motion to dismiss on justiciability grounds, among others, and it ordered the expansion of the administrative record that the government had produced. *Id.* at 444. After this Court denied the government's mandamus petition challenging those orders, the government renewed its arguments in the Supreme Court in a petition for mandamus (or, in the alternative, a petition for certiorari) and further sought a stay of all discovery and the administrative-record order pending consideration of its petition. *Id.* The Supreme Court unanimously vacated the denial of mandamus, remanding with instructions that the district court first rule on the government's threshold arguments and then "consider certifying that ruling for interlocutory appeal under 29 U.S.C. § 1292(b) if appropriate." *Id.* at 445.

The same course is appropriate here if the Court declines at this stage to order dismissal of the case entirely. Both of the government's pending dispositive motions present multiple arguments (on justiciability and other grounds) that, if accepted by the district court, would eliminate any need for any expansion of the record in this case; both can be resolved without any further discovery. A stay of discovery and trial pending final resolution of the dispositive motions will not prejudice Plaintiffs. Because Plaintiffs' alleged injuries stem from the cumulative effects of CO_2 emissions from every source in the world over decades, whatever additions to the global atmosphere that may somehow be attributed to Defendants over the time it takes to resolve the government's pending motions are plainly *de minimis* and not a source of irreparable harm. For those reasons, if the Court does not order dismissal of this case outright at this point, it should at least instruct the district court to stay all discovery and trial until the government's dispositive motions are finally resolved and to consider certifying any rulings on those motions for interlocutory appeal under 28 U.S.C. § 1292(b).

III. The Court should stay discovery and trial pending resolution of this petition.

The government also asks this Court to invoke its authority under the All Writs Act, 28 U.S.C. § 1651, to immediately stay all discovery and trial while it considers this mandamus petition. *See also* 9th Cir. General Order 6.8(a) (motions panel "may also issue a stay or injunction pending further consideration of the

application").[7] Whether to issue a stay is "an exercise of judicial discretion . . . to be guided by sound legal principles," *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (internal quotation marks omitted), based on four factors: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (*Nken* requires a showing of irreparable harm, but applies a balancing test showing "that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor"). Each of these factors counsels in favor of a stay.

The arguments set out above show that Defendants have a strong likelihood of success in obtaining mandamus. Absent a stay, the President and the federal departments and agencies that are subject to the discovery propounded by Plaintiffs will be irreparably harmed by being forced to proceed with burdensome discovery in advance of an imminent 50-day trial while, at the same time, violating their

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[7] While Federal Rule of Appellate Procedure 8(a)(1) does not expressly refer to a stay pending review of a petition for a writ of mandamus under Rule 21, Defendants have nonetheless asked the district court for a stay pending resolution of this petition.

obligations under the APA and the Constitution. Most immediately, the government must identify experts by July 12 and produce expert reports rebutting Plaintiffs' 18 expert witnesses by August 13. ECF No. 196. Those expert reports opine on wide-ranging topics from the merits *vel non* of implementing a carbon tax (ECF No. 266-1 at 33-35) to the technological and economic feasibility of converting 100% of the United States' energy from fossil fuels to renewable energy for all sectors by 2050 (ECF No. 261-1 at 4-11). Plaintiffs also have not withdrawn their requests for admission propounded on the Departments of Interior, Agriculture, Transportation, Defense, and Energy, or their Rule 30(b)(6) notices seeking an official designee from the same agencies to testify to each agency's positions on various aspects of climate change and the agency's view of its role in implementing the President's energy policies. ECF No. 217-6 at 6. Indeed, Plaintiffs have promised that more discovery requests on similar topics will be served soon. ECF No. 247 at 4.

For the reasons discussed above, a stay of proceedings during the pendency of this mandamus petition is not likely to appreciably harm Plaintiffs. Finally, the public interest strongly favors a stay, because absent such relief the Executive Branch and its agencies (including the Executive Office of the President) would be subject to continued unlawful discovery and forced to divert substantial resources away from their essential function of "faithfully execut[ing]" the law. U.S. Const. art. II, § 3.

Given the impending obligations related to the government's experts and the rapidly approaching trial date, the government respectfully requests an expedited ruling from this Court on this request for a stay and an immediate administrative stay while the Court considers the government's stay request. Absent relief from this Court on the government's stay request or mandamus petition by Monday, July 16, the government will have little choice but to seek further relief from the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition should be granted, and the district court should be directed to dismiss the case. At a minimum, all discovery and trial should be stayed until the government's pending motions for judgment on the pleadings and summary judgment are resolved by the district court and any higher courts, and the district court should be instructed, if it denies either motion, to consider certifying its order for interlocutory appeal under 28 U.S.C. § 1292(b). Finally, this Court should grant a stay of discovery and trial in the district court while it considers this petition and an immediate administrative stay while the Court considers the government's stay request.

Dated: July 5, 2018.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There is one related case within the meaning of Circuit Rule 28-2.6, namely, Defendants' prior petition for a writ of mandamus: *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692).

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-____

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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☒ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is 13,264 words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Eric Grant

Date: Jul 5, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 5, 2018.

I further certify that on July 5, 2018, a notice of the filing of the foregoing (including a complete copy of the foregoing) will be filed in underlying proceeding in the United States District Court for the District of Oregon in compliance with Federal Rule of Appellate Procedure 21(a)(1), and that all parties to the proceeding will be served with that notice through the district court's CM/ECF system. In addition, a courtesy copy of the foregoing has been provided via e-mail to the following counsel for Plaintiffs:

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No. 18-_____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Respondent,

and

KELSEY CASCADIA ROSE JULIANA, et al.,
Real Parties in Interest.

On Petition for a Writ of Mandamus to the United States District Court
for the District of Oregon (No. 6:15-cv-1517-TC)

EXHIBITS TO PETITION FOR A WRIT OF MANDAMUS AND EMERGENCY MOTION FOR A STAY OF DISCOVERY AND TRIAL

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INDEX OF EXHIBITS

1. District court's Opinion and Order denying Federal Defendants' Motion to Dismiss, ECF No. 83 (Nov. 10, 2016) (available at *Juliana v. United States*, 217 F. Supp. 2d 1224 (D. Or. 2016)).
2. Ninth Circuit's Opinion denying Defendants' previous mandamus petition, No. 17-71692 (Mar. 7, 2018) (available at *In re United States*, 884 F.3d 830 (9th Cir. 2018)).
3. Excerpts of Reporter's Transcript of Proceedings (Apr. 12, 2018).
4. Excerpts of Reporter's Transcript of Proceedings (May 10, 2018).
5. Excerpts of Reporter's Transcript of Proceedings (May 23, 2018).
6. Magistrate judge's Order denying Defendants' Motion for a Protective Order and for a Stay of All Discovery, ECF No. 212 (May 25, 2018).
7. District court's Order affirming the foregoing order of the magistrate judge, ECF No. 300 (June 29, 2018).

Exhibit 1

District court's Opinion and Order denying
Federal Defendants' Motion to Dismiss, ECF No. 83 (Nov. 10, 2016)
(available at *Juliana v. United States*, 217 F. Supp. 2d 1224 (D. Or. 2016))

IN THE UNITED STATES DISTRICT COURT

FOR THE 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
OPINION AND ORDER

AIKEN, Judge:[1]

Plaintiffs in this civil rights action are a group of young people between the ages of eight and nineteen ("youth plaintiffs"); Earth Guardians, an association of young environmental activists; and

[1] Student externs worked on each stage of the preparation of this opinion, from initial background research to final copyedits. I would be remiss if I did not acknowledge the invaluable contributions of Daniel Bodden (University of Kentucky), Elizabeth Jacklin (University of Oregon School of Law), Ann Richan Metler (Willamette University College of Law), James Mullins (University of Washington School of Law), Jessy R. Nations (University of Washington School of Law), Lydeah Negro (Lewis & Clark Law School), and Eleanor J. Vincent (University of Oregon School of Law.)

Dr. James Hansen, acting as guardian for future generations.[2] Plaintiffs filed this action against defendants the United States, President Barack Obama, and numerous executive agencies. Plaintiffs allege defendants have known for more than fifty years that the carbon dioxide ("CO_2") produced by burning fossil fuels was destabilizing the climate system in a way that would "significantly endanger plaintiffs, with the damage persisting for millenia." First. Am. Compl. ¶ 1. Despite that knowledge, plaintiffs assert defendants, "[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, . . . permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, . . . deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history[.]" *Id.* ¶ 5. Although many different entities contribute to greenhouse gas emissions, plaintiffs aver defendants bear "a higher degree of responsibility than any other individual, entity, or country" for exposing plaintiffs to the dangers of climate change. *Id.* ¶ 7. Plaintiffs argue defendants' actions violate their substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.

Plaintiffs assert there is a very short window in which defendants could act to phase out fossil fuel exploitation and avert environmental catastrophe. They seek (1) a declaration their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO_2 emissions.

Defendants moved to dismiss this action for lack of subject matter jurisdiction and failure

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[2] Although plaintiffs in this lawsuit hale from a number of different states, venue is proper in the District of Oregon. The majority of youth plaintiffs, including lead plaintiff Kelsey Juliana, reside in the District of Oregon. First Am. Compl. ¶¶ 16, 23, 31, 35, 44, 47, 50, 53, 57, 60. In addition, plaintiff Earth Guardians has a chapter in Eugene, Oregon.

to state a claim. Doc. 27. Intervenors the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute moved to dismiss on the same grounds. Doc. 19. After oral argument, Magistrate Judge Coffin issued his Findings and Recommendation ("F&R") and recommended denying the motions to dismiss. Doc. 68. Judge Coffin then referred the matter to me for review pursuant to 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. Doc. 69. Defendants and intervenors filed objections (docs. 73 & 74), and on September 13, 2016, this Court heard oral argument.

For the reasons set forth below, I adopt Judge Coffin's F&R as elaborated in this opinion and deny the motions to dismiss.

BACKGROUND

This is no ordinary lawsuit. Plaintiffs challenge the policies, acts, and omissions of the President of the United States, the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, the Department of Energy, the Department of the Interior, the Department of Transportation ("DOT"), the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency ("EPA"). This lawsuit challenges decisions defendants have made across a vast set of topics — decisions like whether and to what extent to regulate CO_2 emissions from power plants and vehicles, whether to permit fossil fuel extraction and development to take place on federal lands, how much to charge for use of those lands, whether to give tax breaks to the fossil fuel industry, whether to subsidize or directly fund that industry, whether to fund the construction of fossil fuel infrastructure such as natural gas pipelines at home and abroad, whether to permit the export and import of fossil fuels from and to the United States, and whether to

authorize new marine coal terminal projects. Plaintiffs assert defendants' decisions on these topics have substantially caused the planet to warm and the oceans to rise. They draw a direct causal line between defendants' policy choices and floods, food shortages, destruction of property, species extinction, and a host of other harms.

This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of this motion, those facts are undisputed.[3] The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.

STANDARDS

The Magistrates Act authorizes a district court to "accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). When a party objects to any portion of the magistrate's findings and recommendation, the district court must review *de novo* that portion of the magistrate judge's report. Fed. R. Civ. P. 72(b)(3); *see also*

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[3] For the purposes of this motion, I proceed on the understanding that climate change exists, is caused by humans, and poses a serious threat to our planet. Defendants open their Objections to Judge Coffin's F&R by stating that "[c]limate change poses a monumental threat to Americans' health and welfare by driving long-lasting changes in our climate, leading to an array of severe negative effects, which will worsen over time." Fed. Defs.' Obj. to F&R 1 (doc. 78). In the 2015 State of the Union address, defendant President Barack Obama declared "[n]o challenge . . . poses a greater threat to future generations than climate change." President Barack Obama, Remarks in State of the Union Address (Jan. 20, 2015), *available at* www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 (last visited Nov. 7, 2016). When asked at oral argument if they agreed that human-caused climate change poses a serious threat, intervenors declined to take a clear position. All parties agree, however, that a dispute over the existence of climate change is not at the heart of this case.

McDonnell Douglas Corp. v. Commodore Bus. Machs., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981) (for dispositive motions, "the statute grants the broadest possible discretion to the reviewing district court").

Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an action if subject matter jurisdiction is lacking. A motion to dismiss under Rule 12(b)(1) may attack either the allegations of the complaint or the "existence of subject matter in fact." *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The party seeking to invoke the district court's jurisdiction bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Under Federal Rule of Civil Procedure 12(b)(6), a complaint is construed in favor of the plaintiff, and its factual allegations are taken as true. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, the court need not accept as true "conclusory" allegations or unreasonable inferences. *Id.* Thus, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

DISCUSSION

Judge Coffin recommended denying defendants' and intervenors' motions to dismiss and

holding that plaintiffs' public trust and due process claims may proceed. Defendants and intervenors object to those recommendations on a number of grounds. They contend plaintiffs' claims must be dismissed for lack of jurisdiction because the case presents non-justiciable political questions, plaintiffs lack standing to sue, and federal public trust claims cannot be asserted against the federal government. They further argue plaintiffs have failed to state a claim on which relief can be granted. I first address the threshold challenges to jurisdiction, and then proceed to address the viability of plaintiffs' due process and public trust claims.

I. *Political Question*

If a case presents a political question, federal courts lack subject matter jurisdiction to decide that question. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 210 (1962). This limitation on the federal courts was recognized in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803), in which Chief Justice Marshall wrote, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." However, the scope of the political question doctrine should not be overstated. As Alexis de Tocqueville observed, "[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question." 1 Alexis de Tocqueville, Democracy in America 440 (Liberty Fund 2012).

In *Baker,* the Supreme Court identified six criteria, each of which could individually signal the presence of a political question:

> [(1) A] textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy

> determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. The *Baker* tests "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.). The factors overlap, with the analyses "often collapsing into one another." *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). The "common underlying inquiry" is whether "the question is one that can properly be decided by the judiciary." *Id.*

Determining whether the political question doctrine requires abstention calls on a court to balance profoundly important interests. On the one hand, the separation of powers is fundamental to our system of government, known "[e]ven before the birth of this country" to be "a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996). It is a "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Id.* at 757. On the other hand, "[t]he decision to deny access to judicial relief" should never be made "lightly," because federal courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Alperin*, 410 F.3d at 539 (quoting *Liu v. Rep. of China*, 892 F.2d 1419, 1433 (9th Cir. 1989) and *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990)). Accordingly, a court cannot simply err on the side of declining to exercise jurisdiction when it fears a political question may exist; it must instead diligently map the precise limits of jurisdiction.

Climate change, energy policy, and environmental regulation are certainly "political" in the

sense that they have "motivated partisan and sectional debate during important portions of our history." *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). But a case does not present a political question merely because it "raises an issue of great importance to the political branches." *Id.* Instead, dismissal on political question grounds is appropriate only if one of the *Baker* considerations is "inextricable" from the case. *Baker*, 369 U.S. at 217. As a result, federal courts regularly adjudicate claims that arise in connection with politically charged issues. *See, e.g.*, *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011) (electronic surveillance); *Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989) (detention of undocumented immigrants); *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 656 (2d Cir. 1988) (international funding for birth control and abortion). In each of the above cases, the court engaged in "discriminating inquiry into the precise facts" before concluding the controversy was justiciable. *Baker*, 369 U.S. at 217. A similar rigorous analysis is necessary here.

A. *First* Baker *Factor*

The first *Baker* factor requires abstention "[w]hen a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department" because "the court lacks authority to resolve that issue." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). Since *Baker*, the Supreme Court has found such "textual commitment" in very few cases. In *Nixon v. United States*, 506 U.S. 224 (1993), a former federal judge sought to challenge the Senate's processes for taking evidence during impeachment trials. *Id.* at 226. The Court found his claim nonjusticiable due to the Constitution's clear statement granting the Senate "the sole Power to try all Impeachments." *Id.* at 229 (quoting U.S. Const. art. I, § 3, cl. 6). The Court found the provision's use of the word "sole" to be "of considerable significance."

Id. at 231. The Court also discussed the history of the clause at issue, noting that the "Framers labored over the question of where the impeachment power should lie" and "at least two considered" — and rejected — placing that power within the federal judiciary. *Id.* at 233.

In *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979), the Court characterized the Speech or Debate Clause as the "paradigm example" of a "textually demonstrable constitutional commitment." That clause provides that Senators and Representatives, "for any Speech or Debate in either House, . . . shall not be questioned in any other place." U.S. Const. Art. I, § 6, cl. 1. The Court explained that the clause plainly shields statements of federal legislators made during speech or debate in committees or on the House or Senate floor from *any* sort of judicial review, and thus speaks "directly to . . . separation-of-powers concerns." *Davis*, 442 U.S. at 235 n.11.

Most recently, in *Zivotofsky*, the Court held that the Constitution gives the president the exclusive authority to recognize foreign nations and governments. 135 S. Ct. at 2086. The Court acknowledged that the Constitution does not use the term "recognition." *Id.* at 2084. Nonetheless, the Court determined that the Constitution granted the recognition power to the Executive Branch "[a]s a matter of constitutional structure." *Id.* at 2085. The Court concluded that the clauses giving the president exclusive authority to receive ambassadors and to negotiate treaties implicitly granted the recognition power. *Id.* at 2086. That determination rested in part on the Court's conclusion that recognition was uniquely "a topic on which the Nation much speak with one voice." *Id.* at 2086 (quotation marks and ellipsis omitted). If Congress had the power to decline to recognize a foreign state the Executive had decided to recognize, the president would be unable to assure that foreign state that its ambassadors would be received, its officials would be immune from suit in federal court, and it would be permitted to initiate lawsuits in the United States to vindicate its rights. *Id.*

In issuing its decision, the Court expressly declined to hold that the Constitution gives the president the "unbounded power" to "conduct diplomatic relations" and exercise "the bulk of foreign-affairs powers." *Id.* at 2089.

Unlike in the constitutional provisions at issue *Nixon* and *Passman*, the constitutional provisions cited here contain nothing approaching a clear reference to the subject matter of this case. The Constitution does not mention environmental policy, atmospheric emissions, or global warming. And unlike in *Zivotofksy*, climate change policy is not a fundamental power on which any other power allocated exclusively to other branches of government rests. Intervenors correctly point out that the Constitution gives the political branches authority over commerce, foreign relations, national defense, and federal lands — all areas affected by climate change policy. *See* U.S. Const. art. I, § 8 cl. 3 (Congress has authority to "regulate commerce with foreign nations, and among the several states"); *Zivotofsky*, 135 S. Ct. at 2084-86 (discussing various constitutional provisions granting the Executive Branch foreign relations authority); U.S. Const. art. I, § 8 cl. 11-16 (detailing Congress's powers relating to war and the military); U.S. Const. art. II, § 2, cl. 1 (President is commander in chief of armed forces); U.S. Const. art. IV, § 3, cl. 2 (Congress has power to "dispose of and make all needful rules and regulations" regarding federal land). But holding the first *Baker* factor applies in any case relating to these topic areas would permit the exception to swallow the rule. The question is not whether a case *implicates* issues that appear in the portions of the Constitution allocating power to the Legislative and Executive Branches — such a test would, by definition, shield nearly all legislative and executive action from legal challenge. Rather, the question is whether adjudicating a claim would require the Judicial Branch to second-guess decisions committed exclusively to another branch of government.

In the lower courts, the first *Baker* factor has found its broadest application in foreign policy cases. *See, e.g.*, *Corrie*, 503 F.3d at 983 ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263 (D.C. Cir. 2006) (decision to take "drastic measures" to keep Chilean dictator Augusto Pinochet in power was a foreign policy decision textually committed to the Executive Branch); *Sadowski v. Bush*, 293 F. Supp. 2d 15, 21 (D. C. Cir. 2003) (decision to go to war in Afghanistan was not justiciable, "primarily because war powers have been explicitly committed to the political branches"). As a result, I give special consideration to the argument that granting plaintiffs' requested relief would usurp the Executive Branch's foreign relations authority. Climate change policy has global implications and so is sometimes the subject of international agreements. But unlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not *inherently*, or even primarily, a foreign policy decision. Moreover, in the foreign policy context, *Baker* expressly warned against framing the "textually committed" inquiry too broadly. *See Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.") The first *Baker* factor does not apply.

B. *Second and Third* Baker *Factors*

"The second and third *Baker* factors reflect circumstances in which a dispute calls for decisionmaking beyond courts' competence." *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring). "When a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch, resolution of the suit is beyond the judicial role envisioned by Article III." *Id.*

Defendants' and intervenors' arguments on the second and third *Baker* factors can be divided into two main points. First, intervenors contend the Court cannot set a permissible emissions level without making *ad hoc* policy determinations about how to weigh competing economic and environmental concerns. But plaintiffs do not ask this Court to pinpoint the "best" emissions level; they ask this Court to determine what emissions level would be sufficient to redress their injuries. That question can be answered without any consideration of competing interests. *Cf. Coleman v. Schwarzenegger*, 2010 WL 99000, *1 (E.D. Cal. & N.D. Cal. Jan. 12, 2010) (requiring state to reduce the population of adult prisons to 137.5% of their total design capacity, a target which "extend[ed] no further than necessary to correct the violation of California inmates' federal constitutional rights"). The science may well be complex, but logistical difficulties are immaterial to the political question analysis. *See Alperin*, 410 F.3d at 552, 555 ("[T]he crux of th[e political question] inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but rather whether "a legal framework exists by which courts can evaluate . . . claims in a reasoned manner.").

Second, intervenors aver the Court would have to choose which agencies and sectors should reduce emissions, and by how much. At oral argument, intervenors contended this would require review of every environmental rule and regulation in the last one hundred years. These arguments mischaracterize the relief plaintiffs seek. Plaintiffs do not seek to have this Court direct any individual agency to issue or enforce any particular regulation. Rather, they ask the Court to declare the United States' current environmental policy infringes their fundamental rights, direct the agencies to conduct a consumption-based inventory of United States CO_2 emissions, and use that inventory 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." First Am. Compl. at 94. This Court could issue the requested declaration without directing any individual agency to take any particular action.

Finally, defendants and intervenors contend that plaintiffs' failure to identify violations of precise statutory or regulatory provisions leaves this court without any legal standard by which to judge plaintiffs' claims. Plaintiffs could have brought a lawsuit predicated on technical regulatory violations, but they chose a different path. As masters of their complaint, they have elected to assert constitutional rather than statutory claims. Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards. Neither the second nor the third *Baker* factor divests this Court of jurisdiction.

In the political question section of their objections to Judge Coffin's F&R, defendants assert the allegations in the complaint are not specific enough to put them on notice of plaintiffs' claims. This argument relates to the second and third *Baker* factors and the competence of this Court to adjudicate those claims, considerations which are addressed above. The argument also touches on concerns about causation and redressability, which are discussed in Section II of this opinion. However, the argument is also phrased in terms common to cases governing general pleading standards. *See Twombly*, 550 U.S. at 555 (complaint in federal court must contain enough information to "give the defendant fair notice" of both the claim and the "grounds upon which it rests" (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). To the extent defendants challenge the First Amended Complaint as inadequately pleaded, that challenge fails. This is not a typical

environmental case. Plaintiffs are not arguing defendants issued any particular permit in violation of a statutory provision in the Clean Air Act or the Clean Water Act. They are not arguing any specific tax break, royalty rate, or contract runs afoul of an agency's governing regulations. Rather, the theory of plaintiffs' case is much broader: it is that defendants' *aggregate actions* violate their substantive due process rights and the government's public trust obligations. That theory, which requires no citation to particular statutory or regulatory provisions, is clear from the face of the First Amended Complaint.

C. *Fourth through Sixth* Baker *Factors*

The fourth through sixth *Baker* factors "address circumstances in which prudence may counsel against a court's resolution of an issue presented." *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring). Only in "rare" cases will *Baker*'s "final factors alone render a case nonjusticiable." *Id.* at 1434.

Intervenors contend the fourth *Baker* factor, which concerns a court expressing lack of respect to another branch of government, applies in this case. They argue that because the Executive and Legislative branches have taken numerous steps to address climate change, a ruling in plaintiffs' favor would be disrespectful to those efforts. Intervenors would have this Court hold the political question doctrine prevents a court from determining whether the federal government has violated a plaintiff's constitutional rights so long as the government has taken some steps to mitigate the damage. However, intervenors cite no cases — and this Court is aware of none — to support such a broad application of the fourth *Baker* factor. Rather, courts have found the fourth factor applies in cases asking a court to "question the good faith with which another branch attests to the authenticity of its internal acts." *Id.* at 1433. The fourth factor has also been held relevant when

"judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

Consistent with those formulations, federal appellate courts have found the fourth *Baker* factor present when judicial adjudication of a claim would be wholly incompatible with foreign-relations decisions made by one of the political branches. *See, e.g.*, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59 (2d Cir. 2005) (political question doctrine prevented court from adjudicating claims against Austrian government for seizure of property from Jewish families during World War II because two presidential administrations had "committed the United States to a policy of resolving Holocaust-era restitution claims through international agreements rather than litigation."); *Schneider v. Kissinger*, 412 F.3d 190, 198 (D.C. Cir. 2005) (political question doctrine barred review of Executive Branch decision to participate in covert operations in Chile, a decision that had already been the subject of congressional inquiry).

Although the United States has made international commitments regarding climate change, granting the relief requested here would be fully consistent with those commitments. There is no contradiction between promising other nations the United States will reduce CO_2 emissions and a judicial order directing the United States to go beyond its international commitments to *more aggressively* reduce CO_2 emissions. Because this Court could grant plaintiffs' requested relief without expressing disrespect for the Executive Branch's international climate change agreements, the fourth *Baker* factor does not apply.

Neither intervenors nor defendants suggest the fifth or sixth *Baker* factors apply here. Nonetheless, I address those factors because federal courts have an "independent obligation to assure

[them]selves of" the existence of subject matter jurisdiction. *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 769 n.5 (9th Cir. 2008). On the face of the complaint, I see no evidence of an "unusual need for unquestioning adherence to a political decision already made" or any "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. I conclude neither of the two final *Baker* factors deprives this Court of subject matter jurisdiction.

D. *Summary: This Case Does Not Raise a Nonjusticiable Political Question*

There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary. *See INS v. Chadha*, 462 U.S. 919, 941 (1983) (judiciary is bound to determine whether the political branches have "chosen a constitutionally permissible means of implementing [their] power"); *Jewel*, 673 F.3d at 912 (although lawsuit challenging federal agencies' surveillance practices "strikes at the heart of a major public policy controversy," claims were justiciable because they were "straightforward claims of statutory and constitutional rights, not political questions").

This case shares some key features with *Baker* itself. In *Baker*, a group of voters challenged a statute governing the apportionment of state legislative districts. 369 U.S. at 188-95. Sixty years of population growth without legislative reapportionment had led to some votes carrying much more weight than others. *Id.* at 192-93. Here, the majority of youth plaintiffs are minors who cannot vote and must depend on others to protect their political interests. Thus, as amicus the League of Women Voters persuasively argues, the youth plaintiffs' claims are similar to the *Baker* claims because they are "rooted in a 'debasement of their votes' and an accompanying diminishment of their voice in

representational government." Br. for the League of Women Voters in the United States et al. as Amici Curiae at 19-20 (doc. 79-1).[4] In *Baker*, the Court acknowledged that the plaintiffs' claims had political dimensions and ramifications — but nonetheless concluded none of the *Baker* factors was inextricable from the case. 369 U.S. at 209. Similarly, as discussed in detail above, this case raises political issues yet is not barred by the political question doctrine.

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 violations." *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. *See Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial.") Because no *Baker* factor is inextricable from the merits of this case, the political question doctrine is not a barrier to plaintiffs' claims.

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[4] The motion of the League of Women Voters of the United States and the League of Women Voters of Oregon to appear as amici curiae (doc. 79) is granted.

II. *Standing to Sue*

"A threshold question in every federal case is . . . whether at least one plaintiff has standing." *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009) (citation and quotation marks omitted). Standing requires a plaintiff to allege "such a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers[.]" *Warth v. Seldin*, 442 U.S. 490, 498 (1975). To demonstrate standing, a plaintiff must show (1) she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). A plaintiff must support each element of the standing test "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Accordingly, at the motion to dismiss stage "general allegations" suffice to establish standing because those allegations are presumed to "embrace those specific facts that are necessary to support the claim." *Id.* (citation and quotation marks omitted).

A. *Injury in Fact*

In an environmental case, a plaintiff cannot demonstrate injury in fact merely by alleging injury to the environment; there must be an allegation that the challenged conduct is harming (or imminently will harm) the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.,* 528 U.S. 167, 181 (2000). For example, a plaintiff may meet the injury in fact requirement by alleging the challenged activity "impairs his or her economic interests or aesthetic and environmental well-being." *Wash. Envt'l Council v. Bellon*, 732 F.3d 1131, 1140 (9th Cir. 2013) (quotation marks omitted and alterations normalized).

Plaintiffs adequately allege injury in fact. Lead plaintiff Kelsey Juliana alleges algae blooms harm the water she drinks, and low water levels caused by drought kill the wild salmon she eats. First Am. Compl. ¶¶ 17-18. Plaintiff Xiuhtezcatl Roske-Martinez alleges increased wildfires and extreme flooding jeopardize his personal safety. *Id.* ¶ 21. Plaintiff Alexander Loznak alleges record-setting temperatures harm the health of the hazelnut orchard on his family farm, an important source of both revenue and food for him and his family. *Id.* ¶ 26. Plaintiff Jacob Lebel alleges drought conditions required his family to install an irrigation system at their farm. *Id.* ¶ 32. Plaintiff Zealand B. alleges he has been unable to ski during the winter as a result of decreased snowpack. *Id.* ¶ 38. Plaintiff Sahara V. alleges hot, dry conditions caused by forest fires aggravate her asthma. *Id.* ¶ 46.

The most recent allegations of injury appear in the supplemental declaration of plaintiff Jayden F., a thirteen-year-old resident of Rayne, Louisiana. Jayden alleges that at five o'clock the morning of August 13, 2016, her siblings woke her up. Decl. Jayden F. ¶ 5 Sept. 7, 2016 (doc. 78). She stepped out of bed into ankle-deep water. By the end of the day,

> Floodwaters were pouring into our home through every possible opening. We tried to stop it with towels, blankets, and boards. The water was flowing down the hallway, into my Mom's room and my sisters' room. The water drenched my living room and began to cover our kitchen floor. Our toilets, sinks, and bathtubs began to overflow with awful smelling sewage because our town's sewer system also flooded. Soon the sewage was everywhere. We had a stream of sewage and water running through our house.

Id. ¶ 8. With no shelters available and nowhere else to go, the family remained in the flooded house for weeks. *Id.* ¶ 10. The floodwaters eventually receded, but the damage remains: the carpets are soaked with sewage water. *Id.* ¶ 12. The water-logged walls must be torn down to prevent the growth of black mold. *Id.* The entire family sleeps together in the living room because the bedrooms are uninhabitable. *Id.* ¶ 15. Jayden alleges the storm that destroyed her home "ordinarily

would happen once every 1,000 years, but is happening now as a result of climate change." *Id.* ¶ 2.

The government contends these injuries are not particular to plaintiffs because they are caused by climate change, which broadly affects the entire planet (and all people on it) in some way. According to the government, this renders plaintiffs' injuries nonjusticiable generalized grievances. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (explaining that generalized grievances do not meet Article III's case or controversy requirement).

The government misunderstands the generalized grievance rule. As the Ninth Circuit recently explained, federal courts lack jurisdiction to hear a case when the harm at issue is "not only widely shared, but is also of an abstract and indefinite nature — for example, harm to the common concern for obedience to the law." *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) (quoting *Fed. Elec. Comm'n v. Akins*, 524 U.S. 11, 23 (1998)). Standing alone, "the fact that a harm is widely shared does not necessarily render it a generalized grievance." *Jewel*, 673 F.3d at 909; *see also Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[I]t does not matter how many persons have been injured by the challenged action" so long as "the party bringing suit shows that the action injures him in a concrete and personal way." (quotation marks omitted and alterations normalized)); *Akins*, 524 U.S. at 24 ("[A]n injury . . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'"); *Covington v. Jefferson Cnty.*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("[T]he most recent Supreme Court precedent appears to have rejected the notion that injury to all is injury to none for standing purposes."); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff . . . has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Indeed, even if "the experience at the

root of [the] complaint was shared by virtually every American," the inquiry remains whether that shared experience caused an injury that is concrete and particular *to the plaintiff. Jewel*, 673 F.3d at 910. Applying the correct formulation of the generalized grievance rule, plaintiffs' alleged injuries — harm to their personal, economic and aesthetic interests — are concrete and particularized, not abstract or indefinite.

That leaves imminence. Plaintiffs must demonstrate standing for each claim they seek to press and for each form of relief sought. *Daimler Chrysler Corp. v. Cuno,* 547 U.S. 332, 352 (2006). Because plaintiffs seek injunctive relief, they must show their injuries are "ongoing or likely to recur." *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1197 (9th Cir. 2016) (quoting *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985)). They have met this requirement. The complaint alleges that "[t]he present level of CO_2 and its warming, both realized and latent, are already in the zone of danger." First Am. Compl. ¶ 8. It also alleges that "our country is now in a period of carbon overshoot, with early consequences that are already threatening and that will, in the short term, rise to unbearable unless Defendants take immediate action[.]" *Id.* ¶ 10 (quotation marks omitted). Youth plaintiffs each allege harm that is ongoing and likely to continue in the future. *See, e.g.*, *id.* ¶ 17 (alleging current harm and harm "[i]n the coming decades" from ocean acidification and rising sea levels); *id.* ¶ 45 (alleging damage to freshwater resources now and in the future "if immediate action is not taken" to reduce CO_2 emissions). This is sufficient to satisfy the imminence requirement.

By alleging injuries that are concrete, particularized, and actual or imminent, plaintiffs have satisfied the first prong of the standing test.

B. *Causation*

The second requirement of standing is causation. A plaintiff must show the injury alleged is "fairly traceable" to the challenged action of the defendant and not the result of "the independent action of some third party not before the court." *Lujan,* 504 U.S. at 560 (citation and quotation marks omitted). Although a defendant's action need not be the sole source of injury to support standing, *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011), "[t]he line of causation between the defendant's action and the plaintiff's harm must be more than attenuated," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citations and quotation marks omitted). However, a "causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible." *Id.* (citations, quotation marks, and bracket omitted).

The government contends plaintiffs have not adequately alleged causation, relying on the Ninth Circuit's decision in *Bellon.* In that case, environmental advocacy groups sought to compel the Washington State Department of Ecology and other regional agencies "to regulate greenhouse gas emissions" ("GHGs") from five oil refineries. *Bellon*, 732 F.3d at 1135. The court held plaintiffs lacked standing to sue because the causal link between the agencies' regulatory decisions and the plaintiffs' injuries was "too attenuated." *Id.* at 1141. The court explained the special challenge of showing causation with respect to the production of greenhouse gases:

> Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime. Current research on how greenhouse gases influence global climate change has focused on the cumulative environmental effects from aggregate regional or global sources. But there is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region.

Id. at 1143. The court noted that the five oil refineries at issue were responsible for just under six percent of total greenhouse gas emissions produced in the state of Washington, and quoted the state's expert's declaration that the effect of those emissions on global climate change was "scientifically indiscernible, given the emission levels, the dispersal of GHGs world-wide, and the absence of any meaningful nexus between Washington refinery emissions and global GHG concentrations now or as projected in the future." *Id.* at 1144 (quotation marks omitted). The court concluded the "causal chain [wa]s too tenuous to support standing." *Id.*

This case is distinguishable from *Bellon* in two important respects. First, the procedural posture is different. In *Bellon*, the appeal was taken from a grant of summary judgment. *Id.* at 1138. That procedural posture is underscored by the court's reliance on expert declarations in rendering its decision. Plaintiffs have alleged a causal relationship between their injuries and defendants' conduct. At this stage, I am bound to accept those allegations as true. This rule appropriately acknowledges the limits of the judiciary's expertise: at the motion to dismiss stage, a federal court is in no position to say it is impossible to introduce evidence to support a well-pleaded causal connection. *See Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 347 (2d Cir. 2009) (holding that causation in climate change cases is "best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing"), *rev'd on other grounds*, *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 429 (2011). I note, too, that climate science is constantly evolving. *See* Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 Mich. J. Envt'l & Admin. L. 1, 25 (2013) (although "climate impacts at the regional and local levels are subject, among other things, to the uncertainties of downscaling techniques[,] . . . our knowledge of the climate is

developing at a breakneck pace.") As a result, I cannot interpret *Bellon* — which relied on a summary judgment record developed more than five years ago — to forever close the courthouse doors to climate change claims.

Second, the emissions at issue in this case, unlike the emissions at issue in *Bellon*, make up a significant share of global emissions. In *Bellon*, as noted, the five oil refineries were responsible for just under six percent of the greenhouse gas emissions generated in the state of Washington. The Ninth Circuit recently explained that in *Bellon*, "causation was lacking because the defendant oil refineries were such minor contributors to greenhouse gas emissions, and the independent third-party causes of climate change were so numerous, that the contribution of the defendant oil refineries was 'scientifically undiscernable.'" *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1158 (9th Cir. 2015) (quoting *Bellon*, 732 F.3d at 1144). Here, by contrast, plaintiffs' chain of causation rests on the core allegation that defendants are responsible for a substantial share of worldwide greenhouse gas emissions. Plaintiffs allege that over the 263 years between 1751 and 2014, the United States produced more than twenty-five percent of global CO_2 emissions. First Am. Compl. ¶ 151. Greenhouse gas emissions produced in the United States continue to increase. *Id.* ¶ 152. In 2012, the United States was the second largest producer and consumer of energy in the world. *Id.* ¶ 160. *Bellon*'s reasoning, which rested on a determination the oil refineries were "minor contributors" to climate change, does not apply. *WildEarth Guardians*, 795 F.3d at 1158.

The government broadly asserts that *Bellon* rejected "the argument that allegations that a source 'contributed' to climate change are sufficient to satisfy Article III's causation requirement[.]" Fed. Defs.' Mem. of Points & Auth. in Supp. of Mot. Dismiss at 12 (doc. 27-1). Not so. *Bellon* rejected — *at the summary judgment stage* — "vague, conclusory" statements purporting to establish

a causal relationship between the emissions of five refineries and the plaintiffs' injuries. 732 F.3d at 1142. Although the Constitution did not require the *Bellon* plaintiffs to "connect each molecule to their injuries," it demanded more than "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[.]" *Id.* at 1142-43.

The causal chain alleged by plaintiffs here is conclusory, but that is because they have not yet had the opportunity to present evidence. And unlike in *Bellon*, plaintiffs' causation allegations are not vague. At oral argument, plaintiffs explained that their theory of causation has two components. The first relates to defendants' affirmative acts. Specifically, plaintiffs allege that fossil fuel combustion accounts for approximately ninety-four percent of United States CO_2 emissions. First Am. Compl. ¶ 158. Defendants lease public lands for oil, gas, and coal production; undercharge royalties in connection with those leases; provide tax breaks to companies to encourage fossil fuel development; permit the import and export of fossil fuels; and incentivize the purchase of sport utility vehicles. *Id.* ¶¶ 164, 166, 171, 173, 181, 190. Here, the chain of causation is: fossil fuel combustion accounts for the lion's share of greenhouse gas emissions produced in the United States; defendants have the power to increase or decrease those emissions; and defendants use that power to engage in a variety of activities that actively cause and promote higher levels of fossil fuel combustion.

The second component of plaintiffs' causation theory involves defendants' failure to act in areas where they have authority to do so. Plaintiffs allege that together, power plants and transportation produce nearly two-thirds of CO_2 emissions in the United States. *Id.* ¶ 115 (transportation produces approximately twenty-seven percent of annual emissions); *id.* ¶ 125 (power

plants produce roughly thirty-seven percent of annual emissions). Plaintiffs also allege DOT and EPA have broad power to set emissions standards in these sectors. So the chain of causation is: DOT and EPA have jurisdiction over sectors producing sixty-four percent of United States emissions, which in turn constitute roughly fourteen percent of emissions worldwide; they allow high emissions levels by failing to set demanding standards; high emissions levels cause climate change; and climate change causes plaintiffs' injuries.

Each link in these causal chains may be difficult to prove, but the "spectre of difficulty down the road does not inform [the] justiciability determination at this early stage of the proceedings." *Alperin*, 410 F.3d at 539. At the pleading stage, plaintiffs have adequately alleged a causal link between defendants' conduct and the asserted injuries.

C. *Redressability*

The final prong of the standing inquiry is redressability. The causation and redressability prongs of the standing inquiry "overlap and are two facets of a single causation requirement." *Bellon*, 732 F.3d at 1146 (citation and quotation marks omitted). They are distinct in that causation "examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief." *Id.* A plaintiff need not show a favorable decision is certain to redress his injury, but must show a substantial likelihood it will do so. *Id.* It is sufficient for the redressability inquiry to show that the requested remedy would "slow or reduce" the harm. *Massachusetts,* 549 U.S. at 525 (citing *Larson v. Valente,* 456 U.S. 228, 243 n.15 (1982)).

The declaratory and injunctive relief plaintiffs request meets this standard. Most notably, plaintiffs ask this Court 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[.]" First Am. Compl. ¶ 94. If 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.

Bellon is not to the contrary. In *Bellon*, the court concluded the plaintiff's injuries would continue unabated even if the five oil refineries shut down, repeating its conclusion that the effect of the emissions produced by those refineries on global emissions levels was "scientifically indiscernable." 732 F.3d at 1147 (quotation marks omitted). Thus, *Bellon*'s redressability holding, like its causation holding, rested on a factor not present here: that the defendants were minor contributors to global climate change. Accordingly, *Bellon*'s reasoning does not apply.

Defendants and intervenors essentially argue that because many entities contribute to global warming, an injunction operating on one entity — even a major player — would offer no guarantee of an overall reduction in greenhouse gas emissions. But whether the Court could guarantee an overall reduction in greenhouse gas emissions is the wrong inquiry for at least two reasons. First, redressability does not require certainty, it requires only a substantial likelihood that the Court could provide meaningful relief. Second, the possibility that some other individual or entity might later cause the same injury does not defeat standing — the question is whether the injury *caused by the defendant* can be redressed.

Redressability in this case is scientifically complex, particularly in light of the specter of "irreversible climate change," wherein greenhouse gas emissions above a certain level push the planet past "points of no return, beyond which irreversible consequences become inevitable, out of

humanity's control." Hansen Decl. ¶ 13 & Ex. 2 at 13 Sept. 10, 2015 (docs. 7-1 & 7-3) (quotation marks omitted). This raises a host of questions, among them: What part of plaintiffs' injuries are attributable to causes beyond this Court's control? Even if emissions increase elsewhere, will the magnitude of plaintiffs' injuries be less if they obtain the relief they seek in this lawsuit? When would we reach this point of no return, and do defendants have it within their power to avert reaching it even without cooperation from third parties? All of these questions are inextricably bound up in the causation inquiry, and none of them can be answered at the motion to dismiss stage.

Plaintiffs ask this Court to "order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system." First Am. Compl. ¶ 12 (emphasis omitted). Construing the complaint in plaintiffs' favor, they allege that this relief would at least partially redress their asserted injuries. Youth plaintiffs have adequately alleged they have standing to sue.[5]

III. *Due Process Claims*[6]

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of "life, liberty, or property" without "due process of

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[5] Defendants and intervenors also challenge the standing of future generations plaintiffs on a number of grounds. It is not necessary to address these arguments because once a federal court concludes one plaintiff has standing, it need not determine whether the remaining plaintiffs have standing. *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009).

[6] Plaintiffs' due process claims encompass asserted equal protection violations and violations of unenumerated rights secured by the Ninth Amendment. For simplicity's sake, this opinion refers to these claims collectively as "due process claims."

law." U.S. Const. amend. V. Plaintiffs allege defendants have violated their due process rights by "directly caus[ing] atmospheric CO_2 to rise to levels that dangerously interfere with a stable climate system required alike by our nation and Plaintiffs[,]" First Am. Compl. ¶ 279; "knowingly endanger[ing] Plaintiffs' health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion," *id.* ¶ 280; and, "[a]fter knowingly creating this dangerous situation for Plaintiffs, . . . continu[ing] to knowingly enhance that danger by allowing fossil fuel production, consumption, and combustion at dangerous levels," *id.* ¶ 284.

Defendants and intervenors challenge plaintiffs' due process claims on two grounds. First, they assert any challenge to defendants' affirmative actions (*i.e.* leasing land, issuing permits) cannot proceed because plaintiffs have failed to identify infringement of a fundamental right or discrimination against a suspect class of persons. Second, they argue plaintiffs cannot challenge defendants' inaction (*i.e.*, failure to prevent third parties from emitting CO_2 at dangerous levels) because defendants have no affirmative duty to protect plaintiffs from climate change.

A. *Infringement of a Fundamental Right*

When a plaintiff challenges affirmative government action under the due process clause, the threshold inquiry is the applicable level of judicial scrutiny. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008). The default level of scrutiny is rational basis, which requires a reviewing court to uphold the challenged governmental action so long as it "implements a rational means of achieving a legitimate governmental end[.]" *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997) (quotation marks omitted). When the government infringes a "fundamental right," however, a reviewing court applies strict scrutiny. *Witt*, 527 F.3d at 817. Substantive due process "forbids

the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original). It appears undisputed by plaintiffs, and in any event is clear to this Court, that defendants' affirmative actions would survive rational basis review. Resolution of this part of the motions to dismiss therefore hinges on whether plaintiffs have alleged infringement of a fundamental right.[7]

Fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) "deeply rooted in this Nation's history and tradition" or (2) "fundamental to our scheme of ordered liberty[.]" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (internal citations, quotations, and emphasis omitted). The Supreme Court has cautioned that federal courts must "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. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation and quotation marks omitted).

This does not mean that "new" fundamental rights are out of bounds, though. When the Supreme Court broke new legal ground by recognizing a constitutional right to same-sex marriage, Justice Kennedy wrote that

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights . . . did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations

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[7] Strict scrutiny also is triggered by an allegation that the government discriminated on the basis of a suspect classification, regardless of whether the government action infringed a fundamental right. *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003). Because I conclude that plaintiffs have alleged a violation of their fundamental rights, I need not address whether youth or future generations are suspect classifications for equal protection purposes.

> a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015). Thus, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution . . . [that] has not been reduced to any formula." *Id.* (citation and quotation marks omitted). In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* The genius of the Constitution is that its text allows "future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning." *Id.*

Often, an unenumerated fundamental right draws on more than one Constitutional source. The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated. In *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), the Court exhaustively chronicled the jurisprudential history of the fundamental right to privacy — another right not mentioned in the text of the Constitution. *Roe*'s central holding rests on the Due Process Clause of the Fourteenth Amendment. *Id.* at 153. But the Court also found "roots" of the right to privacy in the First Amendment, the Fourth Amendment, the Fifth Amendment, the penumbras of the Bill of Rights, and the Ninth Amendment. *Id.* at 152. Similarly, in *Obergefell*, the Court's recognition of a fundamental right to marry was grounded in an understanding of marriage as a right underlying and supporting other vital liberties. *See* 135 S. Ct. at 2599 ("[I]t would be contradictory to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is at the foundation of the family in our society." (citation and quotation marks omitted)); *id.* at 2601 ("[M]arriage is a keystone of our social order.").

Exercising my "reasoned judgment," *id.* at 2598, I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the "foundation of the family," a stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress." *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)); *cf. Minors Oposa v. Sec'y of the Dep't of Envt'l & Natural Res.*, G.R. No. 101083, 33 I.L.M. 173, 187-88 (S.C., Jul. 30, 1993) (Phil.) (without "a balanced and healthful ecology," future generations "stand to inherit nothing but parched earth incapable of sustaining life.").

Defendants and intervenors contend plaintiffs are asserting a right to be free from pollution or climate change, and that courts have consistently rejected attempts to define such rights as fundamental. Defendants and intervenors mischaracterize the right plaintiffs assert. Plaintiffs do not object to the government's role in producing *any* pollution or in causing *any* climate change; rather, they assert the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they will permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives. Echoing *Obergefell*'s reasoning, plaintiffs allege a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase "capable of sustaining human life" should not be read to require a plaintiff to allege that governmental action will result in

the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.

B. *"Danger Creation" Challenge to Inaction*

With limited exceptions, the Due Process Clause does not impose on the government an affirmative obligation to act, even when "such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). This rule is subject to two exceptions: "(1) the 'special relationship' exception; and (2) the 'danger creation' exception." *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The "special relationship" exception provides that when the government takes an individual into custody against his or her will, it assumes some responsibility to ensure that individual's safety. *Id.* The "danger creation" exception permits a substantive due process claim when government conduct "places a person in peril in deliberate indifference to their safety[.]" *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). Plaintiffs purport to challenge the government's failure to limit third-party CO_2 emissions pursuant to the danger creation *DeShaney* exception.

In the Ninth Circuit, a plaintiff challenging government inaction on a danger creation theory must first show the "state actor create[d] or expose[d] an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). The state action must place the plaintiff "in a worse position than that in which he would have been had the state not acted at all." *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016) (quotation marks omitted and alterations normalized). Second, the plaintiff must show the "state actor . . . recognize[d]" the unreasonable risks to the plaintiff and "actually intend[ed] to expose the plaintiff to such risks without regard to the consequences to the plaintiff." *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011) (brackets and quotation marks omitted). The defendant must have acted with "[d]eliberate indifference," which "requires a culpable mental state more than gross negligence." *Pauluk*, 836 F.3d at 1125 (quotation marks omitted).

Plaintiffs allege that "[a]cting with full appreciation of the consequences of their acts, Defendants knowingly caused, and continue to cause, dangerous interference with our atmosphere and climate system." First Am. Compl. ¶ 85. They allege this danger stems, "in substantial part, [from] Defendants' historic and continuing permitting, authorizing, and subsidizing of fossil fuel extraction, production, transportation, and utilization." *Id.* ¶ 279. Plaintiffs allege defendants acted "with full appreciation" of the consequences of their acts, *id.* ¶¶ 278-79, specifically "[harm to] Plaintiffs' dignity, including their capacity to provide for their basic human needs, safely raise families, practice their religious and spiritual beliefs, maintain their bodily integrity, and lead lives with access to clean air, water, shelter, and food." *Id.* ¶ 283. In the face of these risks, plaintiffs allege defendants "have had longstanding, actual knowledge of the serious risks of harm and have failed to take necessary steps to address and ameliorate the known, serious risk to which they have

exposed Plaintiffs." *Id.* ¶ 285. In sum: plaintiffs allege defendants played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change;[8] and that the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions. Accepting the allegations of the complaint as true, plaintiffs have adequately alleged a danger creation claim.

Defendants argue the *DeShaney* exceptions are inapplicable when the actor is the federal government rather than a state government. It is true that *DeShaney* was a section 1983 case and that the Ninth Circuit cases interpreting the *DeShaney* exceptions are also section 1983 cases. But in *DeShaney*, the Supreme Court was mapping the contours of the Due Process Clause, not section 1983. Defendants have cited no case or legal principle to justify limiting *DeShaney* to the section 1983 context.

Next, defendants contend application of the *DeShaney* danger creation exception in this context would permit plaintiffs to "raise a substantive due process claim to challenge virtually any government program" — for example, to challenge foreign policy decisions that heighten or exacerbate international tensions, or to health and safety regulations the plaintiff deems insufficiently

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[8] At oral argument, plaintiffs supplied the Court with a timeline documenting purported evidence of defendants' knowledge of climate change. The timeline, which dates back to 1955, includes the 1988 testimony of Dr. James Hansen before the Senate Committee on Energy and Natural Resources. Dr. Hansen, who appears in this lawsuit as a guardian for his granddaughter and for future generations, testified about rising global temperatures and their relationship to human activity. First Session on the Greenhouse Effect and Global Climate Change Before the Comm. on Energy & Natural Res., 100th Cong. 39 (1988). He urged legislators to take action to limit greenhouse gas emissions. *Id.* at 158. Dr. Hansen's testimony was preceded by a statement from Senator Dale Bumpers of Arkansas, who bemoaned, "We're not going to have a lot of political support for this. Nobody wants to take on the automobile industry. Nobody wants to take on any of the industries that produce the things we throw up into the atmosphere." *Id.* at 38.

stringent. Fed. Defs.' Obj. 18. Defendants fail to recognize that *DeShaney* imposes rigorous proof requirements. A plaintiff asserting a danger-creation due process claim must show (1) the government's acts created the danger to the plaintiff; (2) the government *knew* its acts caused that danger; and (3) the government with *deliberate indifference* failed to act to prevent the alleged harm. These stringent standards are sufficient safeguards against the flood of litigation concerns raised by defendants — indeed, they pose a significant challenge for plaintiffs in this very lawsuit.[9]

Questions about difficulty of proof, however, must be left for another day. At the motion to dismiss stage, I am bound to accept the factual allegations in the complaint as true. Plaintiffs have alleged that defendants played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change. They may therefore proceed with their substantive due process challenge to defendants' failure to adequately regulate CO_2 emissions.

IV. *Public Trust Claims*

In its broadest sense, the term "public trust" refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers. *See Stone v. Mississippi*, 101 U.S. 814, 820 (1879) ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.") The public trust doctrine rests on the fundamental principle that "[e]very succeeding legislature possesses the same jurisdiction and power with respect to [the public interest] as its predecessors." *Newton v. Mahoning Cnty. Comm'rs*, 100 U.S. 548, 559 (1879).

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[9] There are other barriers to asserting defendants' hypothetical danger-creation claims. For example, as discussed in Part I of this opinion, the political question doctrine sharply limits judicial review of decisions inherently entangled with the conduct of foreign relations.

The doctrine conceives of certain powers and obligations — for example, the police power — as inherent aspects of sovereignty. *Id.* at 554. Permitting the government to permanently give one of these powers to another entity runs afoul of the public trust doctrine because it diminishes the power of future legislatures to promote the general welfare.

Plaintiffs' public trust claims arise from the particular application of the public trust doctrine to essential natural resources. With respect to these core resources, the sovereign's public trust obligations prevent it from "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." Br. of Amici Curiae Global Catholic Climate Movement and Leadership Council of Women Religious at 3 (footnote omitted) (doc. 51-1). Application of the public trust doctrine to natural resources predates the United States of America. Its roots are in the Institutes of Justinian, part of the Corpus Juris Civilis, the body of Roman law that is the "foundation for modern civil law systems." Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 Law Libr. J. 525, ¶ 1 (2007). The Institutes of Justinian declared "the following things are by natural law common to all — the air, running water, the sea, and consequently the seashore." J. Inst. 2.1.1 (J.B. Moyle trans.). The doctrine made its way to the United States through the English common law. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) ("American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose."); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) ("At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders[.]" (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)); Joseph L. Sax,

The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 475-76 (1970) (discussing the history of the public trust doctrine in the United States).

The first court in this country to address the applicability of the public trust doctrine to natural resources was the New Jersey Supreme Court, in 1821. The court explained that public trust assets were part of a taxonomy of property:

> Every thing susceptible of property is considered as belonging to the nation that possesses the country, as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become *private property*. Those things not divided among the individuals still belong to the nation, and are called *public property*. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "*the domain of the crown or of the republic,*" others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called *common property*. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts.

Arnold v. Mundy, 6 N.J.L. 1, 71 (N.J. 1821) (emphasis in original).

The seminal United States Supreme Court case on the public trust is *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). The Illinois legislature had conveyed to the Illinois Central Railroad Company title to part of the submerged lands beneath the harbor of Chicago, with the intent to give the company control over the waters above the submerged lands "against any future exercise of power over them by the state." *Id.* at 452. The Supreme Court held the legislature's attempt to give up its title to lands submerged beneath navigable waters was either void on its face or always subject to revocation. *Id.* at 453. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."

Id. In light of the "immense value" the harbor of Chicago carried for the people of Illinois, the "idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation" could not "be defended." *Id.* at 454.

The natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to "protect the trust property against damage or destruction." George G. Bogert et al., Bogert's Trusts and Trustees, § 582 (2016). The trustee owes this duty equally to both current and future beneficiaries of the trust. Restatement (Second) of Trusts § 183 (1959). In natural resources cases, the trust property consists of a set of resources important enough to the people to warrant public trust protection. *See* Mary C. Wood, A Nature's Trust: Environmental Law for a New Ecological Age 167-75 (2014). The government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust. *Id.* The public trust doctrine is generally thought to impose three types of restrictions on governmental authority:

> [F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477 (1970).

This lawsuit is part of a wave of recent environmental cases asserting state and national governments have abdicated their responsibilities under the public trust doctrine. *See*, *e.g.*, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015); *Kanuk ex rel. Kanuk v. State, Dep't of Natural Res.*, 335 P.3d 1088

(Alaska 2014); *Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. Ct. App. 2014). These lawsuits depart from the "traditional" public trust litigation model, which generally centers on the second restriction, the prohibition against alienation of a public trust asset. Instead, plaintiffs assert defendants have violated their duties as trustees by nominally retaining control over trust assets while actually allowing their depletion and destruction, effectively violating the first and third restrictions by excluding the public from use and enjoyment of public resources.

Defendants and intervenors argue the public trust doctrine has no application in this case. They advance four arguments: (1) the atmosphere, the central natural resource at issue in this lawsuit, is not a public trust asset; (2) the federal government, unlike the states, has no public trust obligations; (3) any common-law public trust claims have been displaced by federal statutes; and (4) even if there is a federal public trust, plaintiffs lack a right of action to enforce it. I address each contention in turn.

A. *Scope of Public Trust Assets*

The complaint alleges defendants violated their duties as trustees by failing to protect the atmosphere, water, seas, seashores, and wildlife. First Am. Compl. ¶ 309. Defendants and intervenors argue plaintiffs' public trust claims fail because the complaint focuses on harm to the atmosphere, which is not a public trust asset. I conclude that it is not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea.[10]

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[10] To be clear, today's opinion should not be taken to suggest that the atmosphere is not a public trust asset. The Institutes of Justinian included the air in the list of assets "by natural law common to all." J. Inst. 2.1.1 (J.B. Moyle trans.). The New Jersey Supreme Court in *Arnold* similarly included air in its list of "common property." 6 N.J.L. at 71. Even Supreme Court case law suggests the atmosphere may properly be deemed part of the public trust *res*. *See United*

The federal government holds title to the submerged lands between three and twelve miles from the coastlines of the United States. *See* Restatement (Third) of The Foreign Relations Law of the United States § 511(a) (1987) (international law permits a nation to claim as its territorial sea an area up to twelve miles from its coast); Presidential Proclamation of Dec. 27, 1988, No. 5928, 3 C.F.R. § 547 (1989) (President Reagan expanding United States' claim from three-mile territorial sea to twelve-mile territorial sea); 43 U.S.C. § 1312 (seaward boundary of a coastal state is "a line

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States v. Causby, 328 U.S. 256, 261 (1946) (holding that private rights to airspace have "no place in the modern world" because recognition of such claims would "transfer into private ownership that to which only the public has a just claim.") The dearth of litigation focusing on atmosphere may reflect the limited state of scientific knowledge rather than signal a determination that the air is outside the scope of the public trust. *See* Mary C. Wood, *Atmospheric Trust Litigation Across the World*, *in* Fiduciary Duty and the Atmospheric Trust 113 (Ken Coghill et al. Eds. 2012) (hypothesizing that the atmosphere does not appear in early public trust case law because air was long thought to be indestructible and incapable of privatization).

Even if the atmosphere was not always considered a public trust asset, some courts have concluded the doctrine should "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (citation and quotation marks omitted). Just last year, Judge Hollis Hill reasoned that it "misses the point" to mechanically rely on what has been identified as a public trust asset in the past because "[t]he navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that [greenhouse gas] emissions do not affect navigable waters is nonsensical." *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1, slip op. at 8 (Wash. King Cnty. Super. Ct. Nov. 19, 2015). At least one state court has held in recent years that "the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property." *Robinson Twp., Wash. Cnty., Pa. v. Pennsylvania*, 83 A.3d 901, 955 (Pa. Sup. Ct. 2013).

The Supreme Court arguably endorsed this pragmatic approach to the identification of trust assets in *Illinois Central*, where it held, contrary to English common law, that lakes and rivers unaffected by the ebb and flow of the tide could be navigable waters within the meaning of the public trust doctrine. 146 U.S. at 436 (English rule for determining navigability would not work in the United States, which contains "rivers [that] are navigable for great distances above the flow of the tide — indeed, for hundreds of miles").

three geographical miles distant from its coast line"). Time and again, the Supreme Court has held that the public trust doctrine applies to "lands beneath tidal waters." *See Phillips Petroleum Co.*, 484 U.S. at 474 (discussing *Shively*, 152 U.S. at 57 and *Knight v. U.S. Land Ass'n*, 142 U.S. 161, 183 (1891)); *Alabama v. Texas*, 347 U.S. 272, 278 (1954) (Black, J., dissenting) ("In ocean waters bordering our country, if nowhere else, day-to-day national power — complete, undivided, flexible, and immediately available — is an essential attribute of federal sovereignty."); *id.* at 282 (Douglas, J., dissenting) ("Thus we are dealing here with incidents of national sovereignty . . . . The authority over [the sea] can no more be abdicated than any of the other great powers of the Federal Government. It is to be exercised for the benefit of the whole."); *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 556 (1970) (public trust law covers "that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence"). Because a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures,[11] they have adequately alleged harm to public trust assets.

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[11] *See, e.g.*, First Am. Compl. ¶ 16 ("An important part of Kelsey's diet includes food that comes from the marine waters and freshwater rivers, including salmon, cod, tuna, clams, mussels, and crab."); *id.* ¶ 27 ("Other food sources for Alex, including crab and seafood, are negatively impacted by ocean acidification, warming, and sea level rise caused by Defendants."); *id.* ¶ 33 ("Ocean acidification caused by Defendants has already begun to adversely impact shellfish along the coast, and is predicted to take its toll on crab, mussels, and all shelled seafood."); *id.* ¶ 45 ("On the Oregon coast, Sahara enjoys climbing rocks and sand dunes, swimming, and tidepooling to see marine life. Sahara's enjoyment of these activities is being increasingly harmed in the future by sea level rise, greater erosion, enhanced ocean acidification, and increased water temperatures.").

B. *Applicability of Public Trust to the Federal Government*

Defendants and intervenors contend that in the United States, the public trust doctrine applies only to the states and not to the federal government. This argument rests primarily on a passing statement in *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012). A close examination of that case reveals that it cannot fairly be read to foreclose application of the public trust doctrine to assets owned by the federal government.

PPL Montana was not a public trust case. Its central concern was the equal footing doctrine. PPL Montana, LLC used three rivers flowing through the state of Montana for hydroelectric projects. *Id.* at 580. Montana sought rent for the use of the riverbeds, arguing it had gained title to the rivers pursuant to the equal footing doctrine when it became a state in 1889. *Id.* The Montana Supreme Court granted summary judgment on title to Montana. On writ of certiorari to the United States Supreme Court, review hinged on whether the rivers in question were "navigable" in 1889, because the "title consequences of the equal-footing doctrine" are that "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced . . .)[.]" *Id.* at 589-90. The Court reversed and remanded, holding that the Montana courts had applied the wrong methodology for determining navigability.

In addition to its main argument that the rivers were navigable, Montana argued that denying it title to the riverbeds in dispute would "undermine the public trust doctrine." *Id.* at 601. The Supreme Court rejected this argument in short order:

> Unlike the equal-footing doctrine, . . . which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the

> contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

Id. at 603 (citations omitted).

Defendants and intervenors take the phrase "the public trust doctrine remains a matter of state law," and interpret it in isolation to foreclose all federal public trust claims. That is not a plausible interpretation of *PPL Montana*. The Court was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana's public trust obligations. *PPL Montana* said nothing at all about the viability of federal public trust claims with respect to federally-owned trust assets.

In a string citation, *PPL Montana* cited *Coeur d'Alene*, 521 U.S. at 285, and *Appleby v. City of New York*, 271 U.S. 364, 395 (1926), for the proposition that *Illinois Central* "was necessarily a statement of Illinois law." 132 S. Ct. at 1235. That statement is not surprising given the nature of the public trust doctrine. Public trust obligations are inherent aspects of sovereignty; it follows that any case applying the public trust doctrine to a particular state is necessarily a statement of that state's law rather than a statement of the law of another sovereign. In *Coeur d'Alene*, the Supreme Court explained that even though *Illinois Central* interpreted Illinois law, its central tenets could be applied broadly (for example, to Idaho) because it "invoked the principle in American law recognizing the weighty public interests in submerged lands." 521 U.S. at 285. The Court then detailed how the American public trust doctrine, which has diverged from the English public trust doctrine in important ways, has developed as "a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied

in a unique way to sovereignty." *Id.* at 286. There is no reason why the central tenets of *Illinois Central* should apply to another state, but not to the federal government.

Defendants and intervenors also contend recognizing a federal public trust claim is contrary to *United States v. 32.42 Acres of Land, More or Less, Located in San Diego County, California*, 683 F.3d 1030, 1038 (9th Cir. 2012), which repeated *PPL Montana*'s statement that "the public trust doctrine remains a matter of state law" in concluding that the federal government's eminent domain powers trumped any state-law public trust concerns. That case did not foreclose a federal public trust claim, however, because the Ninth Circuit *expressly* declined to address the viability of the federal public trust the district court imposed on the federal government after it ruled the land could be taken pursuant to eminent domain. *Id.* at 1033 & 1039 n.2.

In 2012, the federal district court for the District of Columbia held the public trust doctrine does not apply to the federal government. *Alec L.* was substantially similar to the instant action: five youth plaintiffs and two environmental advocacy organizations sued a variety of heads of federal agencies, alleging the defendants had "wasted and failed to preserve and protect the atmosphere Public Trust asset." 863 F. Supp. 2d at 12. The court dismissed the suit with prejudice, holding the plaintiffs' federal public trust claims were foreclosed by *PPL Montana*'s statement that "the public trust doctrine remains a mater of state law." *Id.* at 15 (quoting *PPL Montana*, 565 U.S. at 603). The court also relied on the D.C. Circuit's observation that "'[i]n this country the public trust doctrine has developed almost exclusively as a matter of state law.'" *Id.* (quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984)). In an unpublished memorandum decision, the D.C. Circuit affirmed, holding that "[t]he Supreme Court in *PPL Montana* . . . directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification

or reservation." *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014).

I am not persuaded by the reasoning of the *Alec L.* courts. As explained above, a close reading of *PPL Montana* reveals that it says nothing about the viability of federal public trust claims. And in *Air Florida*, the D.C. Circuit emphasized that "we imply no opinion regarding either the applicability of the public trust doctrine to the federal government or the appropriateness of using the doctrine to afford trustees a means for recovering from tortfeasors the cost of restoring public waters to their pre-injury condition." 750 F.2d at 1084.

Two federal courts — the district courts for the Northern District of California and the District of Massachusetts — have concluded the public trust doctrine applies to the federal government. The decisions, from the 1980s, concerned the federal government's acquisition of various state-owned public trust assets — for example, submerged land beneath navigable rivers or tidelands — through the power of eminent domain. The courts held that the federal government has no public trust obligations under *state* law, but does take the land subject to a *federal* public trust. As one court explained, "[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." *United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cnty., Mass.*, 523 F. Supp. 120, 124 (D. Mass. 1981). Through eminent domain, the federal government "may take property . . . in 'full fee simple' insofar as no other principal may hold a greater right to such land. It must be recognized, however, that the federal government is as restricted as the Commonwealth in its ability to abdicate to private individuals" its title to the land. *Id.* at 124-25. In other words, "[b]y condemnation, the United States simply acquires the land subject to the public trust as though no party had held an interest in the land before." *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal.

1986). *32.42 Acres of Land* is wholly consistent with these opinions; in that case, the Ninth Circuit held that when the federal government condemns state land, it takes title free and clear of any *state* public trust obligations — and that to hold otherwise would violate the Supremacy Clause by subjugating the federal eminent domain power to state public trust law. 683 F.3d at 1038. As noted, however, the court said nothing about the lower court's determination that the condemned tidelands had been taken subject to a federal public trust. *32.42 Acres of Land*, 683 F.3d at 1033 & 1039 n.2.

I am persuaded that the *City of Alameda* and *1.58 Acres of Land* courts were correct. Their decisions rested on the history of the public trust doctrine and the public trust's unique relationship to sovereignty. I can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government.

Defendants' final argument is that recognition of a federal public trust doctrine cannot be reconciled with *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976), in which the Supreme Court stated that "[t]he power over public land" entrusted to Congress by the Property Clause of the United States Constitution is "without limitations." Again, defendants take the Supreme Court's statement out of context. In *Kleppe*, New Mexico challenged the federal government's authority to regulate and protect wild horses and burros, arguing that the Constitution granted Congress only the power to "dispose of and make incidental rules regarding the use of federal property" and "the power to protect" the federal property itself, *i.e.*, the land but not animals living on it. 426 U.S. at 536. The Supreme Court rejected New Mexico's attempt to limit Congress's power to regulate wildlife living on federal lands. It is in that context that the Court stated the "power over public land" was "without limitations." *Id.* at 539. Indeed, in the *very same sentence* the Supreme Court acknowledged that

"the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved[.]" *Id.* The Supreme Court in *Kleppe* simply did not have before it the question whether the Constitution grants the federal government unlimited authority to do whatever it wants with any parcel of federal land, regardless of whether its actions violate individual constitutional rights or run afoul of public trust obligations.

The federal government, like the states, holds public assets — at a minimum, the territorial seas — in trust for the people. Plaintiffs' federal public trust claims are cognizable in federal court.

C. *Displacement of Public Trust Claims*

Defendants and intervenors next argue that any common-law public trust claims have been displaced by a variety of acts of Congress, including the Clean Air Act and the Clean Water Act. For this proposition, they rely on *American Electric Power Company, Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). In *AEP*, the plaintiffs sued five power companies, alleging the companies' CO_2 emissions were a public nuisance under federal common law. *Id.* at 415. The Supreme Court held the nuisance claim could not proceed because "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." *Id.* at 424.

Defendants and intervenors contend that *AEP* controls the displacement analysis. The district court in *Alec L.* agreed with them.[12] The court relied heavily on *AEP*'s statement that the Clean Air Act displaces "'any federal common law right'" to challenge CO_2 emissions, and also discussed at length the *AEP* court's concerns that authorizing a judicial order setting CO_2 emissions limits would require federal judges to make decisions involving competing policy interests — decisions an

[12] The D.C. Circuit did not address the displacement question on appeal.

"expert agency 'is surely better equipped to [make] than individual district judges issuing ad hoc, case-by-case injunctions.'" *Alec L.*, 863 F. Supp. 2d at 16 (quoting *AEP*, 564 U.S. at 424, 428).

I am not persuaded by the *Alec L.* court's reasoning regarding displacement. In *AEP*, the Court did not have public trust claims before it and so it had no cause to consider the differences between public trust claims and other types of claims. Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away. Because of the nature of public trust claims, a displacement analysis simply does not apply.

The interplay between Congress's decision to grant regulatory authority to various federal agencies and the authority of the courts to adjudicate public trust claims raises weightier concerns. Those concerns go to whether this case presents a nonjusticiable political question, and have been addressed in Section I of this opinion.

D. *Enforceability of Public Trust Obligations in Federal Court*

As a final challenge to plaintiffs' public trust claims, defendants contend that even if the public trust doctrine applies to the federal government, plaintiffs lack a cause of action to enforce the public trust obligations. Relatedly, defendants argue that creation of a right of action to permit plaintiffs to assert their claims in federal court would be an exercise in federal common law-making subject to the same statutory displacement arguments outlined above.

In order to evaluate the merits of these arguments, I must first locate the source of plaintiffs' public trust claims. I conclude plaintiffs' public trust rights both predated the Constitution and are secured by it. *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 288-94 (2014).

The public trust doctrine defines inherent aspects of sovereignty. The Social Contract theory, which heavily influenced Thomas Jefferson and other Founding Fathers, provides that people possess certain inalienable rights and that governments were established by consent of the governed for the purpose of securing those rights.[13] Accordingly, the Declaration of Independence and the Constitution did not *create* the rights to life, liberty, or the pursuit of happiness — the documents are, instead, vehicles for protecting and promoting those already-existing rights. *Cf. Robinson Twp.*, 83 A.3d at 948 (plurality opinion) (rights expressed in the public trust provision of Pennsylvania Constitution are "preserved rather than created" by that document); *Minors Oposa*, 33 I.L.M. at 187 (the right of future generations to a "balanced and healthful ecology" is so basic that it "need not even be written in the Constitution for [it is] assumed to exist from the inception of humankind"). Governments, in turn, possess certain powers that permit them to safeguard the rights of the people; these powers are inherent in the authority to govern and cannot be sold or bargained away. One example is the police power. *Stone*, 101 U.S. at 817. Another is the status as trustee pursuant to the

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[13] The Founding Fathers were also influenced by intergenerational considerations. They believed the inalienable rights to life, liberty, and property were rooted in a philosophy of intergenerational equity. Thomas Jefferson, for example, thought that each generation had the obligation to pass the natural estate undiminished to future generations. *See* Br. of Amicus Curiae John Davidson at 21-25 (doc. 60). In a 1789 letter to James Madison, Jefferson wrote that "no man can, by natural right, oblige lands he occupied . . . to the payments of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to than the living, which would be the reverse of our principle. What is true of every member of the society individually is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals." Letter from Thomas Jefferson to James Madison, Sept. 6, 1789, *in* The Founders' Constitution (Philip B. Kurland & Ralph Lerner, eds.) (1986), *available at* press-pubs.uchicago.edu/founders/documents/v1ch2s23.html (last visited Nov. 7, 2016). Although I find it unnecessary today to address the standing of future generations or the merits of plaintiffs' argument that youth and posterity are suspect classifications, I am mindful of the intergenerational dimensions of the public trust doctrine in issuing this opinion.

public trust doctrine. *Illinois Central*, 146 U.S. at 459-60.

Although the public trust predates the Constitution, plaintiffs' right of action to enforce the government's obligations as trustee arises from the Constitution. I agree with Judge Coffin that plaintiffs' public trust claims are properly categorized as substantive due process claims. As explained, the Due Process Clause's substantive component safeguards fundamental rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 761, 767 (internal citations, quotations, and emphasis omitted). Plaintiffs' public trust rights, related as they are to inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives, satisfy both tests. Because the public trust is not enumerated in the Constitution, substantive due process protection also derives from the Ninth Amendment. *See* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *Raich v. Gonzalez*, 500 F.3d 850, 861-66 (9th Cir. 2007) (considering whether the right to use medical marijuana was a fundamental right safeguarded by the Ninth Amendment and the Fifth Amendment's substantive due process clause). But it is the Fifth Amendment that provides the right of action.

Plaintiffs' claims rest "directly on the Due Process Clause of the Fifth Amendment." *Davis*, 442 U.S. at 243 (1979); *see also Carlson v. Green*, 446 U.S. 14, 18 (1980) ("[T]he victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.") They may, therefore, be asserted in federal court.

CONCLUSION

Throughout their objections, defendants and intervenors attempt to subject a lawsuit alleging

constitutional injuries to case law governing statutory and common-law environmental claims. They are correct that plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions — whether or not they violate any specific statutory duty — have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.

A deep resistance to change runs through defendants' and intervenors' arguments for dismissal: they contend a decision recognizing plaintiffs' standing to sue, deeming the controversy justiciable, and recognizing a federal public trust and a fundamental right to climate system capable of sustaining human life would be unprecedented, as though that alone requires its dismissal. This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss. Indeed, the seriousness of plaintiffs' allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly.

Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it. As Judge Goodwin recently wrote,

> The current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits. . . . [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. . . .
>
> The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.

Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 Wis. L. Rev. 785, 785-86, 788 (2015).

Judge Goodwin is no stranger to highly politicized legal disputes. Nearly fifty years ago, he authored the landmark opinion that secured Oregon's ocean beaches for public use. Private landowners wanted to construct fences and otherwise keep private the beaches in front of their properties; they brought suit to challenge an Oregon state law requiring public access to all dry sand beaches. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 672-73 (Or. 1969). Writing for five of the six members of the Oregon Supreme Court, then-Justice Goodwin rooted his determination the beaches were public property in a concept from English common law:

> Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has a legitimate reason to regard as exclusively his.[14]

Id. at 678.

In an argument with strong echoes in defendants' and intervenors' objections here, the plaintiff private property owner contended it was "constitutionally impermissible . . . to dredge up an inapplicable, ancient English doctrine that has been universally rejected in modern America." Kathryn A. Straton, *Oregon's Beaches: A Birthright Preserved* 65 (Or. State Parks & Recreation 1977). The Oregon Supreme Court was not persuaded by this call to judicial conservatism. Because of the application of an ancient doctrine, Oregon's beaches remain open to the public now and forever.

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[14] The sixth justice concurred in the judgment. He found the English rule of custom useful by analogy, but would have held the beaches were public property pursuant to the public trust doctrine. *Hay*, 462 P.2d at 679 (Denecke, J., concurring) ("These rights of the public in tidelands and in the beds of navigable streams have been called 'jus publicum' and we have consistently and recently reaffirmed their existence.").

"A strong and independent judiciary is the cornerstone of our liberties." These words, spoken by Oregon Senator Mark O. Hatfield, are etched into the walls of the Portland United States courthouse for the District of Oregon. The words appear on the first floor, a daily reminder that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.

I ADOPT Judge Coffin's Findings & Recommendation (doc. 68), as elaborated in this opinion. Defendants' Motion to Dismiss (doc. 27) and Intervenors' Motion to Dismiss (doc. 19) are DENIED.

IT IS SO ORDERED.

Dated this 10th day of November 2016.

Ann Aiken
United States District Judge

Exhibit 2

Ninth Circuit's Opinion denying Defendants'
previous mandamus petition, No. 17-71692 (Mar. 7, 2018)
(available at *In re United States*, 884 F.3d 830 (9th Cir. 2018))

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE UNITED STATES OF AMERICA,

UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her official capacity as Director of the Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget; JOHN HOLDREN, DR., in his official capacity as Director of the Office of Science and Technology Policy; RICK PERRY, in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE CHAO, in her official capacity as Secretary of Transportation; U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; U.S. DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF DEFENSE; JIM MATTIS, in his official

No. 17-71692

D.C. No. 6:15-cv-01517-TC-AA

OPINION

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 133 of 170

capacity as Secretary of Defense; U.S. DEPARTMENT OF STATE; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States; THE NATIONAL ASSOCIATION OF MANUFACTURERS; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS; AMERICAN PETROLEUM INSTITUTE,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE,

Respondent,

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his

Guardian Pamela Vergun; MIKO V., through her Guardian Pamela Vergun; HAZEL V., through her Guardian Margo Van Ummersen; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Real Parties in Interest.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted December 11, 2017
San Francisco, California

Filed March 7, 2018

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 135 of 170

Before: Sidney R. Thomas, Chief Judge, and Marsha S. Berzon and Michelle T. Friedland, Circuit Judges.*

Opinion by Chief Judge Thomas

SUMMARY**

Mandamus

The panel denied without prejudice a petition for a writ of mandamus in which federal defendants sought an order directing the district court to dismiss a case seeking various environmental remedies.

Twenty-one plaintiffs brought suit against defendants – the United States, and federal agencies and officials – alleging that the defendants contributed to climate change in violation of the plaintiffs' constitutional rights. The defendants argued that allowing the case to proceed would result in burdensome discovery obligations on the federal government that would threaten the separation of powers.

The panel held that the defendants did not satisfy the five factors in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir.

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* Following the retirement of Judge Kozinski, Judge Friedland was randomly drawn to replace him on the panel. She has read the briefs, reviewed the record, and watched a video recording of the oral argument held on December 11, 2017.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

1977), at this stage of the litigation. Specifically, the panel held that mandamus relief was inappropriate where the district court had not issued a single discovery order, nor had the plaintiffs filed a single motion seeking to compel discovery. The panel also held that any merits errors were correctable through the ordinary course of litigation. The panel further held that there was no controlling Ninth Circuit authority on any of the theories asserted by plaintiffs, and this weighed strongly against a finding of clear error for mandamus purposes. Finally, the panel held that district court's order denying a motion to dismiss on the pleadings did not present the possibility that the issue of first impression raised by the case would evade appellate review. The panel concluded that the issues that the defendants raised on mandamus were better addressed through the ordinary course of litigation.

COUNSEL

Eric Grant (argued), Deputy Assistant Attorney General; Andrew C. Mergen, David C. Shilton, and Robert J. Lundman, Appellate Section; Jeffrey H. Wood, Acting Assistant Attorney General; Environment & Natural Resources Division, United States Department of Justice, Washington, D.C.; for Petitioners.

Julia Ann Olson (argued), Wild Earth Advocates, Eugene, Oregon; Philip L. Gregory, Cotchett Pitre & McCarthy LLP, Burlingame, California; for Real Parties in Interest.

William John Snape III and David Hunter, American University, Washington College of Law, Washington, D.C.,

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 137 of 170

for Amici Curiae Center for International Environmental Law and Environmental Law Alliance Worldwide—US.

David Bookbinder, Niskanen Center, Washington, D.C., for Amicus Curiae Niskanen Center.

Courtney B. Johnson, Crag Law Center, Portland, Oregon, for Amici Curiae League of Women Voters of the United States and League of Women Voters of Oregon.

Sarah H. Burt, Earthjustice, San Francisco, California; Patti Goldman, Earthjustice, Seattle, Washington; for Amicus Curiae EarthRights International, Center for Biological Diversity, Defenders of Wildlife, and Union of Concerned Scientists.

James R. May and Erin Daly, Dignity Rights Project, Widener University, Delaware Law School, Wilmington, Delaware; Rachael Paschal Osborn, Vashon, Washington; for Amici Curiae Law Professors.

Joanne Spalding, Sierra Club, Oakland, California; Alejandra Nuñez and Andres Restrepo, Sierra Club, Washington, D.C.; for Amicus Curiae Sierra Club.

Charles M. Tebbutt, Law Offices of Charles M. Tebbutt P.C., Eugene, Oregon, for Amici Curiae Global Catholic Climate Movement; Leadership Conference of Women Religious; Interfaith Power and Light; The Sisters of Mercy of the Americas' Institute Leadership Team; Sisters of Mercy Northeast Leadership Team; Interfaith Moral Action on Climate; Franciscan Action Network; The National Religious Coalition for Creation Care and Interfaith Oceans; The Faith Alliance for Climate Solutions; Eco-Justice Ministries; San

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 138 of 170

Francisco Zen Center; The Shalom Center; GreenFaith; The Office of Apostolic Action & Advocacy; Christian life Community-USA; and Quaker Earthcare Witness.

Zachary B. Corrigan, Food & Water Watch Inc., Washington, D.C., for Amici Curiae Food & Water Watch Inc., Friends of the Earth—US, and Greenpeace Inc.

OPINION

THOMAS, Chief Judge:

In this petition for a writ of mandamus, the defendants ask us to direct the district court to dismiss a case seeking various environmental remedies. The defendants argue that allowing the case to proceed will result in burdensome discovery obligations on the federal government that will threaten the separation of powers. We have jurisdiction over this petition pursuant to the All Writs Act, 28 U.S.C. § 1651. Because the defendants have not met the high bar for mandamus relief, we deny the petition.

I

Twenty-one young plaintiffs brought suit against the United States, the President, and various Executive Branch officials and agencies, alleging that the defendants have contributed to climate change in violation of the plaintiffs' constitutional rights. They allege that the defendants have known for decades that carbon dioxide emissions from the burning of fossil fuels destabilize the climate. The plaintiffs aver that the defendants have nevertheless enabled and continue to enable, through various government policies, the

burning of fossil fuels, allowing atmospheric carbon dioxide concentrations to reach historically unprecedented levels. They allege that climate change is injuring them and will continue to injure them. The plaintiffs claim that, in light of these facts, the defendants have violated their constitutional rights.

The defendants moved to dismiss the suit for lack of jurisdiction and for failure to state a claim. The district court denied the motion. The court held that the plaintiffs plausibly alleged that they have Article III standing, did not raise non-justiciable political questions, and asserted plausible claims under the Due Process Clause of the Fifth Amendment.

The defendants moved the district court to stay the litigation and to certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court denied the motions. Anticipating burdensome discovery, the defendants petitioned this Court for a writ of mandamus and requested a stay of the litigation. In their petition, the defendants ask that we direct the district court to dismiss the case. We granted the request for a stay and now consider the petition.

II

"The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)) (internal quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). In

considering whether to grant a writ of mandamus, we are guided by the five factors identified in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977):

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief;
>
> (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;
>
> (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and
>
> (5) whether the district court's order raises new and important problems or issues of first impression.

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman*, 557 F.2d at 654–55). "All factors are not relevant in every case and the factors may point in different directions in any one case." *Christensen v. U.S. Dist. Ct.*, 844 F.2d 694, 697 (9th Cir. 1988).

III

The defendants do not satisfy the *Bauman* factors at this stage of the litigation. The issues that the defendants raise on mandamus are better addressed through the ordinary course

of litigation. We therefore decline to exercise our discretion to grant mandamus relief. *See San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999) ("Mandamus review is at bottom discretionary—even where [all] the *Bauman* factors are satisfied, the court may deny the petition.").

A

The first *Bauman* factor is whether the petitioner will "ha[ve] no other means . . . to obtain the desired relief." *Perry*, 591 F.3d at 1156. This factor ensures that a writ of mandamus will not "be used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (internal citation omitted). Here, the defendants argue that mandamus is their only means of obtaining relief from potentially burdensome discovery.

The defendants' argument fails because the district court has not issued a single discovery order, nor have the plaintiffs filed a single motion seeking to compel discovery. Rather, the parties have employed the usual meet-and-confer process of resolving discovery disputes. *See* Fed. R. Civ. P. 37(a)(1). Indeed, both sides have submitted declarations attesting that they have thus far resolved a number of discovery disputes without either side asking the district court for an order. Indeed, the plaintiffs have withdrawn a number of requests for production. The defendants rely on informal communications as to the scope of discovery—in particular, the plaintiffs' litigation hold and demand letter—but the plaintiffs have clarified that these communications were not discovery requests.

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 142 of 170

If a specific discovery dispute arises, the defendants can challenge that specific discovery request on the basis of privilege or relevance. *See McDaniel v. U.S. Dist. Ct.*, 127 F.3d 886, 888–89 (9th Cir. 1997) (per curiam) (holding that mandamus "is not the State's only adequate means of relief" from burdensome discovery because, "as discovery proceeds, the State is not foreclosed from making routine challenges to specific discovery requests on the basis of privilege or relevance"). In addition, the defendants can seek protective orders, as appropriate, under Federal Rule of Civil Procedure 26(c).

Mandamus relief is inappropriate where the party has never sought relief before the district court to resolve a discovery dispute. As we have noted, "courts of appeals cannot afford to become involved with the daily details of discovery." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (quoting *Perry*, 591 F.3d at 1157). Rather, we have only granted mandamus relief to review discovery orders in exceptional circumstances. *Id.* And neither we nor the Supreme Court have ever done so before a party has filed a motion for a protective order in the district court or prior to the issuance of a discovery order by the district court. The defendants will have ample remedies if they believe a specific discovery request from the plaintiffs is too broad or burdensome. Absent any discovery order from the district court, or even any attempt to seek one, however, the defendants have not shown that they have no other means of obtaining relief from burdensome or otherwise improper discovery.

The defendants rely on two cases in which a writ of mandamus issued because of alleged discovery burdens: *Cheney*, and *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342

(9th Cir. 1997). In both cases, the district courts had issued orders compelling document production. *Cheney*, 542 U.S. at 376, 379 (defendant moved for a protective order, but district court issued order allowing discovery to proceed); *Credit Suisse*, 130 F.3d at 1346 (district court issued order compelling defendants to respond to discovery requests).[1]

Absent any district court order concerning discovery, mandamus relief is inappropriate. If the defendants become aggrieved by a future discovery order, they can seek mandamus relief as to that order. But their current request for mandamus relief is entirely premature. The defendants have not satisfied the first *Bauman* factor.

B

The second *Bauman* factor is whether the petitioner "will be damaged or prejudiced in any way not correctable on appeal." *Perry*, 591 F.3d at 1156. To satisfy this factor, the defendants "must demonstrate some burden . . . other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000) (alteration in original) (quoting *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 535 (9th Cir. 1998) (en banc)). Prejudice serious enough to warrant mandamus relief "includes situations in which one's

[1] The defendants also raised, via a letter filed after argument, the Supreme Court's recent summary disposition in an appeal challenging a discovery order. *See In re United States*, 138 S. Ct. 443 (2017). When the government filed a petition for mandamus in that case, the district court had compelled the government to complete the administrative record over the government's opposition that the administrative record was already complete and had deferred ruling on the defendants' earlier motion to dismiss. Neither circumstance exists here.

'claim will obviously be moot by the time an appeal is possible,' or in which one 'will not have the ability to appeal.'" *Id.* (quoting *Calderon*, 163 F.3d at 535).

The defendants argue that holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten the separation of powers. We are not persuaded that simply allowing the usual legal processes to go forward will have that effect in a way not correctable on appellate review.

First, to the extent the defendants argue that the President himself has been named as a defendant unnecessarily and that defending this litigation would unreasonably burden him, this argument is premature because the defendants never moved in the district court to dismiss the President as a party. *See United States v. U.S. Dist. Ct.*, 384 F.3d 1202, 1205 (9th Cir. 2004) (explaining that there is no injustice from declining to consider a new issue on mandamus review because a petitioner may still be able to raise the issue below). Nor has any formal discovery been sought against the President.

To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them. The United States is a defendant in close to one-fifth

of the civil cases filed in federal court.[2] The government cannot satisfy the burden requirement for mandamus simply because it, or its officials or agencies, is a defendant.

Distilled to its essence, the defendants' argument is that it is a burden to defend against the plaintiffs' claims, which they contend are too broad to be legally sustainable. That well may be. But, as noted, litigation burdens are part of our legal system, and the defendants still have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims. And if relief is not forthcoming, any legal error can be remedied on appeal. "The first two criteria articulated in *Bauman* are designed to insure that mandamus, rather than some other form of relief, is the appropriate remedy." *In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. U.S. Dist. Ct.*, 459 U.S. 1191 (1983) (mem.). Because the merits errors now asserted are correctable through the ordinary course of litigation, the defendants have not satisfied the second *Bauman* factor.

C

The third *Bauman* factor is whether the district court's order "is clearly erroneous as a matter of law." *Perry*, 591 F.3d at 1156. Our review of this factor "is significantly deferential and [this factor] is not met unless the reviewing court is left with a definite and firm conviction that a mistake

[2] *See* U.S. Courts, *Federal Judicial Caseload Statistics 2017*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017 (last visited Feb. 14, 2018) (The United States was a defendant in 56,987 of the 292,076 civil cases filed in federal court in the 12-month period ending March 31, 2017.).

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 146 of 170

has been committed." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (quoting *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015)).

"The absence of controlling precedent weighs strongly against a finding of clear error [for mandamus purposes]." *In re Van Dusen*, 654 F.3d 838, 845 (9th Cir. 2011). Here, the defendants concede that there is no controlling Ninth Circuit authority on any of the theories asserted by the plaintiffs. Indeed, the defendants strongly argue that the theories are unprecedented. Thus, the absence of controlling precedent in this case weighs strongly against a finding of clear error. *Id*.

We also underscore that this case is at a very early stage, and that the defendants have ample opportunity to raise legal challenges to decisions made by the district court on a more fully developed record, including decisions as to whether to focus the litigation on specific governmental decisions and orders. Once the litigation proceeds, the defendants will have ample opportunity to raise and litigate any legal objections they have.

However, absent controlling precedent, we decline to exercise our discretion to intervene at this stage of the litigation to review preliminary legal decisions made by the district court or otherwise opine on the merits.

D

The fourth *Bauman* factor is whether the district court's order is "an oft repeated error or manifests a persistent disregard of the federal rules." *Perry*, 591 F.3d at 1156. Absent controlling authority, there is no "oft-repeated error" in this case, *In re Swift Transp. Co.*, 830 F.3d at 917, and the

defendants do not contend that the district court violated any federal rule. The defendants do not satisfy the fourth factor.

E

The final factor is whether the district court's order "raises new and important problems or issues of first impression." *Perry*, 591 F.3d at 1156. In general, we have relied upon this factor when there is a "novel and important question" that "may repeatedly evade review." *Id.* at 1159; *see also In re Cement Antitrust Litig.*, 688 F.2d at 1304–05 ("[A]n important question of first impression will evade review unless it is considered under our supervisory mandamus authority. Moreover, that question may continue to evade review in other cases as well.").

There is little doubt that the legal theories asserted in this case raise issues of first impression. But the district court's order denying a motion to dismiss on the pleadings—which is all that has happened thus far—does not present the possibility that those issues will evade appellate review. The defendants have not satisfied the fifth *Bauman* factor.

IV

There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of issues by the trial courts. If appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed.

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 148 of 170

We are mindful that some of the plaintiffs' claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress. However, the district court needs to consider those issues further in the first instance. Claims and remedies often are vastly narrowed as litigation proceeds; we have no reason to assume this case will be any different. Nor would the defendants be precluded from reasserting a challenge to standing, particularly as to redressability, once the record is more fully developed, or from seeking mandamus in the future, if circumstances justify it. And the defendants retain the option of asking the district court to certify orders for interlocutory appeal of later rulings, pursuant to 28 U.S.C. § 1292(b).

Because petitioners have not satisfied the *Bauman* factors, we deny the petition without prejudice. Absent any discovery order, the mandamus petition is premature insofar as it is premised on a fear of burdensome discovery. The issues pertaining to the merits of this case can be resolved by the district court, in a future appeal, or, if extraordinary circumstances later present themselves, by mandamus relief. For these reasons, we decline to exercise our discretion to grant mandamus relief at this stage of the litigation.

PETITION DENIED WITHOUT PREJUDICE.

Exhibit 3

Excerpts of Reporter's Transcript of Proceedings (Apr. 12, 2018)

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. THOMAS M. COFFIN, JUDGE PRESIDING

4

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6 KELSEY CASCADIA, ROSE JULIANA, et al.,)
7)
Plaintiffs,)
8)
v.) No. 6:15-cv-01517-TC
9)
UNITED STATES OF AMERICA, et al.,)
10)
Defendants.)
11 ___________________________________)

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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 EUGENE, OREGON

16 THURSDAY, APRIL 12, 2018

17 PAGES 1 - 36

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22 Kristi L. Anderson
Official Federal Reporter
23 United States Courthouse
405 East Eighth Avenue
24 Eugene, Oregon 97401
(541) 431-4112
25 Kristi_Anderson@ord.uscourts.gov

1 report is admitted, and we have the opportunity to probe
2 whether or not the report should be admitted at that point.
3 So I --
4 THE COURT: Do you have any objection to the
5 parties submitting their reports to the court in advance of
6 the beginning of trial?
7 MS. PIROPATO: No, we don't object to that, Your
8 Honor.
9 THE COURT: All right. So you -- when you say
10 possible streamlined examination of experts, what did you
11 have in mind with that?
12 MS. OLSON: Your Honor, what we had in mind was
13 having a very brief direct examination that highlights key
14 aspects of the expert report with the understanding that the
15 court is already familiar with the expert reports and then
16 proceed to cross-examination by defense counsel.
17 THE COURT: Okay. Well, obviously Judge Aiken
18 will be dealing with these issues.
19 In terms of the length of trial, you say assuming
20 a six-hour day, 20 court days per side. So you are talking
21 roughly four weeks per side.
22 MS. OLSON: That's plaintiffs' position, Your
23 Honor. I believe defense counsel yesterday in our meet and
24 confer thought that it would be closer to 25 court days per
25 side.

1 THE COURT: So five weeks per side in essence. Is
2 that your view as well?
3 MS. PIROPATO: Yes, Your Honor, with the
4 understanding that if we don't need five weeks, we don't use
5 the five weeks. But given the amount of testimony from
6 individual plaintiffs, the amount of expert testimony, we
7 felt like it would be wise to put a buffer in.
8 THE COURT: Okay. All right. Well, fortunately
9 it's a court trial, not a jury trial, so we can be very
10 flexible with the scheduling.
11 No. 2, you have a question mark. Any further
12 appellate proceedings? Is that a question for the
13 government?
14 MR. DUFFY: I believe that it is.
15 THE COURT: Couldn't be to me.
16 MR. DUFFY: This provides a good point for us to
17 raise -- I said we had five points and one of the points we
18 wanted to raise today, the United States has 90 days to
19 determine whether it's going to seek further appellate
20 review, so until June 5th.
21 That decision has not been made, and as Your Honor
22 is aware, our position throughout has been --
23 THE COURT: When is the deadline for that decision
24 under the 90 days?
25 MR. DUFFY: I believe it's June 5th.

Exhibit 4

Excerpts of Reporter’s Transcript of Proceedings (May 10, 2018)

Case: 18-71928, 07/05/2018, ID: 10932153, DktEntry: 1-2, Page 154 of 170

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA,)
et al.,)
Plaintiffs,)
v.)No. 6:15-CV-1517-TC
THE UNITED STATES OF AMERICA,)
et al.,)
Defendants.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JUDGE COFFIN

May 10, 2018

Thursday

10:00 A.M.

-o0o-

Jan R. Duiven, CSR, FCRR, CRC

CC Court Reporting

172 East 8th Avenue

Eugene, Oregon 97401

541/485-0111

1 work on the protective order. We've been working
2 with NARA, and I think we have a workaround that I
3 think we should meet and confer around in the
4 first instance.
5 THE COURT: Yeah. Because this is
6 pretty standard, isn't it? Medical records and --
7 MS. PIROPATO: Yeah, your Honor.
8 We're not -- let's be clear. We're not saying
9 that this won't be under a protective order.
10 We're just trying to find the simplest mechanism
11 to get to where we need to get to. So thank you.
12 THE COURT: All right. You bet.
13 MR. GREGORY: Excuse me, your Honor.
14 This is -- I think what counsel was just saying is
15 we're not going to have a protective order today.
16 They're going to talk to us and then they're going
17 to go back to their superiors, which is what we've
18 been hearing since last summer. And that's why
19 we're trying to get a definite date by which the
20 defendants will say, Here's the protective order
21 we'll sign. So --
22 THE COURT: Here's -- here's the big
23 picture. October 29, 2018, trial starts unless
24 some higher court says no. So from this
25 perspective, October 29, 2018, the trial starts.

1 Now, the Government is the one that
2 is eager to get your experts reports, et cetera,
3 and so it's in the Government's best interest, it
4 seems to me, to come up with a protective order
5 that allows you to share that as expeditiously as
6 possible. If the Government drags its feet on
7 that, this Court is not going to extend the trial
8 date based upon any complaints that, Oh, we're not
9 prepared. So get to work, folks, and get
10 prepared. That's my advice.
11 All right. Let's -- what else do we
12 need to talk about here? Depositions of
13 plaintiffs' experts.
14 MS. OLSON: Your Honor, we've been
15 in the process of identifying dates our experts
16 are unavailable for depositions starting in June
17 and through September.
18 THE COURT: Where are the
19 depositions going to take place?
20 MS. OLSON: We -- we've agreed --
21 THE COURT: Are they all over or
22 where?
23 MS. OLSON: We've agreed for experts
24 we'll largely be going to where the experts are,
25 except for the international experts we will bring

Exhibit 5

Excerpts of Reporter’s Transcript of Proceedings (May 23, 2018)

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. ANN AIKEN, JUDGE PRESIDING

4

5

6 KELSEY CASCADIA ROSE JULIANA, et al.,)
)
7)
Plaintiffs,)
8)
v.) No. 6:15-cv-01517-TC
9)
UNITED STATES OF AMERICA, et al.,)
10)
Defendants.)
11 ___________________________________)

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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 EUGENE, OREGON

16 WEDNESDAY, MAY 23, 2018

17 PAGES 1 - 20

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15:03:47 1 look at it yet. And so the default rules are 21 days and
2 then 14 for a reply.
3 But I didn't really -- well, we can discuss that
4 issue. I don't know if the plaintiffs have even had an
15:04:01 5 opportunity to meaningfully review it yet.
6 THE COURT: Oh, come on. And I mean it honestly.
7 If you filed it last night, nobody has had a chance to
8 meaningfully look at it.
9 So let's just everybody take it down to dealing as
15:04:15 10 lawyers practicing in the federal court with courtesy and
11 professionalism right now.
12 So I am going to take all the issues as
13 Ms. Olson -- I am going to handle all those issues in a
14 hearing resolving the three issues in July or hearing the
15:04:34 15 arguments and handling it through an oral argument in July.
16 So whatever briefing -- whatever else is needed
17 for the briefing of those issues, we'll take it up -- we'll
18 hear those arguments in July.
19 And then we'll start the calendar, and you can
15:04:47 20 assume that we are going to -- we'll set an oral argument,
21 and it may well be that we set oral argument at the time of
22 trial on the summary judgment motions.
23 I will take a look at my schedule along with the
24 other things that I have to take care of this summer and
15:05:03 25 other commitments so that we can be prepared for those

15:05:05 1 issues.
2 But as we have talked about in this case before,
3 we are not delaying the trial at this point. We are moving
4 forward. And we can -- I have done a lot of patent cases,
15:05:17 5 and a lot of the patent work is done on the legal pleadings
6 as well as the factual determinations, and you can certainly
7 determine how terms are used on a legal basis and then apply
8 those terms to the facts. And that may be what we need to
9 do in terms of setting a hearing in a trial in this
15:05:35 10 particular case.
11 So I am prepared to take these issues up one at a
12 time, and I am setting the three issues that have been
13 raised and filed and are in the process of being briefed to
14 be heard and argued on July 17th or 18th or some other date
15:05:51 15 that everybody can agree on. That's one.
16 With a new summary judgment motion filed last
17 night, we'll go through the regular course of addressing
18 that and putting -- you know, getting a hearing date for
19 that at some later date because we'll be prepared for that
15:06:11 20 and we are going to do it in an orderly fashion.
21 Anyone have anything else they need to add? So I
22 guess we are waiting on -- so are you clear, Ms. Olson,
23 about what you need to respond to? And I am also -- if
24 something changes because I am, of course, watching and
15:06:34 25 seeing whether or not or when, at what hour the petition is

15:06:40 1 filed on the 5th of June because that affects our work as
2 well. And so I am waiting for that and I will take up if
3 there's -- if there's additional need to move the briefing
4 schedule at that point, I am happy to have another
15:06:54 5 conference call.
6 MS. OLSON: Okay. Thank you, Your Honor.
7 And plaintiffs will likely meet and confer with
8 defendants on the timing of the motion for summary judgment
9 that was filed to see if we can work out a briefing schedule
15:07:14 10 and a proposal to the court on when it should be heard, and
11 if we can't come to agreement, we will file a motion for an
12 extension regarding that Rule 56 motion.
13 THE COURT: Yep. Even just filing it last night
14 it puts this case way -- you know, in terms of argument, way
15:07:31 15 into the fall regardless.
16 So people have made some decisions, and we are
17 just -- we have got a trial date and we are moving forward.
18 People need to get their discovery done. Judge Coffin has
19 assured me that's ongoing and people are doing their
15:07:46 20 discovery work. So I was kind of surprised to hear today
21 that that's somewhat on hold. I certainly hope people will
22 be ready for trial in October because I know Judge Coffin
23 has worked very hard to keep on it track.
24 So if there's anything I can do today to be clear
15:07:59 25 or be more helpful about underscoring that he has my full

15:08:03 1 authority to manage this case and he has been gracious in
2 his time and willingness to do so, please ask me now.
3 MS. OLSON: Your Honor, this is Julia Olson.
4 I would like to raise one issue related to
15:08:20 5 plaintiffs' depositions.
6 During our last meet and confer with the
7 defendants we had agreed upon three weeks during the summer
8 when we would have the 21 plaintiffs available for
9 depositions because the defendants have said they would like
15:08:36 10 to depose all 21 plaintiffs. And one of those weeks is the
11 first week in June because some of our plaintiffs have
12 limited availability this summer. And we received a letter
13 in the past couple of days from counsel stating that they
14 are no longer prepared to take plaintiffs' depositions the
15:08:58 15 first week of June on the basis that discovery is improper
16 in this case.
17 And so we are having issues with our ability to
18 come to agreement on dates for depositions and even a
19 protective order over confidential information regarding our
15:09:19 20 young plaintiffs so that we are at a bit of a stalemate on
21 these issues with defense counsel.
22 THE COURT: I am sending this right back to
23 Judge Coffin. This is a discovery issue. This is what he
24 is managing. I think he's not going to be particularly
15:09:35 25 happy to hear what I have just heard, but I am going to give

Exhibit 6

Magistrate judge's Order denying Defendants' Motion for a Protective Order
and for a Stay of All Discovery, ECF No. 212 (May 25, 2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KELSEY CASCADE ROSE JULIANA; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

6:15-cv-1517-TC

ORDER

COFFIN, Magistrate Judge:

Before the court is defendants' motion for a protective order and for a stay of discovery. (#196). In essence, defendants' motion is based on the assertion that "Plaintiff's claim must proceed under the [Administrative Procedure Act] APA" and APA claims must be reviewed solely on the Administrative record. Thus "APA plaintiffs are ... not entitled to discovery ...." Defendants' Motion For A Protective Order And For A Stay Of Discovery (#196) at p. 10.

But the plaintiffs' complaint does not contain an APA claim. No such claim is pleaded, and the defendants have no ability to edit the complaint to cobble the claim into one fo their choosing

to derail discovery. The plaintiffs' claims in this case, which have survived previous efforts by the defendants to dismiss, are claims based on alleged violations of their constitutional rights. As to these claims, the court has denied the defendants' earlier motion to dismiss, an order which defendants challenged through writ of mandamus to the Ninth Circuit, which was denied. The Ninth Circuit further noted the case should proceed through discovery and the normal process of trial and the development of a record before any appellate review would be appropriate.

The defendants' motion for a protective order and stay is simply a recasting of their position that the plaintiffs' claims should all be dismissed and the District Court should revisit its previous ruling to the contrary.

Beyond whatever procedural impediments exist to the to the government's efforts to reconstruct its motion to dismiss under a different theory, this court is not at all persuaded by their argument that the APA is the sole avenue of relief for the plaintiffs for the asserted violations of their constitutional rights.

Indeed, the District Court has already rejected this very argument on its Order denying defendants' motion to dismiss:

> Plaintiffs could have brought a lawsuit predicated on technical regulatory violations, but they chose a different path. As masters of their complaint, they have elected to assert constitutional rather than statutory claims. Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards.

Order dated November 10, 2017 (#83) at p. 13.

In sum, defendants' efforts to transform plaintiffs' constitutional claims into an APA case to bar discovery is unavailing.

Finally, the defendants argue that the separation of powers doctrine justifies an order barring

or staying all discovery in this case based on wholly hypothetical scenarios that may implicate matters of privilege during the discovery process. Under such rationale, the government could avoid all discovery in any litigation in which it is named as a defendant simply by asserting hypothetical discovery requests that a litigant might make during the litigation. Should a specific discovery request arise during discovery in this case that implicates a claim of privilege the government wishes to assert, the government may file a motion for a protective order directed at any such specific request. None has arisen so far in this particular case that the parties have been unable to resolve in the meet and confer process that the court is aware of.

The motion for a protective order and stay of all discovery is hereby denied.

CONCLUSION

For the reasons stated above, defendants' motion for a protective order and stay (#196) is denied.

DATED this 25 day of May 2018.

THOMAS M. COFFIN
United States Magistrate Judge

Exhibit 7

District court's Order affirming the foregoing order of the magistrate judge, ECF No. 300 (June 29, 2018)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA,
et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Civ. No. 6:15-cv-01517-AA

ORDER

AIKEN, District Judge.

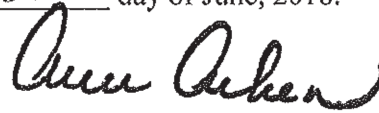
On May 9, 2018, Defendants filed a Motion for Protective Order and Motion for Stay of All Discovery. ECF No. 196. On May 25, 2018, Magistrate Judge Coffin denied Defendants' motion.[1] ECF No. 212. Defendants have filed Objections to Judge Coffin's Order, ECF No. 215, Plaintiffs have filed their Response, ECF No. 242, and the matter is now before this Court.

In accordance with Rule 72(a), "[w]hen a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision." Fed. R. Civ. P. 72(a). The standard of review for an order with objections is "clearly erroneous" or "contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

[1] Defendants complain, *inter alia*, that Judge Coffin denied their motion without allowing them the opportunity to file a reply. The Local Rules of the District of Oregon do not permit replies in support of discovery motions. LR 26-3(c) ("Unless otherwise directed by the Court, a movant may not file a reply supporting a discovery motion."). The timing of Judge Coffin's ruling was therefore appropriate.

The Court has carefully reviewed Judge Coffin's order in light of Defendants' objections. The Court concludes that the order is not clearly erroneous or contrary to law. Accordingly, the Court AFFIRMS Magistrate Judge Coffin's Order, ECF No. 212, denying Defendants' Motion for Protective Order and Stay of All Discovery, ECF No.196. The Court declines to certify this decision for interlocutory appeal under 28 U.S.C. § 1292(b).

It is so ORDERED and DATED this 29th day of June, 2018.



ANN AIKEN
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 5, 2018.

I further certify that on July 5, 2018, a notice of the filing of the foregoing (including a complete copy of the foregoing) will be filed in underlying proceeding in the United States District Court for the District of Oregon in compliance with Federal Rule of Appellate Procedure 21(a)(1), and that all parties to the proceeding will be served with that notice through the district court's CM/ECF system. In addition, a courtesy copy of the foregoing has been provided via e-mail to the following counsel for Plaintiffs:

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