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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Defendants are entitled to judgment on the pleadings for three reasons that the Court has not previously addressed. First, Plaintiffs cannot obtain relief against the President, because the 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) (quoting *Mississippi v. Johnson,* 71 U.S. 475, 501 (1866)). Second, Plaintiffs' remaining challenges are the equivalent of programmatic challenges to government conduct. Such challenges are not cognizable under the APA, which provides the sole right of action to challenge agency actions and inactions of the kind that underlie Plaintiffs' claims. Third, even if they could bring a stand-alone equitable action, Plaintiffs' case cannot proceed because it would require the Court to issue orders that are well beyond its Article III judicial power and which would usurp the powers of the political branches. Finally, if the Court denies Defendants' motion, it should certify its order for interlocutory appeal under 28 U.S.C. § 1292(b).

In addition to the foregoing arguments that Defendants raise in their Motion for Judgment on the Pleadings, ECF No. 195, Defendants reassert the previously rejected arguments made in the Motion to Dismiss. ECF No. 27, which the Court can and should revisit. *See* Fed. R. Civ. P. 54(b).

ARGUMENT

I. Because Plaintiffs Cannot Obtain Relief Against the President, the Claims Against the President Should be Dismissed

A. Plaintiffs may not obtain injunctive relief against the President.

Federal courts may not compel the President to undertake discretionary official acts. This rule is firmly grounded in separation of powers principles and recognizes the unique position of the President in our constitutional system. *See Franklin,* 505 U.S. at 827 ("[I]n

general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" (citation omitted)); *Johnson*, 71 U.S. at 500 (1866) ("Neither [the Congress nor the President] can be restrained in its action by the judicial department"); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (per curiam) ("[T]he Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the Government is well taken."), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, and *vacated and remanded on other grounds*, 138 S. Ct. 377 (2017).

Plaintiffs ask the Court to ignore the long line of legal authority holding that a court may not enjoin the official acts of the President of the United States.[1] They claim that the serious separation of powers concerns raised by such acts are "speculative.'" Pls.' Resp. in Opp'n to Defs.' Mot. for J. on the Pleadings 4, ECF No. 241 ("Pls.' Resp."). This is incorrect.

Focusing on the "ongoing actions of past and current Presidents with respect to fossil fuel development and climate change[,]" Pls.' Resp. 8, Plaintiffs allege that the President should phase out fossil fuels. Am. Compl. ¶ 99, ECF No. 7. Plaintiffs thus seek to entangle the Court in the President's administration of existing laws and his assessment and recommendation of potential new laws addressing environmental and energy policies. Plaintiffs seek to compel the President to refashion our energy system, by taking actions that are well within the province of discretionary Executive activity.

[1] *See Newdow v. Bush*, 355 F. Supp. 2d 265, 280-82 (D.D.C. 2005) ("The prospect of this Court issuing an injunction against the President raises serious separation of powers concerns."); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) ("The President's unique status under the Constitution distinguishes him from other executive officials.").

Plaintiffs argue that to foreclose their attempt to enjoin the President means that the President is "beyond all constitutional command" or that it makes the President akin to a "despot." Pls.' Resp. 3, 4. In doing so, Plaintiffs ignore the long-recognized separation of powers principles that preclude courts from commandeering the President and forcing him to undertake discretionary acts within the powers proscribed to him by the constitution. *See Franklin,* 505 U.S. at 827 (Scalia, J., concurring) (describing the "apparently unbroken historical tradition ... implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular Executive acts). The cases Plaintiffs cite actually reinforce the limited nature of the judicial power when it comes to directing executive action. It is one thing for a court to issue a subpoena in a criminal prosecution, *United States v. Nixon*, 418 U.S. 683 (1974); it is quite another for this Court to order the President to undertake a "national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 [emissions,]" Am. Compl. 94.

While the Supreme Court has not foreclosed a judicial injunction requiring the President to carry out "a purely 'ministerial' duty," *Franklin*, 505 U.S. at 802, "in respect to which nothing is left to discretion," *Mississippi*, 71 U.S. at 7, that is clearly not what Plaintiffs seek here. There is nothing ministerial or non-discretionary about establishing national energy policy; rather, it involves a complex of discretionary decisions that the President—or Congress—is constitutionally charged with making. Even if one were to accept Plaintiffs' constitutional theories, Plaintiffs have not identified any ministerial act by the President that the Court could order him to take.[2] Pls.' Resp. 6. Plaintiffs attempt to sidestep the distinction between

[2] Plaintiffs rely on *Nurse v. United States*, 226 F.3d 996 (9th Cir. 2000), for the proposition that conduct cannot be discretionary if it is discriminatory and unconstitutional. Pls.' Resp. 6-7. *Nurse* is inapposite. The issue in *Nurse* was whether discriminatory conduct by customs' agents

ministerial and discretionary acts by claiming that the President has a non-discretionary "duty not to infringe" constitutional rights, Pls.' Resp. 6, but this merely reframes their theory of their case as a ministerial duty.

B. Plaintiffs may not obtain declaratory relief against the President.

Plaintiffs argue that even if injunctive relief is unavailable, declaratory relief against the President is "well established." Pls.' Resp. 7. However, the distinction Plaintiffs attempt to make between injunctive and declaratory relief is illusory in the context of separation of powers. Either form of relief improperly places the Court in the position of sitting in judgment of the President's executive decisions, including the decision not to act. *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) (noting that injunctive relief and declaratory judgments raise the same separation of powers concerns); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (noting that "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment."); *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment) (arguing that federal courts cannot issue a declaratory judgment against the President). Nor would such declaratory relief provide Plaintiffs with any remedy to their alleged injuries.

Plaintiffs rely on cases considering the President's exercise of statutorily-prescribed power to support their contention that a declaratory judgment similarly allows them to assess the constitutionality of the President's conduct. Pls.' Resp. 7-8. Such cases are not relevant here.

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fell within the discretionary function exemption to the Federal Tort Claims Act's waiver of sovereign immunity, which is a matter of statutory interpretation. *Nurse*, 226 F.3d at 1001; *see* 28 U.S.C. § 2680(a) (addressing the "discretionary function" of "an employee of the Government"). *Nurse* does not speak to the question of whether injunctive relief is available against the President, which is a matter of constitutional separation of powers.

For example, in *Clinton v. City New York*, 524 U.S. 417 (1998), the declaratory judgment entered concerned the constitutionality of the Line Item Veto Act. It did not enjoin the President to take any non-ministerial actions or, indeed, any action at all. *See id.* at 448–49. Plaintiffs also rely on *National Treasury Employees Union v. Nixon (NTEU)*, 492 F.2d 587 (D.C. Cir. 1974); Pls.' Resp. 4-5, 7. But the D.C. Circuit's decision in *NTEU* predated the Supreme Court's 1992 decision in *Franklin*, as well as the D.C. Circuit's own 2010 decision in *Newdow*, where the Circuit unequivocally stated that "injunctive or declaratory relief" against the President "is unavailable." 603 F.3d at 1013; *see also Swan*, 100 F.3d at 978 (questioning whether *NTEU* remains good law after *Franklin*). Even if *NTEU* remains good law, it involved a declaratory judgment directing the President to merely execute a ministerial duty set forth in the Federal Pay Comparability Act to adjust the pay of federal employees. *Id.* No such ministerial act is involved here.

Plaintiffs' reliance on the Ninth Circuit's decision in *Hawaii v. Trump*, for the proposition that declaratory relief is available against the President, is also misplaced. 859 F.3d 741. There, the court held that "Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and that the extraordinary remedy of enjoining the President [wa]s not appropriate[.]" *Id.* at 788. So too with *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *appeal filed*, No. 18-1691 (2d Cir. June 5, 2018), in which the court did not enter an injunction or declaratory judgment against the President and instead recognized that, "[a]s a matter of comity, courts should normally direct legal process to a lower Executive official . . . ." Mem. and Order at 72, *Knight First Amendment Institute v. Trump*, No. 17-cv-5205 (NRB) (S.D.N.Y. May 23, 2018), ECF No. 72 (quoting *Nixon v. Sirica*,

487 F.2d 700, 709 (D.C. Cir. 1973) (en banc)). Both of these decisions make plain that this suit should be directed at lower officials rather than the President.[3]

C. No relief against the President is available where it is available against another Defendant.

This court need not decide whether injunctive or declaratory relief is ever available against the President, only whether it is available here, where eight agencies and eleven agency heads are also sued. If the prerequisites to judicial review are satisfied, any agency action—or inactions—that are subject to challenge under existing law may be brought in a suit against another Defendant in this suit. *See Franklin*, 505 U.S. at 803 (finding that plaintiffs' injuries could be redressed by entry of declaratory relief against the Secretary of Commerce, but ultimately rejecting underlying claim); *Swan*, 100 F.3d at 979-81 (bypassing issue of injunction against President by finding that plaintiffs' alleged injuries are redressable against subordinate executive officials, but ultimately rejecting underlying claim). Plaintiffs give short shrift to this line of case law and argue that it is appropriate to sue the President if the President bears ultimate responsibility for ensuring that executive agencies carry out any injunctive relief ordered by this Court. Pls.' Resp. 8. By this reasoning, it would always be appropriate to sue the President anytime a plaintiff sues an executive agency because the President is the head of the executive branch and therefore bears ultimate responsibility for the actions of the executive agencies. Such

[3] *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *13 (W.D. Wash. Apr. 13, 2018), a district court case evaluating a ban on openly transgender persons in the military, does not control. In that case, a court found that declaratory relief against the President is proper. But the court never discussed the Supreme Court's most recent decision on this issue, *Franklin v. Massachusetts*, and instead relied on cases that have been called into doubt since *Franklin* (citing *NTEU*, *see supra*) or are otherwise factually distinguishable because they involve the interpretation of statutory executive power (citing *Clinton*).

a rule cannot be reconciled with Supreme Court precedent counseling courts to order relief against subordinate officials rather than the President. *Franklin*, 505 U.S at 803.

Plaintiffs offer no compelling reason why the President should remain in this suit. They fail to identify a single executive action solely attributable to the President. And any grievances that Plaintiffs may claim arising from executive action could be pursued in a properly framed APA action against the agency defendants, assuming Plaintiffs establish justiciability and satisfy the APA's requirements. Accordingly, Plaintiffs fail to show that "the extraordinary remedy of enjoining the President" is appropriate here. *Hawaii v. Trump*, 859 F.3d at 788.

II. Plaintiffs Fail to State a Claim Under the Administrative Procedure Act

Plaintiffs' challenge to the administrative decisions that underlie this action can only proceed, if at all, under the APA.[4] But Plaintiffs concede that they have not challenged discreet and final agency actions as that statute requires. Indeed, they all but concede that they are attempting to bring a "broad programmatic challenge" to the defendant agencies' conduct, which the APA does not permit. Pls' Resp. 18-19. They nevertheless advance three arguments why this Court should not enter judgment on the pleadings. First, they contend that the United States has already lost this argument. This is incorrect. Neither this Court nor the Ninth Circuit has yet addressed the United States' argument that the APA provides the sole vehicle for Plaintiffs to bring the challenges to agency action or inaction of the sort they seek to raise in this suit. Second, Plaintiffs argue that the Court can consider their constitutional challenge separate and apart from the APA. Here they miss the main thrust of the United States' argument, which is

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

that when Congress provides a right of action to challenge federal agency action and inaction, Plaintiffs are required to use it. Instead Plaintiffs seek to rely on inapposite cases in which the United States was sued but no federal agency action was at issue. Third, Plaintiffs argue that limiting their suit to an action under the APA would "violate their right to procedural due process." Pls.' Resp. 15. But such an argument wrongly assumes that the APA—the vehicle Congress provided to review the constitutionality of administrative actions such as those challenged here—does not provide Plaintiffs with any process that is due.

A. The argument that Plaintiffs must proceed under a valid right of action has never been considered by this Court.

Plaintiffs argue that this Court need not address whether the APA provides the sole vehicle for Plaintiffs' claims because it already rejected this argument when it stated that "it is the Fifth Amendment that provides the right of action." Pls.' Resp. 10 (quoting *Juliana v. United States*, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016)). Plaintiffs use this quoted language misleadingly, and shorn of its context, when they suggest that the Court has already rejected the contention that Plaintiffs must avail themselves of the APA. The language quoted from the Court's opinion on the motion to dismiss came in response to the United States' argument that Plaintiffs do not have a cause of action to enforce a public trust in federal court, *Juliana*, 217 F. Supp. 3d at 1260, and not in response to any suggestion that the APA provides the sole vehicle for bringing claims challenging agency action, as is argued here. This Court thus did not address the United States' present argument that the APA's express provisions for bringing constitutional claims forecloses Plaintiffs' attempt to bring a constitutional claim in some other way. That issue has never been decided by this Court and is ripe for a determination.

Plaintiffs also claim that the quoted statement was "affirmed by the Ninth Circuit under the 'no clear error' standard." Pls.' Resp. 10. This is incorrect. As an initial matter, the Ninth

Circuit did not substantively address *any* of the arguments made in the motion for judgment on the pleadings. The Ninth Circuit did not conclude that Plaintiffs may obtain relief against the President. Nor did it conclude that Plaintiffs have asserted claims that are consistent with the Constitution's separation of powers. And the Ninth Circuit certainly did not determine that Plaintiffs are free to bring claims challenging agency actions without availing themselves of the APA right of action and its various requirements, including a necessary focus on specifically identified agency actions. To the contrary, the Ninth Circuit observed that Plaintiffs' claims may well be "too broad to be legally sustainable." *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 836 (9th Cir. 2018). It stressed that this Court needed to reconsider whether Plaintiffs' claims are too broad or whether "some of the remedies the plaintiffs seek may not be available as redress." *Id.* at 837. And it made clear that it expected that the "[c]laims and remedies" in this case would be "vastly narrowed as litigation proceeds[,]" *id.* at 838, for example, by "focus[ing] the litigation on specific governmental decisions and orders[,]" *id.* at 837. That is precisely what requiring Plaintiffs to bring their claims through the APA, as Congress intended, would accomplish. This Court should not accept Plaintiffs' invitation to ignore the Ninth Circuit's instructions. It should instead hold that Plaintiffs' challenges, if viable, must proceed under the APA.

B. Plaintiffs' claims must proceed, if at all, under the Administrative Procedure Act.

Plaintiffs have not identified a valid right of action, which is an independent legal requirement. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). Plaintiffs argue instead that they are not required to identify a right of action, but may instead rest their claims "on the Due Process Clause of the Fifth Amendment." Pls.' Resp. 13

(quoting *Davis*, 442 U.S. at 243-44). For this proposition, Plaintiffs rely exclusively on an inapposite body of case law. For example, Plaintiffs suggest that two Ninth Circuit decisions allow them to bring Constitutional claims against federal agencies without invoking the APA right of action, when in fact those cases do not address this issue. Pls.' Resp. 12 (citing *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989) and *Navajo Nation*, 876 F.3d 1144). Those cases instead address the separate issue of when a plaintiff may avail herself of the APA's waiver of sovereign immunity.

In support of their argument that the Constitution itself provides the required right of action, Plaintiffs rely on the *Bivens* line of cases, in which the Supreme "Court recognized a private right of action for damages under the Fifth Amendment." Pls.' Resp. 13 (citing *Davis*, 442 U.S. 228). But as the Supreme Court recently explained, "*Bivens*, *Davis*, and *Carlson* . . . represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). And "it is possible that the analysis in [those] three *Bivens* cases might have been different if they were decided today[,]" because "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1856-57 (citation omitted); *see id.* at 1857 (citing long line of recent cases declining to imply a right of action under *Bivens*). Specifically, the Court has explained that "the context is new" for purposes of the *Bivens* analysis if "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id.* at 1859. Plaintiffs' claim here is clearly "different in a meaningful way" from any previous *Bivens* case. *Id.* Indeed, as this Court has recognized, Plaintiffs' claim is unprecedented. *Juliana*, 217 F. Supp. 3d at 1262. And especially given that "a *Bivens* action is not 'a proper vehicle for altering an entity's

policy[,]'" Plaintiffs' suit here is clearly not cognizable under the *Bivens* line of cases. *Ziglar*, 137 S. Ct. at 1860 (citation omitted).

Plaintiffs suggest that the Constitution itself provides a right of action to seek injunctive relief against any alleged deprivation of constitutional rights. *See* Am. Compl. ¶ 13. But no such generic constitutional right of action exists. Rather, while federal courts have equitable authority in some circumstances "to enjoin unlawful executive action . . . ," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015), that equitable power is "subject to express and implied statutory limitations." *id*. Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (citation omitted).[5]

[5] Plaintiffs' claim that language from the Supreme Court's recent decision in *Ziglar* confirms the "right of every citizen to injunctive relief from ongoing and prospective 'official conduct prohibited' by the Constitution . . . ." Pls.' Resp. 14-15. Plaintiffs then suggest that the implied cause of action they identify allows courts "[t]o address these kinds of [large-scale] policy decisions" and allow plaintiffs to "seek injunctive relief." *Id.* The issue before the Court in *Ziglar* was whether it should recognize an implied cause of action for damages, as it did in *Bivens* itself, to challenge the FBI's alleged "hold-until-cleared policy" adopted in the wake of the terrorist attacks on September 11, 2001. *Ziglar*, 137 S. Ct. at 1852. The Court in *Ziglar* there catalogued the "far more cautious course before finding implied causes of action" in the years following the *Bivens* decision. *Id.* at 1855-56; *see e.g. Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979) (cautioning that where Congress "intends private litigants to have a cause of action" the "far better course" is for Congress to confer that remedy in express terms); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to create an implied right of action in a First Amendment suit against a federal employer); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (declining to create an implied right of action in a procedural due process suit against Social Security officials). It then declined to create an implied right of action, leaving the work of crafting a right of action to Congress. *Ziglar*, 137 S. Ct. at 1863. Plaintiffs focus on the Court's suggestion that challengers could likely seek injunctive relief against the FBI's alleged policy. But the Court did not suggest that such a challenge could be raised directly under the Constitution, as opposed to through the APA's right of action. Moreover, while the FBI's alleged policy may have been "large-scale" in the sense that it applied to hundreds of individuals, the plaintiffs' challenge in *Ziglar* was targeted as to one specific agency action—the adoption of

Here, the APA provides "express . . . statutory limitations" that "foreclose" an equitable cause of action to enforce Plaintiffs' asserted constitutional claims, *Armstrong*, 135 S. Ct. at 1385, outside of the provisions for judicial review in the APA itself. Section 702 of the APA provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity[,]" among other legal defects, *id.* § 706(2), and to "compel agency action unlawfully withheld or unreasonably delayed[,]" *id.* § 706(1). The APA thus provides a "comprehensive remedial scheme" for "person[s] adversely affected or aggrieved by agency action . . . ." *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) (quotation marks and citation omitted).

Because the APA provides a "carefully crafted and intricate remedial scheme" for challenging agency action, the courts may not supplement it with one of their own creation. *Seminole Tribe*, 517 U.S. at 73-74 (citation omitted). The APA accordingly "describes the exclusive mechanism . . . by which the federal district courts may review" challenges to agency action of the kind that underlie Plaintiffs' claims here. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1220 (D.N.M. 2014); *see also Occupy Eugene v. U.S. Gen. Servs. Admin.*, No. 6:12-CV-02286-MC, 2013 WL 6331013, at *6 (D. Or. Dec. 3, 2013)

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that policy—not the unconnected "aggregate actions" of a dozen or more agencies taken over five decades that Plaintiffs attempt to challenge here.

(dismissing constitutional claims against federal officials because APA provides appropriate remedy).

Because the APA provides the sole mechanism for Plaintiffs to bring their claims, they must comply with the APA's requirements for judicial review. Of particular relevance here, they must direct their challenges to "circumscribed, discrete" final agency action, rather than launching a "broad programmatic attack" on agency policies in general. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62, 64 (2004); *see Lujan v. Nat'l 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).

Aside from their allegations directed at the Department of Energy's Order No. 3041,[6] Plaintiffs have not identified any discrete, final agency actions as required to assert a valid challenge under the APA. *See Norton*, 542 U.S. at 62-64; *Lujan*, 497 U.S. at 891; *San Luis Unit*

[6] The Court lacks jurisdiction to review Plaintiffs' claims concerning Order No. 3041. DOE/FE Order No. 3041, ECF No. 27-2. That order granted approval for the export of liquefied natural gas to nations with free trade agreements in effect, from a proposed liquefaction facility and export terminal to be located in Coos Bay, Oregon. *Id.* The Department of Energy issued this order pursuant to section 201 of the Energy Policy Act of 1992, which provides that the exportation of natural gas to "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such . . . exportation shall be granted without modification or delay." 15 U.S.C. § 717b(c). Though not stated as a separate claim, Plaintiffs allege that section 201 is unconstitutional on its face. Am. Compl. ¶ 288. This Court cannot rule on any claim concerning Order No. 3041 or on the constitutionality of the section 201, however, because such import/export approvals are reviewable, if at all, exclusively in the courts of appeals. *See* 15 U.S.C. § 717r(b) ("Any person . . . aggrieved by an order issued by the Commission . . . . may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ."). As the Supreme Court explained in reviewing the nearly identical judicial review provision of the Federal Power Act, the prescribed judicial review process represents "the specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma v. Taxpayers*, 357 U.S. 320, 336 (1958) (citation omitted); *see Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (provision vesting review in a court of appeals barred district court jurisdiction over facial challenge to constitutionality of a statute).

Food Producers, 709 F.3d at 801-06. Instead, Plaintiffs cast their claims as a challenge to "affirmative aggregate actions" by the defendant agencies that "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels[.]" Am. Compl. ¶¶ 1, 5. But this challenge to "aggregate actions" is precisely the kind of sweeping "programmatic" challenge that the Supreme Court foreclosed in *Lujan*. 497 U.S. at 891. Plaintiffs challenge the actions of eight federal agencies and the President without identifying those actions in any specific or meaningful way. *See, e.g.*, Am. Compl. ¶¶ 5, 7, 12, 279-80. Plaintiffs' challenge to "affirmative aggregate actions" is unreviewable under the principles announced in *Norton* and *Lujan*. *See San Luis Unit Food Producers*, 709 F.3d at 801-06 (rejecting farmers' suit to compel the Bureau of Reclamation to provide more water to irrigation districts because it "amount[s] to a broad programmatic attack on the way the Bureau generally operates the Central Valley Project").

The APA's requirement that Plaintiffs challenge discrete "agency actions" serves to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. It is hard to imagine a suit that more squarely implicates those concerns than this one, in which Plaintiffs ask this Court to direct the development and implementation of environmental and energy policy for the entire United States Government, indeed for the entire Nation. Such a request is precisely what the Supreme Court foreclosed when it explained that the APA prevents "wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891 (emphasis omitted). "[M]ore sweeping actions" are the province of "the other branches" of government. *Id.* at 894.

C. Judicial review under the APA provides sufficient procedural due process.

Finally, Plaintiffs make the extraordinary contention that it would violate procedural due process to require them to channel their claims through the statutory procedures that Congress has provided for challenging the constitutionality of agency action or inaction. The APA explicitly provides for judicial review of constitutional claims. *See* 5 U.S.C. § 706 ("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[.]"). Thus, Plaintiffs' observation that where Congress intends to preclude judicial review of constitutional claims "its intent to do so must be clear[,]" Pls.' Resp. 16 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1998)), is wholly inapt in the context of the APA. *cf. Elgin*, 567 U.S. at 9 ("*Webster's* standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court.").[7] Indeed, as Plaintiffs correctly observe, the APA nowhere evinces an intent to "preclude review of constitutional claims." Pls.' Resp. 17 (quoting *Webster*, 486 U.S. at 598.). To the contrary, it expressly provides the vehicle for such claims against federal agencies.

Plaintiffs point to no case holding that the APA's judicial review provisions are constitutionally deficient, either as a general matter, or as applied to plaintiffs who bring constitutional claims. And courts that have considered those procedures have concluded that they pass constitutional muster. *See e.g. Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 50 (1st Cir. 2016) ("The APA sets forth no strict procedural regime for informal agency

[7] Moreover, the serious constitutional question recognized by *Webster* only arises where a federal statute arguably precludes judicial review of a "colorable constitutional claim." 486 U.S. at 603. As Defendants have previously explained, Plaintiffs' constitutional claims are not colorable.

decisionmaking, and a party's procedural due process rights are respected as long as the party is afforded adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (citation omitted)).

At root, Plaintiffs' objections are ultimately to the APA itself, under which they must direct their challenges to "circumscribed, discrete" final agency action, rather than launching a "broad programmatic attack" on agency policies in general. *Norton*, 542 U.S. at 55, 62, 64; *see Lujan*, 497 U.S. at 891; *San Luis Unit Food Producers*, 709 F.3d at 801-06; *see also* 5 U.S.C. §§ 702, 704. The APA's requirement that plaintiffs challenge discrete "agency actions" serves to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. Plaintiffs are free to challenge particular agency actions or inactions before the agencies or the courts, to petition for rulemakings or for the repeal of certain rules (and to subsequently challenge the agencies' response), or take any of a number of various options provided by Congress and the APA to vindicate their alleged constitutional rights in the context of discrete agency actions and in concrete factual settings. There is no basis to conclude that bringing one omnibus action making a litany of vague assertions against more than fifty years of unspecified and unconnected actions (or inactions), policies, and practices, by nearly a dozen different agencies, is consistent with the judicial role, much less that it is required by procedural due process.

III. Even if Plaintiffs Could Bring an Equitable Action Outside the APA Framework, Their Claims Are Foreclosed by Separation of Powers Principles

Dismissal of Plaintiffs' claims is also appropriate because they raise significant and unsurmountable separation of powers issues. Plaintiffs are wrong that deciding this issue now is "premature" and can be put off until a remedy phase because Plaintiffs' claims cannot be

adjudicated in a manner that is consistent with core separation of powers principles. Plaintiffs unquestionably seek an order of this Court imposing national environmental and energy policy under a clause of the Bill of Rights designed to protect individual liberties, and this Court relied on that request to determine that the Plaintiffs had adequately alleged Article III standing to pursue their claims. Because the very process of adjudicating Plaintiffs' claims, as currently formulated, or awarding such relief would effectively place this Court in the position of the President or Congress, those claims should be dismissed.

Plaintiffs' proposed remedy of a national remedial plan tramples upon core separation of powers principles, including the constitutionally-prescribed power of the President pursuant to the Opinion and Recommendations Clauses. U.S. CONST. art. II, § 2, cl. 1 & § 3. Plaintiffs contend that Defendants' arguments are wrong because Plaintiffs seek to force Defendants to implement a plan of their own making and "nothing in the requested relief would prevent the President" from availing himself of the power to seek the opinions of executive agencies and making recommendations to Congress. Pls.' Resp. 22. But this argument sidesteps the threshold question of who has the power under the Constitution to order the relief sought in the first instance. The answer is assuredly not the judiciary.

Under Article III, courts possess the power to render judgments, not to make law or set policy. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Plaintiffs here ask the Court to supplant the President by ordering federal executive agencies and their principal officers "to prepare and implement" Plaintiffs' proposed remedial plan with continued oversight by the Court. Am. Compl. ¶ 99 & Prayer for Relief ¶ 7. It is no response to say, as Plaintiffs attempt to do here, that such concern can be cast aside because Defendants may have some latitude in how they implement Plaintiffs' proposed plan. Pls.' Resp. 22. Requiring the President and the entire

Executive Branch to produce to the Court a "national remedial plan" to combat global warming, end the Nation's reliance on fossil fuels, or ensure that atmospheric CO_2 is no more concentrated than a specific parts-per-million, and retaining jurisdiction to ensure the Executive Branch's compliance with that plan, simply cannot be reconciled with the limited judicial power vested by Article III in the federal courts. And it would put the Court on a collision course with Congress' legislative power and the President's supervisory power over federal agencies as the Nation's Chief Executive. *See Free Enter. Fund*, 561 U.S. at 496; *Clinton v. Jones*, 520 U.S. 681, 712-713 (1997) (Breyer, J., concurring in the judgment) (explaining that Article II "makes a single President responsible for the actions of the Executive Branch"). As a unanimous Supreme Court recognized in *American Electric Power Company v. Connecticut (AEP)*, 564 U.S. 410 (2011), federal courts "lack the scientific, economic, and technological resources an agency can utilize in coping with [such] issues . . . ." *Id.* at 428.

Indeed, just this week, the Northern District of California (Alsup, J.) reached the same conclusion in dismissing a series of public nuisance claims brought by several cities against oil and gas production companies, alleging that their production and sale of fossil fuels caused climate change and sea level rise that injured the cities. *City of Oakland v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 3109726 (N.D. Cal. June 25, 2018). Relying on both the Supreme Court's decision in *AEP* and the separation of powers principles articulated here, Judge Alsup concluded:

> The dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case. While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed

> by those branches. The Court will stay its hand in favor of solutions by the legislative and executive branches.

Id. at *9. This Court should follow the same course here.

IV. If the Court Denies Defendants' Motion, it Should Certify its Decision for Interlocutory Appeal Under 28 U.S.C. § 1292(b)

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

CONCLUSION

Plaintiffs' complaint fails as a matter of law. Plaintiffs' policy disagreements with the federal government are not judicially cognizable claims. The relief they seek—an injunction against the President and programmatic change in the government's approach to climate change—is not relief that this Court can provide. And the challenges they make against

"affirmative aggregate actions" are not claims that this Court has jurisdiction to entertain.

Accordingly, Defendants are entitled to judgment on the pleadings.

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Respectfully submitted,

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