No.

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In 2015, plaintiffs—21 minors, an environmental advocacy organization, and a guardian purporting to represent future generations—sued the United States, the President, eight Executive Branch agencies, and other federal defendants for depriving them of an asserted right to "a climate system capable of sustaining human life" under the Due Process Clause of the Fifth Amendment and related legal theories. As relief, plaintiffs ask the district court to order the federal defendants to "move to swiftly phase out CO_2 emissions, as well as take such other action as 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." After three years of litigation, trial is set to begin on October 29, 2018. The questions presented are as follows:

1. Whether this suit is justiciable under Article III.

2. Whether this suit should be dismissed for failure to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

3. Whether this suit should be dismissed because there is no right to "a climate system capable of sustaining human life" under the Due Process Clause or a public-trust doctrine.

PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States of America; Donald J. Trump, in his official capacity as the President of the United States*; Office of the President of the United States; the Director of Council on Environmental Quality; Mick Mulvaney, in his official capacity as the Director of the Office of Management and Budget; the Director of the Office of Science and Technology Policy; U.S. Department of Agriculture; Sonny Perdue, in his official capacity as the Secretary of Agriculture; U.S. Department of Commerce; Wilbur Ross, in his official capacity as the Secretary of Commerce; U.S. Department of Defense; James N. Mattis, in his official capacity as the Secretary of Defense; U.S. Department of Energy; Rick Perry, in his official capacity as the Secretary of Energy; U.S. Environmental Protection Agency (EPA); Andrew R. Wheeler, in his official capacity as the Acting Administrator of the EPA; U.S. Department of the Interior; Ryan Zinke, in his official capacity as the Secretary of the Interior; U.S. Department of State; Michael R. Pompeo, in his official capacity as the Secretary of State; U.S. Department of Transportation; and Elaine Chao, in her official capacity as the Secretary of Transportation.

Respondent in this Court is the United States District Court for the District of Oregon. Respondents also

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* On October 15, 2018, the district court dismissed President Trump from the suit without prejudice. See App., *infra*, 77a. The government opposes that relief because the President should be dismissed with prejudice. The President accordingly joins in this petition for a writ of mandamus.

include 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 Toña 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; and future generations, through their Guardian Dr. James Hansen (collectively plaintiffs in the district court, and real parties in interest in the court of appeals).

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PETITION FOR A WRIT OF MANDAMUS

The Solicitor General, on behalf of the United States and the other federal defendants, respectfully petitions for a writ of mandamus to the United States District Court for the District of Oregon. In the alternative, the Solicitor General respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, or as a petition for a common-law writ of certiorari to review the district court's decisions on the government's dispositive motions.

OPINIONS BELOW

The opinion of the district court denying a motion for judgment on the pleadings and a motion for summary judgment (App., *infra*, 1a-77a) is not published in the Federal Supplement but is available at 2018 WL 4997032. The opinions of the court of appeals denying petitions for a writ of mandamus (App., *infra*, 78a-85a, 91a-103a) are reported at 895 F.3d 1101 and 884 F.3d 830. The opinion of the district court denying a motion to dismiss (App., *infra*, 104a-200a) is reported at 217 F. Supp. 3d 1224.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651. In the alternative, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the court of appeals was entered on July 20, 2018.

STATEMENT

1. This suit was filed in 2015 by 21 minor children, a "tribe of young activists, artists and musicians from across the globe" known as Earth Guardians, and "Future Generations" of humans "by and through their" self-appointed guardian, Dr. James Hansen. Am. Compl. ¶¶ 91-92; see *id.* ¶¶ 16-90. The plaintiffs (respondents here) sued President Obama, eight Cabinet-level departments and agencies, and various other federal agencies and officials. *Id.* ¶¶ 98-128. President Trump and officials in his administration were later substituted for President Obama and officials in his administration.

Respondents allege that petitioners—and their predecessors in government dating back more than 50 years to President Lyndon Johnson's administration—have "known of the unusually dangerous risks of harm to human life, liberty, and property that would be caused by continued fossil fuel burning," and have "willfully ignored this impending harm." Am. Compl. ¶ 5. Because the federal government has "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels," respondents allege that petitioners have "deliberately allowed atmospheric CO_2 concentrations to escalate to levels unprecedented in human history, resulting in a dangerous destabilizing climate system." *Ibid.*

Respondents allege that petitioners' "aggregate actions and deliberate omissions" have violated their

"substantive Fifth Amendment rights" because petitioners "directly caused atmospheric CO_2 to rise to levels that dangerously interfere with a stable climate system." Am. Compl. ¶¶ 279, 281. Respondents further allege that petitioners have violated (1) their rights under the equal protection principles of the Due Process Clause by "causing irreversible climate change" and thereby failing to provide respondents "the same protection of fundamental rights afforded to prior and present generations," *id.* ¶ 292; (2) their "right to be sustained by our country's vital natural systems, including our climate system," which they contend is protected by the Ninth Amendment, *id.* ¶ 303; and (3) their rights under a supposed federal "public trust doctrine," *ibid.*

Respondents seek to prove these asserted constitutional violations through a bench trial. As relief, respondents ask the district court to order the federal government to "cease [its] permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions," and to "take such other action as 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." Am. Compl. ¶ 12 (emphasis omitted). To ensure "compliance with the national remedial plan," respondents ask the court to "[r]etain jurisdiction" indefinitely. *Id.* at 94.

2. In November 2015, the government moved to dismiss the complaint for lack of jurisdiction and failure to state a claim. D. Ct. Doc. 27 (Nov. 17, 2015). The district court denied that motion. App., *infra*, 104a-200a. While recognizing that "[t]his is no ordinary lawsuit,"

the court found that respondents had adequately alleged the elements of Article III standing and had stated a claim on the merits. *Id.* at 106a.

With respect to standing, the district court concluded that respondents had adequately alleged injuries in the form of increased droughts, wildfires, flooding, and other effects of climate change, and that those injuries were caused by the government's regulation of (and failure to further regulate) fossil fuels. App., *infra*, 125a-134a. The court further concluded that it could redress respondents' alleged injuries by granting the relief sought, including ordering the federal government "to cease [its] permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions" and to "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 137a (citation omitted); see *id.* at 134a-137a.

On the merits, the district court concluded that respondents had stated a claim under the Fifth Amendment's Due Process Clause. App., *infra*, 137a-147a. Relying primarily on this Court's decision in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), as well as *Roe* v. *Wade*, 410 U.S. 113 (1973), and a 1993 decision from the Supreme Court of the Philippines, the district court found in the Fifth Amendment's protection against the deprivation of "life, liberty, or property, without due process of law," U.S. Const. Amend. V, a previously unrecognized "fundamental right * * * to a climate system capable of sustaining human life." App., *infra*, 142a; see *id.* at 140a-142a.

The district court further determined that respondents had adequately stated a claim under a federal public-trust theory. App., *infra*, 147a-167a. The court acknowledged this Court's statement that "the public trust doctrine remains a matter of state law," *PPL Montana, LLC* v. *Montana*, 565 U.S. 576, 603 (2012), as well as the D.C. Circuit's rejection of a federal public-trust doctrine, see *Alec L. ex rel. Loorz* v. *McCarthy*, 561 Fed. Appx. 7, 8 (per curiam), cert. denied, 135 S. Ct. 774 (2014). But the court nevertheless concluded that a public-trust doctrine 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." App., *infra*, 148a (citation omitted).

The district court acknowledged the government's arguments that "recognizing [respondents'] standing to sue, deeming the controversy justiciable, and recognizing a federal public trust and a fundamental right to a climate system capable of sustaining human life would be unprecedented," but rejected the premise that the unprecedented nature of those decisions "alone requires * * * dismissal." App., *infra*, 167a. The court expressed its view that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." *Id.* at 167a-168a. The court invoked the "failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits," and stated that 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." *Id.* at 168a (citation omitted).

The district court subsequently declined the government's request to certify its decision denying the motion to dismiss for interlocutory appeal under 28 U.S.C. 1292(b). See *Juliana* v. *United States*, No. 15-cv-1517, 2017 WL 2483705, at *2 (June 8, 2017).

3. The government petitioned the Ninth Circuit for a writ of mandamus ordering dismissal of the suit. The government contended that allowing respondents' claims to proceed contravened fundamental limitations on judicial review imposed by Article III of the Constitution, and that the district court had clearly erred in recognizing a sweeping new fundamental right to certain climate conditions under the Due Process Clause and a federal public-trust theory. The government further requested a stay of the litigation pending the court of appeals' consideration of the mandamus petition.

On July 25, 2017, the court of appeals granted the government's request for a stay. See App., *infra*, 7a-8a, 94a. But after considering the petition for nearly eight more months, the court in March 2018 "decline[d] to exercise [its] discretion to grant mandamus relief at th[at] stage of the litigation." *Id.* at 103a; see *id.* at 91a-103a. The court recognized that "some of [respondents'] claims as currently pleaded are quite broad, and some of the remedies [respondents] seek may not be available as redress." *Id.* at 103a. The court reasoned, however, that "the district court need[ed] to consider those issues further in the first instance." *Ibid.* The court "underscore[d] that this case [wa]s at a very early stage, and that the [government] [would] 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 101a. The

court also 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 103a. And the court stated that the governmental defendants could continue to "raise and litigate any legal objections they have," 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 99a, 101a-103a.

4. The government did not immediately seek this Court's review. Instead, in light of the court of appeals' identification of various means by which the government could contest the suit, the government filed a series of motions in the district court seeking to terminate the case or at least narrow respondents' claims.

First, the government filed a motion for judgment on the pleadings, reiterating its prior arguments for dismissal and setting forth three new grounds for dismissing some or all of respondents' claims: (1) the President must be dismissed because the court lacks jurisdiction to enjoin him in the performance of his official duties; (2) respondents' claims must be dismissed because the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, provides the mechanism for challenging the federal administrative actions that underlie respondents' claims, but respondents fail to challenge discrete, identified agency actions or alleged failures to act, as the APA requires; and (3) in any event, respondents' claims and requested relief violate the constitutional separation of powers by effectively requiring the district court to usurp the roles of Congress and the President. D. Ct. Doc. 195, at 6-25 (May 9, 2018).

Second, the government filed a motion for a protective order barring all discovery. D. Ct. Doc. 196 (May 9, 2018). The government argued that, because this case may proceed only under the APA, judicial review must be based on the administrative record of specifically identified actions or decisions, not on discovery. *Id.* at 9-14. The government also contended 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 and the agencies' organic statutes impose on agency fact-finding and decision-making (including the requirements for public participation) and the separation of powers. *Id.* at 14-19.

Third, the government filed a motion for summary judgment, arguing that (1) respondents lack standing as a matter of law and as judged against the evidentiary record, and the suit is not a proper case or controversy within the meaning of Article III; (2) respondents have failed to identify a right of action for their claims apart from the APA and have not satisfied the APA's requirement to challenge discrete agency actions or inactions; and (3) respondents' claims fail on the merits. D. Ct. Doc. 207, at 5-19, 24-30 (May 22, 2018).

5. On May 25, 2018, the magistrate judge denied the government's motion for a protective order. App., *infra*, 88a-90a. He rejected the government's argument that any challenges to the agencies' actions or failures to act must proceed under the APA, concluding that respondents may proceed in a sweeping manner against all federal defendants collectively because their claims are "based on alleged violations of their constitutional rights." *Id.* at 89a. He also declined to grant a protec-

tive 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 90a.

The district court summarily affirmed the magistrate judge's order. App., *infra*, 86a-87a. The court stated that it had "carefully reviewed [the] order in light of [the government's] objections" and "conclude[d] that the order is not clearly erroneous or contrary to law." *Id.* at 87a. The court provided no further explanation for its decision and declined "to certify [its] decision for interlocutory appeal under 28 U.S.C. § 1292(b)." *Ibid.*

The district court set an opening trial date of October 29, 2018. See D. Ct. Doc. 189 (Mar. 26, 2018); D. Ct. Doc. 192 (Apr. 12, 2018). The court indicated its expectation that the trial will last approximately 50 trial days. See, *e.g.*, 4/12/18 Tr. 8 (Coffin, J.) (estimating "five weeks per side in essence"). And the court has repeatedly made clear that it has no intention of delaying trial. See, *e.g.*, 10/4/18 Tr. 19 (Coffin, J.) ("Th[e] trial date of October 29th is a firm trial date and will not be changed unless changed by order of an appellate court or the Supreme Court."); 5/23/18 Tr. 17 (Aiken, J.) ("[W]e have got a trial date and we are moving forward."); 5/10/18 Tr. 27 (Coffin, J.) ("October 29, 2018, trial starts unless some higher court says no.").

6. On July 5, 2018, the government again petitioned the Ninth Circuit for a writ of mandamus. The government explained that, in an effort to terminate or narrow this case, it had taken every step that the Ninth Circuit had contemplated in its prior decision. And yet the district court was moving forward with discovery and an

impending trial without narrowing the claims in any respect. The government accordingly asked the Ninth Circuit to order dismissal of this case, or, at a minimum, to direct the district court to stay all discovery and trial pending the resolution of the government's dispositive motions, and to consider certifying for interlocutory appeal any rulings on those motions.

On July 20, 2018, the court of appeals denied the government's mandamus petition without prejudice. App., *infra*, 78a-85a. The court noted that "the government has not challenged a single specific discovery request," and the "government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers." *Id.* at 81a-82a. The court further rejected the government's separation-of-powers argument, stating that "allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." *Id.* at 84a. The court denied the "mandamus petition without prejudice," adding that the "merits of the case can be resolved by the district court or in a future appeal." *Id.* at 85a.

7. While its second mandamus petition was pending before the court of appeals, the government filed a stay application in this Court. The government asked this Court to stay discovery and trial pending the Ninth Circuit's consideration of the mandamus petition. As an alternative, the government noted that the Court could direct dismissal of the case itself by construing the stay application as a petition for a writ of mandamus or a petition for a writ of certiorari.

On July 30, 2018, this Court denied the stay application "without prejudice." *United States* v. *U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (*Juliana*).

While stating that the government's application was "premature," the Court observed that the "breadth of respondents' claims is striking" and that "the justiciability of those claims presents substantial grounds for difference of opinion." *Ibid.* The Court directed the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Ibid.*

8. Despite this Court's expectation of "a prompt ruling on the Government's pending dispositive motions," *Juliana*, 2018 WL 3615551, at *1, the district court issued no ruling on those motions for more than two months after this Court's order, which itself came more than two months after the motions were filed. With the trial date of October 29 just weeks away, the government on October 5 filed another stay request with the district court. The government informed the court that it planned to file a petition for a writ of mandamus (or, in the alternative, a petition for a writ of certiorari) with this Court, and asked the district court to stay discovery and trial pending this Court's resolution of that petition. See D. Ct. Doc. 361 (Oct. 5, 2018). The court called for a response and took the stay motion under advisement. See D. Ct. Doc. 362 (Oct. 9, 2018). The court ultimately denied the request. See D. Ct. Doc. 374 (Oct. 15, 2018).

One week after asking the district court for a stay, the government asked the court of appeals to stay discovery and trial pending this Court's review of the government's petition. At the time this petition was printed, the court of appeals had not yet acted on that request.[1]

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[1] Under Ninth Circuit precedent, the court of appeals lacks jurisdiction to consider a motion for a stay pending Supreme Court review after the court of appeals has denied a mandamus petition. See

9. On October 15, 2018—roughly five months after the government's dispositive motions were filed and only two weeks before the start of the scheduled trial—the district court issued an opinion largely denying the motions and declining to certify its ruling for interlocutory appeal. App., *infra*, 1a-77a.

The district court granted two narrow aspects of the government's motions. First, the court dismissed the President from the suit, but only "without prejudice." App., *infra*, 23a, 77a. The court explained that "on the current record, it appears that this is a case in which effective relief is available through a lawsuit addressed only to lower federal officials," but added that it "is not possible to know how developments to the record in the course of the litigation may change the analysis" and that the court could "not conclude with certainty that President Trump will never become essential to affording complete relief." *Id.* at 23a. Second, the court granted summary judgment to the government on respondents' "freestanding claim under the Ninth Amendment," which the court found "not viable as a matter of law." *Id.* at 69a.

The district court otherwise denied the government's motions. The court rejected the government's argument that respondents were required to assert their challenges under the APA, concluding that the "APA does not govern" claims seeking equitable relief for alleged constitutional violations based on "*aggregate action* by *multiple agencies*." App., *infra*, 31a. The court also rejected the government's argument that respondents had failed to establish standing under the summary-

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In re United States, 875 F.3d 1177, 1178 (2017). The government disagrees with that precedent but accepted it for purposes of this case and accordingly submitted its stay request to the Ninth Circuit in the form of an additional petition for a writ of mandamus.

judgment standard, largely by reiterating its analysis from the motion-to-dismiss stage. *Id.* at 36a-55a. The court likewise reiterated its earlier holdings on the government's other central arguments. See *id.* at 31a-34a, 56a-59a, 68a-69a. And the court addressed respondents' equal protection claim for the first time, allowing the claim to proceed because it "would be aided by further development of the factual record." *Id.* at 73a.

The district court again declined to certify its order for interlocutory appeal under 28 U.S.C. 1292(b), which authorizes certification where, *inter alia*, an "order involves a controlling question of law as to which there is substantial ground for difference of opinion." See App., *infra*, 73a-77a. The court did not address this Court's express statement that "the justiciability of [respondents'] claims presents substantial grounds for difference of opinion." *Juliana*, 2018 WL 3615551, at *1.

REASONS FOR GRANTING THE PETITION

A writ of mandamus is warranted when a party establishes that (1) the "right to issuance of the writ is 'clear and indisputable,'" (2) the party has "no other adequate means to attain the relief" sought, and (3) "the writ is appropriate under the circumstances." *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004) (citation omitted). Mandamus is reserved for "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Id.* at 380 (citation omitted). Those are the circumstances of this case. Respondents' position amounts to the astounding assertion that permitting or encouraging the combustion of fossil fuels violates the Due Process Clause of the Constitution and a single district court in a suit brought by a handful of plaintiffs may decree the end of the carbon-based features of the United States' energy system, without regard to the

statutory and regulatory framework Congress enacted to address such issues with broad public input. Months ago, this Court flagged the "striking" breadth of those claims and the "substantial" doubts about their justiciability, reciting the standard for interlocutory certification and thereby indicating that appellate review is warranted before trial. *United States* v. *U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018). But the district court nevertheless refused to meaningfully narrow respondents' claims, to certify its orders for interlocutory appeal, or to halt the trial now set to begin in less than two weeks. The government therefore has no choice but to ask this Court once again to intervene—and to end this profoundly misguided suit.

The factors for mandamus are readily satisfied. Given the manifest absence of Article III jurisdiction and the egregious defects in respondents' claims, the government has established a "clear and indisputable" right to relief. *Cheney*, 542 U.S. at 381 (citation omitted). The government has "no other adequate means" to "attain the relief" it seeks before an unjustified trial that would "threaten the separation of powers." *Id.* at 380-381 (citation omitted). And issuance of "the writ is appropriate under the circumstances"; indeed, the "traditional use of the writ * * * has been to confine" a court "to a lawful exercise of its prescribed jurisdiction." *Id.* at 380 (citation omitted). Mandamus is especially appropriate here, because it is the only way "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382.

In the alternative, the Court could grant further review of this case in either of two other ways. First, the Court could construe this petition as a petition for a writ

of certiorari under 28 U.S.C. 1254(1) seeking review of the Ninth Circuit's July 20, 2018, denial of the government's mandamus petition. App., *infra*, 78a-85a. The Court could then grant certiorari on any or all of the questions presented and review the court of appeals' decision not to issue a writ of mandamus directing dismissal of the suit. Cf. *Cheney*, 542 U.S. at 391 (granting petition for writ of certiorari and reversing court of appeals' decision not to grant mandamus).[2] Second, the Court could construe this petition as a petition for a common-law writ of certiorari under 28 U.S.C. 1651 seeking review of the district court decisions denying the government's dispositive motions. App., *infra*, 1a-77a, 104a-200a; see, *e.g.*, *De Beers Consol. Mines* v. *United States*, 325 U.S. 212, 217 (1945) (explaining the "propriety of review" under a common-law writ of certiorari where "there is a substantial question whether the District Court has jurisdiction of a suit which it has retained for trial on the merits"); *United States Alkali Exp. Ass'n* v. *United States*, 325 U.S. 196, 201-204 (1945) (similar). The Court could then grant certiorari on any or all of the questions presented and review the district court's decisions directly.

Whatever path the Court chooses, this case should not be permitted to proceed to trial on respondents' "striking[ly]" broad claims without the further appellate review contemplated by this Court's July order. *Juliana*, 2018 WL 3615551, at *1.

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[2] In *Cheney*, this Court declined to issue a writ of mandamus directly to the district court because the "Court wa[s] not presented with an original writ of mandamus." 542 U.S. at 391. Here, by contrast, the government has sought a writ of mandamus from this Court.

A. The Government Has A Clear And Indisputable Right To Relief From The District Court's Refusal To Dismiss This Fundamentally Misguided Suit

The government's right to the dismissal of this case is "clear and indisputable." *Cheney*, 542 U.S. at 381 (citation omitted). Respondents' implausible and far-reaching claims are procedurally and substantially defective in at least three independent ways.

1. The district court clearly and indisputably erred by exercising jurisdiction over the suit

Most fundamentally, the district court lacks jurisdiction over respondents' claims. "[N]o 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) (citation omitted; brackets in original). Accordingly, the "[t]raditional use of the writ" of mandamus "has been to confine" a court "to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (citation omitted). Respondents' suit fails to qualify as a case or controversy within the meaning of Article III for at least two reasons.

a. Respondents lack Article III standing. To demonstrate standing, respondents 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, 560-561 (1992) (citations and internal quotation marks omitted; brackets in original). The purpose of these standing requirements 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 (2013). "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.'" *Ibid.* (citation omitted). All three standing requirements must be satisfied to invoke a court's jurisdiction. See *Defenders of Wildlife*, 504 U.S. at 560. Respondents here cannot show *any* of the three standing requirements.

i. As to injury, respondents fail to satisfy the standing requirement because they assert "generalized grievance[s]," not the invasion of a "legally protected" interest that is "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560, 575 (citation omitted); see, *e.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 125, 127 n.3 (2014). This Court has made clear that "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).

Respondents' asserted injuries are quintessential generalized grievances, rather than challenges to the invasion of a distinct, legally protected interest. The asserted injuries arise from a diffuse, global phenomenon that affects every other person in their communities, in the United States, and throughout the world. Indeed,

the "very concept of global warming seems inconsistent with" the "particularization requirement," because "[g]lobal warming is a phenomenon 'harmful to humanity at large.'" *Massachusetts* v. *EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (citation omitted).

ii. Even if respondents adequately alleged judicially cognizable injuries, they cannot establish that those injuries were *caused* by the broad, undifferentiated aggregation of the largely unspecified government actions they challenge, much less particular actions that must be the focus of judicial review. See *Defenders of Wildlife*, 504 U.S. at 560. Respondents principally complain of the government's regulation (or lack thereof) of private parties not before the district court. Among their widely scattered objections, for example, respondents claim that the United States subsidizes the fossil-fuel industry. Am. Compl. ¶¶ 171-178. But 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), it is "substantially more difficult to meet the minimum requirement" of Article 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, 504-505 (1975); accord *Defenders of Wildlife*, 504 U.S. at 562.

Showing causation is especially difficult given the complex interaction of greenhouse gases in the global atmosphere. As this Court has explained, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 422 (2011). But even respondents' extremely broad challenge does not suggest that petitioners can control "emissions in China."

Ibid. And the types of regulatory decisions that respondents and the district court do reference, such as permits for livestock grazing and setting "energy and efficiency standards," are remarkably attenuated from the specific injuries alleged, such as "the magnitude of rainfall and the extent of flooding" near one respondent's home or "the pattern of drought that led" another respondent to relocate. App., *infra*, 48a, 50a. In short, there is no "causal nexus" between the amorphously described decisions respondents challenge and the specific harms they allege. *Washington Envtl. Council* v. *Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013) (finding no causation in similar case). To the contrary, there is "a natural disjunction between [respondents'] localized injuries and the greenhouse effect." *Ibid.*

iii. Finally, even if respondents could somehow establish injury-in-fact and causation, they could not establish that their asserted injuries likely could be *redressed* by an order of a federal court. See *Defenders of Wildlife*, 504 U.S. at 560. Respondents have not even begun to articulate a remedy within a federal court's authority to award that could move the needle on the complex phenomenon of global climate change, much less likely redress their alleged injuries. See, *e.g.*, *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976) (holding that plaintiffs challenging tax subsidies for hospitals serving indigent patients lacked standing where they could only speculate whether a change in policy would "result in [the plaintiffs] receiving the hospital services they desire").

The district court assumed that it had the authority to order petitioners "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emission[s] and draw down excess atmospheric CO_2."

App., *infra*, 172a (quoting Am. Compl. 94); see *id.* at 184a. In its most recent order, the court contemplates some of the "actions" that petitioners could take to redress respondents' asserted injuries, including drastic measures like phasing out all greenhouse gas emissions "within several decades" or converting the Nation's entire electricity generation infrastructure to "100 percent clean, renewable wind, water, and sunlight" sources. *Id.* at 54a (brackets and citation omitted). But neither respondents nor the court has cited any legal authority that would permit such an unprecedented usurpation of legislative and executive authority by an Article III court, essentially placing a single district court in Oregon—acting at the behest of a few plaintiffs having one particular perspective on the complex issues involved—in charge of directing American energy and environmental policy. Nor have respondents or the district court grappled with the fact that the carbon emissions arguably within the control of petitioners "may become an increasingly marginal portion of global emissions" as developing countries increase their own emissions, thereby making it all the more speculative and uncertain that even respondents' unprecedented remedy would actually redress their asserted injuries. *Massachusetts*, 549 U.S. at 545 (Roberts, C.J., dissenting).

b. Quite aside from these fatal flaws with respect to standing, this suit simply is not one that a federal court may entertain consistent with the Constitution. The "judicial Power of the United States," U.S. Const. Art. III, § 1, is "'one to render dispositive judgments'" in "cases and controversies" as defined by Article III. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995) (citation 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 Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (citation omitted). "If a dispute is not a proper case or controversy, the courts have no business deciding it." *Cuno*, 547 U.S. at 341.

Respondents' suit is not a case or controversy cognizable under Article III. Respondents ask the district court to review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to climate change and then to undertake to pass upon the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate. See, *e.g.*, Am. Compl. ¶¶ 277-310. No federal court, nor the courts at Westminster, has ever purported to use the "judicial Power" to perform such a sweeping policy review—and for good reason: the Constitution commits to Congress the power to enact comprehensive government-wide measures of the sort respondents seek. And it commits to the President the power to oversee the Executive Branch in its administration of existing law and to draw on its expertise and formulate policy proposals for changing existing law. Such functions are not the province of Article III courts. The district court's contrary assertion constitutes a "judicial 'usurpation of power.'" *Cheney*, 542 U.S. at 380 (citation omitted).

Respondents 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." *Guaranty Trust Co.* v. *York*, 326 U.S. 99,

105 (1945). The relief requested by respondents is plainly not of the sort "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Missouri* v. *Jenkins*, 515 U.S. 70, 132 (1995) (Thomas, J., concurring). One of those things is "running Executive Branch agencies." *Id.* at 133. The same is surely true of running *all* of them. At bottom, this dispute over American energy and environmental policy "is not a proper case or controversy" or a proper suit in equity, so "the courts have no business deciding it." *Cuno*, 547 U.S. at 341.

2. The district court clearly and indisputably erred by allowing the claims to proceed outside the binding framework of the APA

Respondents' suit is misconceived for another reason. Under the APA, a suit challenging an agency's regulatory measures must be targeted at specifically identified agency actions or alleged failures to act, and review must be based on the administrative record for those actions and in accordance with special statutory provisions for judicial review.[3] 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. The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an

[3] Respondents ignore, for example, that challenges to many regulatory measures, such as those adopted under the Clean Air Act, must be brought in a court of appeals, not in a district court. See 42 U.S.C. 7607(b)(1).

abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. 706(2)(A)-(B), and to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1).

The APA thus provides a "comprehensive remedial scheme" for a "person '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. *United States Forest Serv.*, 578 F.3d 1116, 1122-1123 (9th Cir. 2009) (citation omitted), cert. denied, 559 U.S. 1106 (2010); see *Wilkie* v. *Robbins*, 551 U.S. 537, 551-554 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions"); *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").

Respondents allege that a vast number of (mostly unspecified) "agency action[s]" and inactions spanning the last several decades are, in the words of the APA, "contrary to constitutional right." 5 U.S.C. 702, 706(2)(B). As currently formulated, however, respondents' claims cannot proceed under the APA, because the APA only allows challenges to "circumscribed, discrete" final agency action, not the "broad programmatic attack" on agency policies that respondents assert here. *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62, 64 (2004) (*SUWA*); see *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Respondents expressly cast their claims as a challenge to the "affirmative aggregate actions" of the defendant agencies, Am. Compl. ¶ 5—the

antithesis of a challenge to specifically identified and "*discrete* agency action" as permitted by Congress under the APA, *SUWA*, 542 U.S. at 64.

Respondents do not argue that their claims are proper under the APA. Rather, they argue that their claims need not comply with the APA because the Constitution itself provides a right of action. Am. Compl. ¶ 13. But this Court has never suggested that the Constitution itself provides an across-the-board right of action for all constitutional claims. To the contrary, the Court recently concluded that the Supremacy Clause does *not* "confer a right of action," a decision that conflicts with the inherent cause of action for constitutional claims envisioned by respondents. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

The district court likewise failed to grapple with *Armstrong*. See App., *infra*, 23a-31a. *Armstrong* recognized that federal courts have equitable authority in some circumstances "to enjoin unlawful executive action." 135 S. Ct. at 1385. But *Armstrong* emphasized that equitable power is "subject to express and implied statutory limitations." *Ibid.* 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). Here, even if the equitable authority of an Article III court could otherwise ever extend to a suit remotely resembling the one respondents seek to bring here, the APA provides "express * * * statutory limitations" that "'foreclose,'" *Armstrong*, 135 S. Ct. at 1385 (citation omitted), respondents' asserted constitutional claims against the broad

and largely unspecified "aggregate actions" of the federal government as a whole, Am. Compl. ¶ 129.

3. The district court clearly and indisputably erred by allowing the claims to proceed on the merits

Finally, even if the district court could reach the merits of respondents' constitutional theories, it should not have allowed their claims to move forward, let alone to a ten-week trial. In declining to dismiss the case, the court concluded that respondents had stated two constitutional claims based on substantive due process: (1) a judicially enforceable fundamental right to "a climate system capable of sustaining human life," and (2) a federal public-trust doctrine to the same effect. App., *infra*, 59a; see *id.* at 69a. Both claims are baseless.

a. As this Court has recognized, respondents' substantive due process claims are "striking" in breadth. *Juliana*, 2018 WL 3615551, at *1. And this Court has repeatedly instructed courts considering novel due process claims to "'exercise the utmost care whenever * * * 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 omitted). More specifically, 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 720-721 (citation omitted). The district court's recognition here of an "unenumerated fundamental right" to "a climate system capable of sustaining human life," App., *infra*, 140a-141a, squarely contradicts that directive, because such a right is entirely without basis in this Nation's history or tradition.

The district court's recognition of a constitutional right to particular climate conditions, moreover, would wrest fundamental policy issues of energy development and environmental regulation affecting everyone in the country from "the arena of public debate and legislative action," and thrust them into the supervision of the federal courts. *Glucksberg*, 521 U.S. at 720. Indeed, the district court's decision here would vest a single district court—acting at the behest of 21 minors, a person purporting to act on behalf of future generations, and a single environmental organization advocating one particular perspective—with authority to oversee some of the most complex and high-stakes policy problems in government. To understate considerably, Congress or an "expert agency is surely better equipped to do the job than individual district judges." *American Elec. Power*, 564 U.S. at 428.

Remarkably, the district court rooted its recognition of a fundamental due process right to "a climate system capable of sustaining human life," App., *infra*, 141a, in this Court's recognition of a fundamental right to same-sex marriage in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). There is no relationship, however, between a distinctly 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 indiscriminately to every individual in the United States. The right recognized by the district court has no relationship to any right as "fundamental as a matter of history and tradition" as the right to marry recognized in *Obergefell*. *Id.* at 2602. Nor was *Obergefell*'s recognition of that narrow right an invitation to abandon the cautious approach to recognizing new funda-

mental rights that is demanded by the Court's prior decisions. The district court's reliance on *Roe* v. *Wade*, 410 U.S. 113 (1973), and a decision from the Supreme Court of the Philippines provides no further support. See App., *infra*, 141a. To the contrary, the court's invocation of such far-afield precedents underscores that the right it purported to recognize has no legal basis.

b. Respondents' novel 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, such a 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. *Superior Court*, 658 P.2d 709, 718 (Cal.) (citation and internal quotation marks omitted), cert. denied, 464 U.S. 977 (1983).

Respondents attempt to invoke a federal public-trust doctrine to impose judicially enforceable, extra-statutory obligations on the government's regulation of the fossil-fuel industry and the alleged effects on the atmosphere. They fail, however, to identify a single decision applying public-trust notions in this sweeping and novel manner. And even if such a doctrine could ever dictate a sovereign's regulation of private parties, respondents' claim would be unavailing because a public-trust doctrine is purely a matter of *state* law and pertains only to a *State's* functions. See *PPL Montana*, 565 U.S. at 603 ("[T]he public trust doctrine remains a matter of state law."). Indeed, the D.C. Circuit concluded that a similar

public-trust claim against federal officials could not provide a basis for federal jurisdiction. See *Alec L. ex rel. Loorz* v. *McCarthy*, 561 Fed. Appx. 7, 8 (per curiam), cert. denied, 135 S. Ct. 774 (2014). As the D.C. Circuit explained, this Court has "categorically rejected any federal constitutional foundation for th[e public trust] doctrine, without qualification or reservation." *Ibid.*

B. The Government Has No Other Adequate Means To Attain Relief From A Fundamentally Misguided And Improper Trial

Mandamus is warranted to correct the district court's egregious errors because the government has "no other adequate means" to obtain relief from the district court's refusal to dismiss this litigation or to prevent the impending trial. *Cheney*, 542 U.S. at 380 (citation omitted). The denial of a motion to dismiss is not among the "final decisions of the district courts" reviewable by a court of appeals under 28 U.S.C. 1291. And the district court has repeatedly rejected the government's requests to certify its decisions for interlocutory appeal. See App., *infra*, 73a-77a. Indeed, the court refused to certify its decision for interlocutory appeal even after this Court expressly recognized the "substantial grounds for difference of opinion" about the justiciability of the claims, *Juliana*, 2018 WL 3615551, at *1—a statement that directly tracks the text of the statute authorizing certification for interlocutory appeal, 28 U.S.C. 1292(b), but that the district court did not even mention in its order denying the government's dispositive motions.

To be sure, the government may be able to raise some of the arguments asserted here after a 50-day liability-phase trial, a finding that the federal government is lia-

ble for the harms of climate change, and further proceedings to impose an unprecedented invasive remedy. But an appellate reversal at that point would hardly provide an "*adequate* means" of obtaining relief from the usurpation of power by the district court and from the resulting proceedings that themselves violate the separation of powers. *Cheney*, 542 U.S. at 380 (emphasis added; citation omitted); see, *e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (granting mandamus where appeal after final judgment would not provide an "adequate" means of obtaining relief), cert. denied, 135 S. Ct. 1163 (2015); *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 20-25 (1st Cir. 1982) (Breyer, J.) (same); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932 (3d ed. 2005 & Supp. 2018) (citing similar cases).

Petitioners, moreover, are not private litigants seeking to evade the normal process of appellate review. The Executive Branch agencies and officials sued by respondents will "suffer a special institutional harm by being forced to remain" in this suit through a trial, finding of liability, and entry of a remedy. *In re Justices*, 695 F.2d at 20. As this Court explained in *Cheney*, "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 *ibid.* (recognizing the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties"). Here, requiring petitioners to participate in the fundamentally misguided trial envisioned

by the district court would constitute a "judicial 'usurpation of power'" warranting mandamus for at least two additional reasons. *Id.* at 380 (citation omitted).

First, subjecting petitioners to trial on respondents' claims would violate the APA's carefully reticulated scheme for agencies to make factual assessments and policy determinations through rulemaking with broad public participation and through agency adjudication, not civil litigation in Article III courts. The APA sets forth a "comprehensive regulation of procedures" for agency decisionmaking. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 36 (1950). "Time and again," this 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. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015). To require agencies to take official positions on factual assessments and questions of policy concerning the climate through the civil litigation process—and then, if liability is found, to participate in further judicial proceedings to impose on them an "enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2," Am. Compl. 94—would impermissibly conflict with the procedures prescribed by the APA and deprive other interested parties and the public of the opportunity mandated by Congress or agency procedures to provide input.

Second, subjecting petitioners to trial on respondents' claims would violate the Constitution's separation of powers. Even before the enactment of the APA, this 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). 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 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).

Limiting judicial review of actions taken within the scope of the agency's authority as conferred by Congress in its organic statute in this manner reflects fundamental separation-of-powers principles. By seeking to leverage the civil litigation process to direct petitioners' decisions outside the congressionally prescribed statutory framework, respondents would run roughshod over those principles. Respondents' proposed approach 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. U.S. Const. Art. I, § 1. And to the extent respondents seek a judicial decree directly requiring petitioners to develop and implement broad policies across the Executive Branch, they seek to violate the Constitution's vesting of "executive Power * * * in a President of the United States." *Id.* Art. II, § 1, Cl. 1. Granting mandamus relief is the only "adequate means" of preventing such intrusions. *Cheney*, 542 U.S. at 380 (citation omitted).

C. Mandamus Relief Is Appropriate Under The Circumstances

Finally, and for the reasons discussed above, mandamus relief is "appropriate under the circumstances."

Cheney, 542 U.S. at 381. As noted, mandamus was traditionally used "to confine [an inferior court] to a lawful exercise of its prescribed jurisdiction," and granting mandamus to dismiss this case based on the manifest absence of Article III jurisdiction and of any cognizable constitutional rights on the merits would be consistent with that use. *Id.* at 380 (citation omitted); see, *e.g.*, *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 35-36 (2d Cir. 2014) (per curiam) (issuing writ of mandamus based on district court's failure to grant motion to dismiss for lack of jurisdiction); *Abelesz* v. *OTP Bank*, 692 F.3d 638, 651-652 (7th Cir. 2012) (same); *In re Justices*, 695 F.2d at 25 (same); Wright § 3933.1 (discussing other examples).

Mandamus is particularly appropriate here because dismissing the case is the only way "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382. As noted, this Court has indicated that appellate review before trial is appropriate by reciting language from the statute authorizing certification for interlocutory appeal. See *Juliana*, 2018 WL 3615551, at *1. But the district court declined to follow this Court's lead, leaving an extraordinary writ as the only means for appellate review before much of the Executive Branch is subjected to a trial on baseless claims that the district court has no authority to remedy. The "novelty of the District Court's" ruling, "combined with its potentially broad and destabilizing effects," underscores that granting such a writ is "'appropriate under the circumstances.'" *In re Kellogg Brown & Root*, 756 F.3d at 763 (quoting *Cheney*, 542 U.S. at 381).

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus directing the district court to dismiss this suit. Alternatively, the Court should construe this petition as either (1) a petition for a writ of certiorari seeking review of the court of appeals' July 20, 2018, decision (App., *infra*, 78a-85a) or (2) a petition for a common-law writ of certiorari seeking review of the district court decisions denying the government's dispositive motions (*id.* at 1a-77a, 104a-200a), and grant certiorari on the questions presented.

Respectfully submitted.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

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

KELSEY CASCADIA ROSE JULIANA, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Oct. 15, 2018

OPINION AND ORDER

AIKEN, Judge:[1]

In this civil rights action, plaintiffs—a group of young people who were between the ages of eight and nineteen when this lawsuit was filed; Earth Guardians, a nonprofit association of young environmental activists; and Dr. James Hansen, acting as guardian for

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[1] As with the Court's previous Order and Opinion on the federal defendants' motions to dismiss, student externs worked on each stage of the preparation of this opinion. The Court would be remiss if it did not acknowledge the invaluable contributions of JoAnna Atkinson (George Washington University Law School), Trevor Byrd (Willamette University Law School), Doyle Canning (University of Oregon School of Law), Omeed Ghafarri (University of Washington School of Law), Tyler Hardman (University of Oregon School of Law), Maggie Massey (University of Oregon School of Law), and Patrick Rosand (Boston University School of Law), Elise Williard (University of Oregon School of Law).

plaintiff "future generations"—allege that the federal government is violating their rights under the Fifth Amendment to the United States Constitution.

Before the Court are two dispositive motions: federal defendants' Motion for Judgment on the Pleadings (doc. 195) and federal defendants' Motion for Summary Judgment (doc. 207). For the reasons set forth below, the Motion for Judgment on the Pleadings is granted in part and denied in part, and the Motion for Summary Judgment is granted in part and denied in part.

BACKGROUND

Plaintiffs filed this action in August 2015, naming the United States, President Barack Obama, and the heads of numerous executive agencies (collectively, "federal defendants") as defendants.[2] Plaintiffs allege that federal defendants have known for more than fifty years that carbon dioxide ("CO_2") produced by the industrial scale burning of fossil fuels was "causing global warming and dangerous climate change, and that continuing to burn fossil fuels would destabilize the climate system on which present and future generations of our nation depend for their wellbeing and survival." First Am. Compl. ¶ 1. Plaintiffs further allege that federal defendants have long "known of the unusually dangerous risks of harm to human life, lib-

[2] The First Amended Complaint names as defendants the United States, the President, and the heads of 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, the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency.

erty, and property that would be caused by continued fossil fuel burning." *Id.* ¶ 5. Plaintiffs assert that, rather than responding to this knowledge by "implement[ing] a rational course of effective action to phase out carbon pollution," federal defendants "have continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation[,]" thereby "deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history[.]" *Id.* ¶¶ 5, 7.

Plaintiffs contend that federal defendants' policy on fossil fuels deprives plaintiffs of life, liberty, and property without due process of law; impermissibly discriminates against "young citizens, who will disproportionately experience the destabilized climate system in our country[;]" and fails to live up to federal defendants' obligations to hold certain essential natural resources in trust for the benefit of all citizens. *Id.* ¶ 8. Plaintiffs seek injunctive and declaratory relief, asserting that there is "an extremely limited amount of time to preserve a habitable climate system for our country" before "the warming of our nation will become locked in or rendered increasingly severe." *Id.* ¶ 10.

In November 2015, federal defendants moved to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b)(l) and 12(b)(6). (doc. 27) Federal defendants argued that plaintiffs lacked standing to sue; that plaintiffs' public trust claims failed as a matter of law because the public trust doctrine does not apply to the federal government; that plaintiffs' equal protection claims could not proceed because plaintiffs are not members of a protected class and the government's energy and climate policies have a rational basis;

and that plaintiffs' due process claims were deficient because they had not alleged violation of a fundamental right.

Also in November 2015, three national trade organizations—the National Association of Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers (collectively, "intervenor-defendants")—moved to intervene under Federal Rule of Civil Procedure 24(a) and dismiss the complaint. (doc. 14 & 19) Like federal defendants, intervenor-defendants argued that plaintiffs lacked standing to sue. Intervenor defendants also argued that plaintiffs had failed to identify a cognizable cause of action and that dismissal was required because the case presented non-justiciable political questions.

In January 2016, Magistrate Judge Coffin granted intervenor-defendants' motion to intervene. *Juliana v. United States*, 2016 WL 138903, at *5 (D. Or. Jan. 14, 2016). In April 2016, following oral argument, Judge Coffin issued his Findings and Recommendation ("F&R"), recommending that the Court deny both motions to dismiss. (doc. 68) Federal defendants and intervenor-defendants filed objections to the F&R and the Court held oral argument in September 2016. (doc. 73, 74 & 81) Following that argument, in November 2016, the Court issued an opinion and order adopting Judge Coffin's F&R and denying the motions to dismiss. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1276 (D. Or. 2016).

In January 2017, federal defendants filed their Answer. (doc. 98) They agreed with many of the scientific and factual allegations in the First Amended Complaint, including that:

- "for over fifty years some officials and persons employed by the federal government have been aware of a growing scientific body of research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO_2—including that increased concentrations of atmospheric CO_2 could cause measureable long-lasting changes to the global climate, resulting in an array of severe and deleterious effects to human beings, which will worsen over time;"
- "global atmospheric concentrations of CO_2, methane, and nitrous oxide are at unprecedentedly high levels compared to the past 800,000 years of historical data and pose risks to human health and welfare;"
- "Federal Defendants . . . permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation;"
- "fossil fuel extraction, development, and consumption produce CO_2 emissions and . . . past emissions of CO_2 from such activities have increased the atmospheric concentration of CO_2;"
- "EPA has concluded . . . that, combined, emissions of six well-mixed [greenhouse gases] are the primary and best understood drivers of current and projected climate change;"
- "the consequences of climate change are already occurring and, in general, those consequences will become more severe with more fossil fuel emissions;"

- "climate change is damaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species;" and
- "human activity is likely to have been the dominant cause of observed warming since the mid-1900s."

Fed. Defs.' Answer to First Am. Compl. ¶¶ 1; 5; 7; 10; 213; 217. Those admissions and federal defendants' other filings make clear that plaintiffs and federal defendants agree on the following contentions: climate change is happening, is caused in significant part by humans, specifically human induced fossil fuel combustion, and poses a "monumental" danger to Americans' health and welfare. *See Juliana*, 217 F. Supp. 3d at 1234 n.3 (quoting federal defendants' objections to Judge Coffin's F&R recommending denial of the motions to dismiss). The pleadings also make clear that plaintiffs and federal defendants agree that federal defendants' policies regarding fossil fuels and greenhouse gas emissions play a role in global climate change, though federal defendants dispute that their actions can fairly be deemed to have caused plaintiffs' alleged injuries.[3]

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[3] Intervenor-defendants' Answer, by contrast, contained no admissions with respect to plaintiffs' factual and scientific assertions about climate change. (doc. 93) Intervenor-defendants asserted that they lacked sufficient information to admit or deny those allegations. At a series of status conferences in 2017, Judge Coffin

In January 2017, Barack Obama left office and Donald J. Trump assumed the presidency. In March 2017, both federal defendants and intervenor-defendants moved to certify the opinion and order denying their motion to dismiss for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). (doc. 120 & 122) That same day, federal defendants sought a stay of proceedings pending this Court's resolution of the motion to certify for interlocutory appeal and the Ninth Circuit's resolution of that proposed appeal. (doc. 121) In April 2017, Judge Coffin denied the request for a stay. (doc. 137) In May 2017, Judge Coffin issued his F&R recommending that the Court deny the motions to certify. (doc. 146) Federal defendants and intervenor-defendants filed objections, and in June 2017, the Court adopted Judge Coffin's F&R and declined to certify the opinion and order for interlocutory appeal. *Juliana v. United States,* 2017 WL 2483705, at *2 (D. Or. June 8, 2017).

In May and June 2017, intervenor-defendants moved to withdraw from this lawsuit. (docs. 163, 166 & 167) Judge Coffin granted that motion. (doc. 182)

In June 2017, federal defendants filed a petition for writ of mandamus in the Ninth Circuit, seeking an order directing this Court to dismiss the case. (doc. 177) Federal defendants asked the Ninth Circuit to stay all proceedings in this Court pending resolution of that petition. *Id.* In July 2017, the Ninth Circuit granted

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pressed intervenor-defendants to clarify their position regarding whether the issues to be litigated at trial would include whether climate change is happening or whether humans play a role in causing climate change. Intervenor-defendants withdrew from the lawsuit before taking a position on those questions.

the request for a stay and ordered plaintiffs to file a response to the petition for writ of mandamus. Ninth Circuit Case No. 17-71692.

On March 7, 2018, the Ninth Circuit denied the petition for writ of mandamus. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). The denial rested on the court's determination that federal defendants had not satisfied any of the factors justifying the extraordinary remedy of mandamus. *Id.* at 834-38.

On May 7, 2018, federal defendants filed a motion for judgment on the pleadings. (doc. 195) In that motion, they seek to dismiss President Trump as a party and to obtain dismissal of the entire lawsuit on the grounds that plaintiffs failed to state a claim under the Administrative Procedure Act ("APA"). Additionally, federal defendants argue that plaintiffs' requested relief is barred by the separation of powers. Federal defendants also moved for a protective order, seeking a stay of all discovery on the theory that discovery in this case is barred by the APA. (doc. 196) Specifically, federal defendants sought a stay of discovery pending the resolution of the motion for a protective order, the motion for judgment on the pleadings, and a not-yet-filed motion for summary judgment. On May 22, 2018, federal defendants filed a motion for summary judgment. (doc. 207) In that motion, they seek a judgment as a matter of law in their favor, arguing that (1) there are no genuine issues of material fact; (2) plaintiffs lack Article III standing to sue; (3) plaintiffs have failed to assert a valid cause of action under the APA; (4) plaintiffs' claims violate separation of powers principles; (5) plaintiffs have no due process right to a climate system capable of sustaining human

life; and (6) the federal government has no obligations under the public trust doctrine.

Meanwhile, the Solicitor General was considering seeking Supreme Court review of the Ninth Circuit's opinion denying mandamus relief. The presumptive deadline to file a petition for writ of certiorari to review that opinion was June 5, 2018. On May 24, 2018, the Solicitor General sought to extend the time for filing a petition for writ of certiorari to July 5, 2018. That request was docketed in *United States v. U.S. District Court for the District of Oregon*, Supreme Court No. 17A1304. Justice Kennedy granted the extension.

On May 25, 2018, Judge Coffin denied federal defendants' motion for a protective order and a stay. (doc. 212) On June 1, 2018, federal defendants filed objections to Judge Coffin's denial of the protective order and requested a stay of discovery pending resolution of those objections. (doc. 215 & 216) On June 14, 2018, the Court denied that request for a stay by minute order. (doc. 238)

On June 25, 2018, federal defendants sought a second extension of the deadline for filing a petition for writ of certiorari. Justice Kennedy granted that request and extended the deadline to August 4, 2018.

On June 29, 2018, the Court affirmed Judge Coffin's denial of federal defendants' request to stay all discovery. (doc. 300) On July 5, 2018, federal defendants sought review of that decision through a second petition for writ of mandamus in the Ninth Circuit. In separate filings, federal defendants asked this Court and the Ninth Circuit to stay all discovery and trial pending the Ninth Circuit's resolution of that petition.

On July 16, 2018, the Ninth Circuit denied the request for a stay. On July 17, 2018, the Court denied the request for a stay. (doc. 324) That same day, the Solicitor General petitioned Justice Kennedy for a stay of proceedings pending the Ninth Circuit's resolution of the mandamus petition. That request was docketed at *United States v. U.S. District Court for the District of Oregon*, Supreme Court No. 18A65. In his application for a stay, the Solicitor General suggested to Justice Kennedy that he could construe the stay application as a petition for writ of mandamus directing this Court to dismiss the lawsuit or as a petition for a writ of certiorari to review the Ninth Circuit's first mandamus decision.

On July 18, 2018, the parties appeared for oral argument before this Court on the Motion for Judgment on the Pleadings and Motion for Summary Judgment.

On July 20, 2018, the Ninth Circuit denied federal defendants' second mandamus petition, holding that federal defendants had not met the standard to qualify for mandamus relief. *In re United States*, ___ F.3d ___, 2018 WL 3484444, at *1 (9th Cir. July 20, 2018). The court concluded that because "no new circumstances justify this second petition," it "remains the case that the issues the government raises in its petition are better addressed through the ordinary course of litigation." *Id.*

That same day, the Solicitor General wrote to Justice Kennedy to reiterate his request that he construe the application for a stay in Supreme Court Case No. 18A65 as a petition for a writ of certiorari to review the Ninth Circuit's first mandamus decision. Alternatively, he suggested that Justice Kennedy could construe the application as a petition for a writ of certiorari to re-

view the Ninth Circuit's second mandamus decision. On July 30, 2018, Justice Kennedy referred the application for a stay to the entire Supreme Court. In a summary order, the Supreme Court denied as the Solicitor General's application as premature.

This leaves two substantive motions before the Court, which the Court now addresses in Sections I and II below: federal defendants' motion for judgment on the pleadings, and federal defendants' motion for summary judgment. Defendants have also requested that the Court certify any portion of this opinion and order denying their substantive motions for interlocutory appeal, this is addressed in Section III. Plaintiffs' Motion *in Limine,* (doc. 254) seeking judicial notice of certain documents, is addressed in Section IV.

STANDARDS

A party may move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. Fed. R. Civ. P. 12(c). "Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Pit River Tribe v. Bureau of Land Mgmt.,* 793 F.3d 1147, 1155 (9th Cir. 2015) (citation and quotation marks omitted). Accordingly, "[a] judgment on the pleadings is properly granted when, taking all allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Owens v. Kaiser Found. Health Plan, Inc.,* 244 F.3d 708, 713 (9th Cir. 2001) (quotation marks omitted). To survive a motion for judgment on the pleadings, "the non-conclusory 'factual content' [of the complaint]," 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) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2007)). "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." *Iqbal,* 556 U.S. at 678. "[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).

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Id.; Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. Summary judgment is inappropriate if a rational trier of fact, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor. *Diaz v. Eagle Produce Ltd. P'ship,* 521 F.3d 1201, 1207 (9th Cir. 2008). Any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. *Celotex,* 477 U.S. at 339. Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

DISCUSSION

There are two motions before the Court in this now three year old case: federal defendants' Motion for Judgment on the Pleadings (doc. 195) and Motion for Summary Judgment (doc. 207). Many of the issues raised in these motions are interrelated. Given the nature of the arguments presented, it is more efficient and likely to avoid confusion to deal with all of the pending issues in a single opinion and order. Thus, the Court addresses each motion in turn.

I. *Motion for Judgment on the Pleadings*[4]

Federal defendants' motion for judgment on the pleadings rests on four grounds, two of which they raise for the first time in their 12(c) motion and two of which the Court has already considered and ruled

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[4] Even though federal defendants could have raised each argument in its 12(c) motion in its initial motion to dismiss, that failure is not a bar to asserting the arguments now. *See* Fed. R. Civ. P. 12(g) (prohibiting subsequent Rule 12 motions "based on [a] defense or objection . . . omitted" in a prior Rule 12 motion "except . . . as provided in subdivision (h)(2)"); Fed. R. Civ. P. 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7 (a), or by motion for judgment on the pleadings, or at the trial on the merits."). There are reasons to question the wisdom of permitting failure-to-state-a-claim defenses to be raised on different legal theories in back-to-back 12(b)(6) and 12(c) motions. *See Sprint Telephony PCS, L.P. v. Cty. of San Diego,* 311 F. Supp. 2d 898, 905 (S.D. Cal. 2004) ("It is a waste of judicial resources to consider motion after motion in which defendants raise the same defense over and over, each time testing a new argument. Allowing such a tactic means that defendants potentially could stall litigation indefinitely as long as they can conjure up a new argument on which to base a failure to state a claim defense."). But as presently written, the rules plainly permit such successive motions.

upon. First, federal defendants move to dismiss President Trump as a defendant, arguing that he is not essential to effective relief and his presence in the lawsuit violates the separation of powers. Second, federal defendants seek dismissal of the lawsuit in its entirety, on the theory that the APA governs all challenges to federal agency action and plaintiffs have failed to state a claim under the APA. Third, federal defendants invite the Court to reconsider all aspects of its opinion and order denying their November 2016 motion to dismiss and urge dismissal of the lawsuit on the grounds raised in that motion. Finally, echoing arguments raised two years ago by intervenor-defendants, federal defendants contend that dismissal of this action is required because the Court cannot redress plaintiffs' injuries without violating the separation of powers.

A. *Motion to Dismiss President Trump as a Defendant*

Federal defendants first move to dismiss President Trump as a defendant. The Ninth Circuit declined to address federal defendants' argument on that point in its denial of the 2017 mandamus petition because defendants had not first raised the issue in this Court. *See In re United States,* 884 F.3d at 836 ("First, to the extent the defendants argue that the President himself has been named as a party 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.").

At oral argument, the parties reported that plaintiffs were willing to stipulate to the dismissal of the President without prejudice. Federal defendants rejected

that offer and request dismissal with prejudice. In the absence of a stipulation, the Court must address both whether dismissal is warranted and, if it is, whether that dismissal should be with or without prejudice.

Federal defendants assert that it would violate separation of powers principles for this Court to issue an injunction or declaration against President Trump in connection with his official duties. The extent to which a federal court may issue equitable relief against a sitting President is unsettled and hotly contested. As Justice O'Connor, writing for a plurality of the Court, explained twenty-five years ago:

> While injunctive relief against executive officials like the Secretary of Commerce is within the courts' power, *see Youngstown Sheet & Tube Co. v. Sawyer,* [343 U.S. 579 (1952),] the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *Mississippi v. Johnson,* 4 Wall. 475, 498-499 (1867), and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, *United States v. Nixon,* 418 U.S. 683 (1974), but in general "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson,* [4 Wall. at 501]. At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable.

Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992) (plurality op.) (parallel citations omitted). Justice O'Connor ultimately concluded that it was unnecessary to "decide whether injunctive relief against the President was appropriate" because "the injury alleged [wa]s likely to be redressed by declaratory relief against the Secretary [of Commerce] alone." *Id.* at 803.

Since *Franklin*, subsequent cases have made clear that there is no absolute bar on issuance of declaratory and injunctive relief against a sitting president, even with regard to the exercise of his official duties. For example, in *Clinton v. City of New York*, 524 U.S. 417, 449 (1998), the Supreme Court affirmed a declaratory judgment holding that certain actions taken by President Clinton under the Line Item Veto Act violated the Constitution's allocation of lawmaking authority between Congress and the President.

In its recent decision on President Trump's second "travel ban" executive order, the Ninth Circuit cited *Franklin* for the proposition that when adequate equitable relief is likely available from some inferior governmental official (or group of officials) the President ought to be dismissed out of respect for separation of powers:

> Finally, the 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. Generally, we lack "jurisdiction of a bill 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. (4 Wall.) 475, 501 (1866)); *see id.* at 802 ("[I]njunctive relief against

> the President himself is extraordinary, and should . . . raise [] judicial eyebrows."). Injunctive relief, however, may run against executive officials, including the Secretary of Homeland Security and the Secretary of State. *See, e.g., Youngstown Sheet & Tube Co.,* 343 U.S. at 588-89 (holding that President Truman did not act within his constitutional power in seizing steel mills and affirming the district court's decision enjoining the Secretary of Commerce from carrying out the order); *Franklin,* 505 U.S. at 802-03.
>
> We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and that the extraordinary remedy of enjoining the President is not appropriate here. *See Franklin,* 505 U.S. at 803. We therefore vacate the district court's injunction to the extent the order runs against the President, but affirm to the extent that it runs against the remaining "Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them."

Hawaii v. Trump, 859 F.3d 741, 788 (9th Cir. 2017), *vacated and remanded on mootness grounds,* 138 S. Ct. 377 (2017). *Hawaii* makes *Franklin*'s plurality opinion on this point binding Ninth Circuit precedent. The inquiry is not into the President's action or inaction in relationship to the injuries complained of, but rather into the relief requested, and whether or not equitable remedies involving the President himself are essential to that relief. As adopted in *Hawaii, Franklin*'s rule on when the President is an appropriate defendant is best understood as a strain of the canon of constitu-

tional avoidance: because granting equitable relief against the President of the United States raises serious constitutional questions, dismissal of the President as a defendant is appropriate whenever it appears likely that the plaintiffs' injuries can be redressed through relief against another defendant.

Plaintiffs' opposition to dismissing President Trump boils down to a general assertion that complete relief may be unavailable without the President as a defendant. They argue that further development of the factual record is necessary to determine whether injunctive or declaratory relief is available against President Trump and whether plaintiffs' injuries are redressable in the absence of such relief. The Court is not persuaded. This lawsuit is, at its heart, a challenge to the environmental and energy policies of the federal government as expressed through the action (or inaction) of federal agencies. Because the Supreme Court and Ninth Circuit have spoken so clearly about the separation of powers concerns inherent in awarding equitable relief against a sitting president, the burden is on plaintiffs to explain with specificity why relief against President Trump is essential to redressing their injuries. They have failed to carry that burden.

In an attempt to demonstrate why President Trump is necessary to effective equitable relief, plaintiffs cite a number of specific presidential actions in their Amended Complaint and briefs. For example, plaintiffs cite:

- An Executive Order in which President Trump directed a rollback of the Clean Power Plan by rescinding the moratorium on coal mining on federal lands and six other Obama-era executive

orders aimed at curbing climate change and regulating emissions;

- An Executive Order in which President Trump ordered the expedition of environmental reviews and approvals for infrastructure projects;
- An Executive Order in which President Trump ordered a review of the "Waters of the United States" Rule; and
- Presidential memoranda encouraging approval of the Dakota Access Pipeline and the Keystone XL Pipeline.

The problem with those examples is that it is not enough, under *Hawaii,* to show that the President was involved in the challenged action; plaintiffs must show that effective relief is *unavailable* unless it is awarded against the President. Like the "travel ban" challenged in *Hawaii,* each of the foregoing orders and memoranda included express directives to be carried out by other governmental officials. *See, e.g.* Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (issuing orders to "[t]he heads of agencies" including to the "Administrator of the Environmental Protection Agency" and the "Secretary of the Interior"); Exec. Order No. 13766, 82 Fed. Reg. 8657 (directing the Chairman of the White House Council on Environmental Quality the Director of the Office of Management and Budget to take certain actions); Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (addressing "the Administrator, the Assistant Secretary, and the heads of all executive departments and agencies" including the Administrator of the Environmental Protection Agency); President Trump Takes Action to

Expedite Priority Energy and Infrastructure Projects (Jan. 24, 2017), https://www.whitehouse.gov/briefings-statements/president-trump-takes-action-expedite-priority-energy-infrastructure-projects/ (summarizing memoranda addressed to "relevant Federal agencies"). Thus, with respect to the propriety of the President as a defendant, this case is indistinguishable from *Hawaii* and *Franklin*: because lower governmental officials are charged with executing the challenged presidential policies, equitable relief against President Trump is not essential to redressability.

Plaintiffs note that *Hawaii* concerned injunctive relief only, and certainly injunctive relief implicates more serious separation of powers concerns than declaratory relief. But as articulated in *Franklin, any* equitable relief awarded against a sitting president with respect to his official duties raises constitutional concerns. Accordingly, when effective relief is available against lower administration officials, the Court concludes that dismissal of the President is the correct decision for either type of equitable relief. *See Franklin,* 505 U.S. at 827-828 (Stevens, J., concurring) (arguing that declaratory relief against the president, like injunctive relief, "would produce needless head-on confrontations between district judges and the Chief Executive"). On the current record, the Court concludes that President Trump is not essential to effective relief because "[p]laintiffs' injuries can be redressed fully by injunctive [or declaratory] relief against the remaining [d]efendants." *Hawaii,* 859 F.3d at 788. Due respect for separation of powers therefore requires dismissal of President Trump as a defendant.

The next question is whether dismissal should be with or without prejudice. Across a host of contexts, the default rule is dismissal without prejudice. *See, e.g., Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000) (stating that dismissal under Federal Rule of Civil Procedure 12(b)(6) should be with prejudice only if the court determines that the pleading "could not possibly be cured by the allegation of other facts"); *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.,* 898 F.2d 1428, 1429 (9th Cir. 1990) (explaining that, even when a party's misconduct justifies the sanction of dismissal, dismissal with prejudice is "extreme" and rarely deployed); Fed. R. Civ. P. 41(a)(2) (providing that dismissal at the plaintiffs request shall be without prejudice unless the dismissal order states otherwise); *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liability Litig.,* 111 F. Supp. 3d 103, 106 (D. Mass. 2015) (explaining that dismissal with prejudice under Rule 41(a)(2) generally is justified only in situations where it is clear that there is "no way for any plaintiff to bring the same claim" in the future, for example when the applicable statute of limitations has "conclusively run"); *Lepesh v. Barr,* 2001 WL 34041885, *3 (D. Or. 2001) (citing Ninth Circuit precedent governing when amendment of a pleading would be futile for the proposition that dismissal should be with prejudice only if it "appear[s] to a certainty that Plaintiff would not be entitled to relief under any set of facts that could be proven").

Federal defendants argue that President Trump should be dismissed with prejudice because Supreme Court and Ninth Circuit precedent is clear that federal courts lack jurisdiction to issue equitable relief in connection with a sitting president's performance of his

official duties. As explained above, however, neither the Supreme Court nor the Ninth Circuit has gone so far. Indeed, it is clear that under some limited circumstances and when required by the constitution, such equitable relief is available. *Clinton,* for example, involved a challenge to President Clinton's use of the line-item veto. *Clinton,* 524 U.S. at 449. The veto power is, of course, exercised directly by the President and not by subordinate agencies, so no other federal official would have been an appropriate defendant in that case. More recently, in a case involving alleged violations of the Foreign and Domestic Emoluments Clauses of the Constitution, the U.S. District Court for the District of Maryland addressed the availability of equitable relief against President Trump:

> The Court also disagrees that the President's status as the sole defendant changes this analysis, given that no official other than he could be sued to enforce the purported violations at issue. "[I]t would be exalting form over substance if the President's acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he and/or the Congress has delegated the performance of duties to federal officials subordinate to the President and one or more of them can be named as a defendant." *Nat'l Treasury Emps. Union v. Nixon,* 492 F.2d 587, 613 (D.C. Cir. 1974).

District of Columbia v. Trump, 291 F. Supp. 3d 725, 751-52 (D. Md. 2018). The Emoluments Clauses, like the veto power, are specific to the President. A lawsuit asserting violation of those clauses therefore could

not be directed to federal agency heads or other federal officials.

As explained above, on the current record, it appears that this is a case in which effective relief is available through a lawsuit addressed only to lower federal officials. It is not possible to know how developments to the record in the course of the litigation may change the analysis. The Court cannot conclude with certainty that President Trump will never become essential to affording complete relief. For that reason, the Court concludes that dismissal without prejudice is the appropriate course. Any harm the President will suffer from the continuing *hypothetical possibility* that he might be joined as a defendant in the future is minimal. Moreover, that minimal harm is further mitigated by the fact that federal defendants would be free to oppose any future motion for leave to amend the complaint and add the President as a defendant on the grounds that permitting such amendment would cause "undue prejudice to the opposing party." *Foman v. Davis,* 371 U.S. 178, 182 (1962).

Federal defendants' motion to dismiss President Trump from this lawsuit is granted. The dismissal is without prejudice.

B. *Motion to Dismiss for Failure to State a Claim under the APA*

Federal defendants next argue that this entire case must be dismissed because plaintiffs are challenging the actions (and inactions) of federal agencies, and thus

must bring their suit, if at all, under the APA.[5] The APA provides a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. "Agency action made reviewable by statute and final agency action for which there is no

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[5] As a threshold matter, plaintiffs contend that this Court already has rejected federal defendants' APA argument, and that the Ninth Circuit affirmed that rejection under the "no clear error' standard. Neither contention is correct. First, this Court has not addressed federal defendants' APA argument. Federal defendants argued in their motion to dismiss that plaintiffs had failed to identify a viable cause of action, but they did not argue that the APA was the exclusive vehicle for claims that a federal agency has violated a plaintiff's constitutional rights. Second, the Ninth Circuit did not "affirm" any of this Court's determinations under the "clear error" standard. It is true that in both mandamus opinions, the Ninth Circuit held that the government had not shown that this Court's order was "clearly erroneous as a matter of law," as required to satisfy the third factor of the five-factor test for mandamus relief. *In re United States,* 884 F.3d at 837-38; *see also In re United States,* 2018 WL 3484444, at *2 ("As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors."). But in finding that the third factor had not been satisfied, the Ninth Circuit declined to take a position on whether this Court's rulings were clearly erroneous. *See In re United States,* 884 F.3d at 837 ("[W]e 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."). Because this is the first time either this Court or the Ninth Circuit has addressed federal defendants' APA argument, the Court will address the argument on its merits. *See Sprint Telephony,* 311 F. Supp. 2d at 905 (holding that application of the law of the case doctrine was inappropriate because, "although the court previously considered defendants' failure to state a claim *defense* in its earlier order, the court has not considered the *issues* defendants now raise in their motion presently before the court").

other adequate remedy in court are subject to judicial review." *Id.* § 704. A reviewing court has authority both to "compel agency action unlawfully withheld or unreasonably delayed" and to "set aside agency action" on several grounds, including that the action is "arbitrary, capricious, [or] an abuse of discretion;" is "contrary to constitutional right, power, privilege, or immunity"; or exceeds the agency's statutory authority. *Id.* § 706(1) & (2)(A)-(C). The APA's judicial review provisions apply only in limited circumstances such as when agency action is final or "otherwise reviewable by statute." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).

When a plaintiff asserts an APA claim, the court must determine whether the plaintiff has identified a final agency action subject to judicial review. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990). But here, plaintiffs have not asserted APA claims; their claims are brought directly under the United States Constitution, which has no "final agency action" requirement. As a general rule, plaintiffs are "master[s] of [their] complaint" and may choose which claims to assert and which legal theories to press. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). Federal defendants' APA argument succeeds only if they can demonstrate that the APA is the only available avenue to judicial review of the government's conduct that plaintiffs challenge in this lawsuit.

Federal defendants' argument that the APA is the exclusive means to challenge *any* agency action rests on the proposition that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts "have, in suits against federal of-

ficers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996). Federal defendants indiscriminately cite cases involving both claims for damages and claims for equitable relief in arguing that the APA is a comprehensive statutory scheme demonstrating Congressional intent to cut off common law claims. But in order to properly analyze federal defendants' argument, it is critical to avoid conflating the Supreme Court's treatment of claims for damages with its treatment of claims for equitable relief.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971), the Supreme Court broke new ground by permitting a suit for damages against federal officials for violations of the Fourth Amendment, even though no federal statute created such a cause of action. The Court subsequently extended *Bivens* to two other contexts. In *Davis v. Passman*, 442 U.S. 228, 247 (1979), the Court recognized an implied right of action to sue for damages based on an allegation that a U.S. Congressman had discriminated against an employee on the basis of sex, in violation of the Due Process Clause of the Fifth Amendment. And in *Carlson v. Green*, 446 U.S. 14, 20 (1980), the Court recognized a *Bivens* cause of action for a federal prisoner alleging violations of his rights under the Eighth Amendment.

"Since *Carlson*, however, the Supreme Court has consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1119 (9th Cir. 2009); *see also, Armstrong v. Exceptional Child Ctr., Inc.*, ___ *U.S.* ___, 135 S. Ct. 1378, 1384

(2015) (rejecting the argument that the Supremacy Clause creates an implied cause of action for every violation of federal law). As the Ninth Circuit has explained, whether to recognize a *Bivens* cause of action in a new context involves a two-step inquiry:

> First, the Court determines whether there is any alternative, existing process for protecting the plaintiffs interests. Such an alternative remedy would raise the inference that Congress expected the Judiciary to stay its *Bivens* hand and refrain from providing a new and freestanding remedy in damages. The Court has explained that, when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies. . . .
>
> . . . .
>
> Second, if the Court cannot infer that Congress intended a statutory remedial scheme to take the place of a judge-made remedy, the Court next asks whether there nevertheless are factors counseling hesitation before devising such an implied right of action. Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so would be plainly inconsistent with Congress' authority in this field.

Id. at 1120-21 (citations and internal quotation marks omitted).

Applying that two-step inquiry in *Western Radio,* the Ninth Circuit determined that the APA is the sort

of "comprehensive remedial scheme" that indicates "Congress's intent that courts should not devise additional, judicially crafted default remedies." *Id.* at 1123. Based on that determination, the court held "that the APA leaves no room for *Bivens* claims based on agency action or inaction." *Id.* Federal defendants cite *Western Radio* for its broad language on the comprehensiveness of the APA. However, Ninth Circuit and Supreme Court precedent make clear that the analysis for *Bivens* claims is specific to the availability of remedies for *damages.*

The process for determining whether Congress intended to cut off common law claims *for equitable relief*—such as those contained in plaintiffs' petition—is substantially different. With respect to equitable relief, the Supreme Court has expressly required a "heightened" showing of clear legislative intent to displace constitutional claims in part to avoid the "serious constitutional question" that would arise "if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe,* 486 U.S. 592, 603 (1988). In *Webster,* the Supreme Court expressly rejected the argument that the APA provided the only available route to judicial review of agency action and inaction. *Id.* That rejection is brought into sharp relief by Justice Scalia's assertion, in dissent, that "at least with respect to all entities that come within the [APA]'s definition of 'agency,' if review is not available under the APA it is not available at all." *Id.* at 607 n.* (Scalia, J., dissenting).

The APA contains no express language suggesting that Congress intended it to displace constitutional claims for equitable relief. Indeed, the Ninth Circuit

has held that § 702 of the APA "is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable"—whether such actions are asserted under the APA or under the general federal question jurisdiction statute. *The Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518, 525 & n.9 (9th Cir. 1989). Recognition of causes of action against federal agencies that fall outside the APA is implicit in *Presbyterian Church;* it makes little sense to hold that the APA waives sovereign immunity for both APA and non-APA claims against federal agencies if the only viable claims are subject to the APA's judicial review provisions.

In a recent case involving a challenge to "the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy," the Supreme Court underscored the difference between claims for damages and claims for equitable relief:

> It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which it is damages or nothing. Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. *To address those kinds of decisions, detainees may seek injunctive relief.*

Ziglar v. Abbasi, ___ *U.S.* ___ 137 S. Ct. 1843, 1862 (2017) (citations and internal quotation marks omitted) (emphasis added). The Court expressly noted that separation-of-powers concerns "are . . . more pronounced when the

judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable belief" because "the risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions[.]" *Id.* at 1861.

Supreme Court, Ninth Circuit, and other cases plainly show that challenge to federal agency action may, depending on the circumstances, be stated as an APA claim or a constitutional claim. *See, e.g., Franklin,* 505 U.S. at 801 ("Although the apportionment challenge is not subject to review under the standards of the APA, that does not dispose of appellees' constitutional claims."); *Webster,* 486 U.S. at 603 (holding that § 102(c) of the National Security Act rendered the CIA director's personnel decisions unreviewable under the APA, but rejecting that argument that the same statute precluded a claim that those decisions violated the Constitution); *Navajo Nation,* 876 F.3d at 1170 ("Claims not grounded in the APA, like . . . constitutional claims . . . , do not depend on the cause of action found in the first sentence of § 702 [of the APA] and thus § 704's limitation does not apply to them.") (internal quotation marks omitted and alterations normalized); *Stone v. Trump,* 280 F. Supp. 3d 747, 772 (D. Md. 2017) (dismissing the plaintiffs' APA claim but permitting equal protection and due process claims to proceed in a case challenging the ban on transgender individuals serving in the military); *L. v. U.S. Immigration & Customs Enforcement,* 302 F. Supp. 3d 1149, 1168 (S.D. Cal. 2018) (dismissing the plaintiffs' APA claim but permitting their due process claim to proceed in a case challenging the federal practice of separating migrant children from their parents at the border).

Plaintiffs' claims simply do not fall within the scope of the APA. As federal defendants correctly point out, the Supreme Court has made clear that review under the APA requires a "case-by-case approach" to determine whether "a specific final agency action has an actual or immediately threatened effect." *Lujan*, 497 U.S. at 892. By its terms, the APA contains no provisions by which plaintiffs may "seek *wholesale* improvement of [an agency] program by court decree[.]" *Id.* at 891 (emphasis in original). But that case law does not support the conclusion that plaintiffs' claims must be dismissed; it simply underscores that plaintiffs' claims are not APA claims. Plaintiffs do not contend that any single agency action is causing their asserted injuries—nor could they, given the complex chain of causation involved in climate change. They seek review of *aggregate action* by *multiple agencies*, something the APA's judicial review provisions do not address. The APA does not govern plaintiffs' claims. As a result, plaintiffs' failure to state a claim under the APA is not a ground for dismissal of this action.

C. *Motion to Dismiss on Separation of Powers Grounds & Request to Reconsider the November 2016 Denial of the Government's 12(b)(6) Motion*

Finally, federal defendants raise a set of arguments on which this Court already has ruled. First, federal defendants open their Rule 12(c) motion by asserting "that [they are] entitled to judgment as a matter of law for the reasons set forth in [their] November 2015 motion to dismiss." Defs.' Mot. for J. on the Pleadings 6. Federal defendants ask the Court to "revisit its order denying the motion to dismiss and grant judgment to Defendants on some or all of Plaintiffs' claims." *Id.* at 7. Second and more specifically, federal defendants argue

that any claim brought outside the APA's framework is foreclosed by the separation of powers.

As an initial matter, the Court acknowledges now, as it did in 2016, that the allocation of power among the branches of government is a critical consideration in this case and reiterate that, "[s]hould 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." *Juliana*, 217 F. Supp. 3d at 1241. The Court recognizes that there are limits to the power of the judicial branch, as demonstrated by the Court's determination that President Trump is not a proper defendant in this case.

This is the first time that federal defendants have highlighted separation of powers concerns; they did not raise that argument, except in passing, in their 12(b)(6) motion. But former defendant-intervenors raised and fully briefed separation-of-powers arguments in the section of their motion to dismiss addressing the political question doctrine. Although this is the first time federal defendants are raising a political question challenge, their brief on the subject largely reiterates arguments considered and rejected in the opinion and order on the motion to dismiss. And obviously, the invitation to reconsider the November 2016 order and opinion necessarily implicates issues on which this Court has already ruled.

In order to determine how to address federal defendants' attempt to re-raise these issues, the Court begins by considering the application of the law of the case doctrine. Under that doctrine, "a court is ordinarily precluded from reexamining an issue previously decided by the same court." *Old Person v. Brown*,

312 F.3d 1036, 1039 (9th Cir. 2002). The doctrine is "founded upon the sound public policy that litigation must come to end." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc). It also "serves to maintain consistency." *Id.* The doctrine has three exceptions: reconsideration is permitted when "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Old Person*, 114 F.3d at 1039. Although the federal rules permit back-to-back motions to dismiss for failure to state a claim, *see* Section I n.3, *supra,* courts are under no obligation to give full consideration to a rehash of arguments already presented in a 12(b)(6) motion. *See Alexander v. City of Greensboro,* 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011) (declining to "reconsider issues that it addressed fully at the Rule 12(b)(6) stage" in adjudicating a Rule 12(c) motion).

To the extent that federal defendants seek reconsideration on questions unrelated to the Court's subject matter jurisdiction, the Court declines to revisit its earlier rulings. The Court gave full and fair consideration to the arguments federal defendants now raise in their November 2016 opinion. Nothing has changed to warrant expending judicial resources in retreading that ground at this juncture. The same legal standard applies to motions under Rules 12(b)(6) and 12(c) and federal defendants have cited no intervening changes in the law.

To the extent that federal defendants' arguments challenge subject matter jurisdiction, the law of the case doctrine does not apply. *United States v. Houser*, 804 F.2d 565, 569 (9th Cir. 1986). But federal defend-

ants have pointed to no relevant change in circumstances or the governing law between November 2016 and today. Accordingly, the Court has little to add to the prior opinion, which addressed the separation of powers issue at length. *See Juliana,* 217 F. Supp. 3d at 1235-42, 1270-71. The separation of powers did not require dismissal of this lawsuit in November 2016, and it does not require dismissal of this lawsuit now.

Due respect for the separation of powers has informed, and will continue to inform, the Court's approach to this case at every step of the litigation. The Court remains mindful, however, that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137, 177 (1803). Courts have an obligation not to overstep the bounds of their jurisdiction, but they have an equally important duty to fulfill their role as a check on any unconstitutional actions of the other branches of government.

II. *Motion for Summary Judgment*[6]

Federal defendants raise several arguments in their motion for summary judgment, many of which were previously considered in the November 2016 Order. Namely, federal defendants reiterate their contention that plaintiffs lack Article III standing because their

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[6] Subsequent to Oral Argument in July 2018, plaintiffs filed what they style as a Notice of Supplemental Disputed Facts Raised by federal defendants' Expert Reports in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. (doc. 338) Essentially, plaintiffs submit excerpts from defendant's expert reports and argue that these submissions show that genuine issues of material fact remain for trial. However, the Court declines to consider the notice as it is untimely and prohibited under the District's Local Rules. L.R. 7-1(f).

injuries are not concrete and particularized; the harms alleged by plaintiffs are not fairly traceably to federal defendants; and plaintiffs' claims are not redressable by this Court. Federal defendants also argue that plaintiffs have failed to adequately state a claim under the APA and that plaintiffs' claims would violate separation of powers principles. Federal defendants further argue, as they did in their previous motion to dismiss, that there is no fundamental right to a climate system capable of sustaining human life; that plaintiffs cannot establish a state-created danger claim; and that the public trust doctrine does not apply to the federal government.

In response, plaintiffs proffer the declarations of the named plaintiffs as well as declarations from eighteen expert witnesses.[7] They argue that genuine issues of material fact exist as to standing, separation of powers, and their due process and public trust claims.

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[7] Many of documents referenced by plaintiffs' in their response to the motion for summary judgment, and supporting declarations, are subject to their motion *in limine* (doc. 254) seeking judicial notice of certain documents. The Court has examined which of those documents are judicially noticeable in a contemporaneous opinion. Further, at oral argument plaintiffs requested that the Court take judicial notice of the announcement of the Department of Interior's plan to offer 78 million acres offshore of the Gulf Coast for oil and gas exploration and development. The Court has located the announcement of the plan available on the Department's public website. https://www.doi.gov/pressreleases/interior-announces-region-wide-oil-and-gas-lease-sale-gulf-mexico. Consistent with the Court's analysis the contemporaneous opinion regarding plaintiffs' first motion *in limine,* the Court takes judicial notice of the announcement.

Many of these arguments raised in the present motion are substantially similar to those raised in federal defendants' and the former defendant-intervenors' motions to dismiss. However, federal defendants correctly note that the standard for this Court in reviewing a motion for summary judgment is different than the standard which was applied in the previous order. Thus the Court must review the briefing and record to determine whether there is any genuine dispute as to any material fact and the government is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

A. *Standing*

Federal defendants argue, as they did at the pleadings stage, that plaintiffs lack Article III standing to bring their claims. While many of the arguments offered in the present summary judgment motion are substantially similar to those offered in the federal defendants' previous motion to dismiss, a different standard applies at this stage of the proceedings.

To avoid summary judgment, plaintiffs need not establish that they in fact have standing but only that there is a genuine question of material fact as to the standing elements. *Cent. Delta Water Agency v. United States,* 306 F.3d 938, 947 (9th Cir. 2002). To demonstrate standing, a plaintiff must show that (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. General factual allegations of injury resulting from the defendant's conduct will suffice in responding to a motion to dismiss. *Id.* In responding to a motion for summary judgment, however, a plaintiff can no longer rest on "'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.* And at the final stage of standing evaluation, those facts (if controverted) must be supported adequately by the evidence adduced at trial. *Id.*

i. *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. (I'OC), Inc.*, 528 U.S. 167, 181 (2000). For example, a plaintiff may meet the injury in fact requirement by alleging that 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 have filed sworn declarations attesting to a broad range of personal injuries caused by human induced climate change. For example, plaintiff Jayden F. attests to being injured by extreme weather events in 2016 and 2017 which led to the flooding in both 2016 and 2017 of her home in Rayne, Louisiana. Jayden Decl. ¶ 2-16; ¶ 26; ¶ 28-32. This has caused emotional trauma, lost recreational opportunities, as

well as lost personal and economic security. *Id.* at ¶ 36; 39-42. Other plaintiffs also attest to injuries caused by flooding caused by sea level rise and extreme weather events. *See* Journey Decl. ¶¶ 21-27; Levi Decl. ¶¶ 3; 12-16; Tia Decl. ¶ 9; Victoria Decl. ¶¶ 8-9. Similarly, plaintiff Journey attests that harm to his health, personal safety, cultural practices, economic stability, food security and recreation interests have occurred due to climate destabilization and ocean acidification. Journey Decl. ¶¶ 1; 11-20;; *See also* Journey Decl. 21-27; Levi Decl. ¶¶ 3; 12-16; Tia Decl. ¶ 9; Victoria Decl. ¶¶ 8-9; Jacob Decl. ¶ 20; Wanless Decl. Ex. 1 at 30.

Plaintiff Kelsey Juliana attests that climate change has harmed her recreational interests in Oregon's freshwater lakes, rivers, forests, and mountains and has degraded the quality of local food sources and drinking water. Kelsey Decl. ¶¶ 10-12. She, like other plaintiffs, also alleges adverse health and recreation impacts caused by the increased occurrence and intensity of seasonal wildfires. *Id.* ¶ 15; Aji Decl. ¶¶ 2-3; Alexander Decl. ¶¶ 33-41; Jaime Decl. ¶ 17; Kirin Decl. ¶¶ 6-8; Xiuhtezcatl Decl. ¶ 15; Zealand Decl. ¶ 6. Some plaintiffs attest that they are suffering psychological trauma as result of fossil-fuel induced climate change caused by federal defendants. *See* Levi Decl. ¶ 5; Victoria Decl. ¶¶ 8-10, 16-18; Jayden Decl. ¶ 42; Nicholas Decl. ¶¶ 4, 7, 17. Other plaintiffs attest to injuries to their indigenous and cultural practices and values. Miko Decl. ¶¶, 6-7, Jamie Decl. ¶¶ 12-14; Xiuhtezcatl Decl. ¶¶ 6-8. These are merely a selection of the many injuries alleged.

Plaintiffs further offer expert testimony tying injuries alleged by plaintiffs to fossil fuel induced global

warming. *See* Trenberth Decl. 23 ("[I]t is my expert opinion that Plaintiffs including Jayden, Levi, Xiuhtezcatl, Victoria, Jaime, Journey, Zealand, and Nathan are already experiencing extreme weather events that have been exacerbated due to anthropogenic climate change."); Frumpkin Decl. Ex. 1, 2 & 11; Running Decl. 13 ("This will impact the many Plaintiffs in the West who suffer increased risk and severity of impacts from wildfires near their homes, in places that they visit for recreation, and in the air they breathe during the extended fire season, including Xiuhtezcatl, Jaime Lynn, Jacob, Sahara, Kelsey, Alex, Zealand, Nick, Aji, Nathan, Hazel and Avery."); Van Sustern Decl. Ex. 1, 17 ("The Plaintiffs I interviewed are suffering a range of emotional injuries from acute and chronic exposure to climate change—from being personally harmed by climate change impacts like drought and extreme weather events, to empathic identification with others who are harmed by climate change, to profound fears about future harm—consistent with those injuries described in the literature."); Stiglitz Decl. Ex. 1 ¶ 29 ("Youth Plaintiffs themselves will suffer the disproportionate, increased financial burdens of climate change as the impacts of climate change propagate throughout the economy.").

Federal defendants argue that these declarations fail to show that plaintiffs' injuries are concrete and particularized to them; rather federal defendants' contend that the injuries alleged are generalized widespread environmental phenomena which affect all other humans on the planet, making them nonjusticiable. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ___ U.S. ___ 134 S. Ct. 1377, 1387 n.3 (2014) (ex-

plaining that generalized grievances do not meet Article III's case or controversy requirement).

However, as the Court noted in its November 2016 order:

> 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.

Juliana, 217 F. Supp. 3d at 1243-44.

Further, denying "standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 687 (1973). Federal defendants have presented no new controlling authority or other evidence which changes the Court's previous analysis.

As to imminence, plaintiffs must demonstrate standing for each claim they seek to press and for each form of relief sought. *DaimlerChrysler Corp. v. Cuna,* 547 U.S. 332, 352 (2006). Because plaintiffs seek injunctive relief, they must show that 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)). Plaintiffs have met this requirement under the summary judgment standard.

Plaintiffs submit evidence that fossil fuel emissions are responsible for most of the increase in atmospheric CO_2, and that increasing CO_2, in turn, is the main cause of global warming, and that atmospheric concentrations of greenhouse gasses, due to fossil fuel combustion, are increasing quickly such that planetary warm-

ing is accelerating at rates never before seen in human history. Hansen Decl. Ex. A, at 38. Further, not only are concentrations of atmospheric CO_2 continuing to increase, but the rate of increase has also nearly doubled since measurements began being recorded pushing humanity closer to the "point of no return." *Id.* at 29, 38. Estimates show that extreme weather events are likely to continue to increase as the global surface temperature continues to rise. *Id.* at 35; Trenberth Decl. Ex. 1, at 1, 8, 13. Indeed, the five hottest years in the 123 years of record-keeping in the United States have all occurred in the past decade. Trenberth Decl. Ex. 1, at 3. Plaintiffs present evidence that 2017 saw record setting events such as extreme wildfires in the western United States[8] and abnormally strong hurricanes in the southeastern United States and Gulf of Mexico (Hurricanes Harvey, Irma, and Maria), all of which were exacerbated by climate change. *Id.* at 7-11.

Further, plaintiffs offer that global sea level rise will continue unabated under current conditions. Plaintiffs' expert Dr. James Hansen has submitted video animations showing how the future impacts of seal level rise will flood or impact the livability of the homes of plaintiffs in Louisiana, Oregon, Washington, Florida,

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[8] "By 2006, scientists documented that the wildfire season in the western United States was 87 days longer than it was in the 1980s (Westerling et al. 2006). The number of large fires, >1000 acres, had grown four times, and the number of acres burned per year had increased six times. Recent studies have found the global wildfire season increased 19 [percent] globally from 1979-2013, and the global area vulnerable to wildfire increased 108 [percent] (Jolly et al. 2015)." Running Decl. Ex. 1, 13. Future wildfire activity may be 200-600 [percent] higher than today in the Pacific Northwest alone. *Id.* at 28.

New York, and Hawaii based on current assumptions about carbon emission. Hansen Decl. Ex. E-R. The most recent projections from the National Oceanic and Atmospheric Administration ("NOAA") provide that global mean sea level will rise between 1.5-2.5 m (5-8.2 ft.) by 2100 and that it is expected to continue to rise and even accelerate more after 2100. Wanless Decl. Ex. 1 at 12.

In sum, the Court is left with plaintiffs' sworn affidavits attesting to their specific injuries, as well as a swath of extensive expert declarations showing those injuries are linked to fossil fuel-induced climate change and if current conditions remain unchanged, these injuries are likely to continue or worsen. Federal defendants offer nothing to contradict these submissions, and merely recycle arguments from their previous motion. Thus, for the purposes of this case, the declarations submitted by plaintiffs and their experts have provided "specific facts," of immediate and concrete injuries. *Lujan,* 504 U.S. at 561; *See Bellon,* 732 F.3d at 1141.

ii. *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 plaintiffs 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 alterations omitted). At the summary judgment stage, the "causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits." *Ecological Rights Found. v. Pac. Lumber Co.,* 230 F.3d 1141, 1152 (9th Cir. 2000)

Here, federal defendants argue again that the association between the conduct of which plaintiffs complain, namely the government's subsidizing the fossil fuel industry; allowing the transportation, exportation, and importation of fossil fuels; setting of energy and efficiency standards for vehicles, appliances, and buildings; reducing carbon sequestration capacity and expanding areas for fossil fuel extraction and production through federal land leasing policies is tenuous and filled with many intervening actions by third parties. Thus, they argue that plaintiffs have failed to tether their injuries, both direct and indirect, to specific actions of the United States.

Federal defendants again rely on the Ninth Circuit's holding in *Bellon* to support their argument that "the causal chain is too weak to support standing" for plaintiffs' injuries. *Bellon,* 732 F.3d at 1142. The Court discussed *Bellon* in detail in its November 2016 Order on the motions to dismiss. *See Juliana,* 217 F. Supp. 3d at 1244-1246. Briefly, the court in *Bellon* found

that the five oil refineries at issue in that case were responsible for just under six percent of total greenhouse gas emissions produced in the State of Washington. The court 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 greenhouse gases worldwide, and the absence of any meaningful nexus between Washington refinery emissions and global greenhouse gases concentrations now or as projected in the future." *Bellon,* 732 F.3d at 1144 (quotation marks omitted).

Previously, the Court distinguished *Bellon* on the procedural basis that it was considering motions to dismiss, while the court in *Bellon* reviewed an order on a motion for summary judgment. Now on summary judgment in this case, the Court still finds that *Bellon* does not foreclose standing for plaintiffs. The court in *Bellon* relied on the scientific evidence, presented in an *"unchallenged declaration"* from the defendants' expert that showed that the causal connection between the regulatory actions of the defendants, the greenhouse gas emissions in question, and the injuries complained of by the plaintiffs were too tenuous to support standing. *Id.* at 1143-44 (emphasis added). The Ninth Circuit later clarified, "causation was lacking [in *Bellon*] 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 indiscernible.'" *WildEarth Guardians v. U.S. Dep't of Agric.,* 795 F.3d 1148, 1158 (9th Cir. 2015) (quoting *Bellon,* 732 F.3d at 1144).

Unlike in *Bellon,* plaintiffs' claims do not challenge the global impact of such specific emissions. Rather, plaintiffs have proffered uncontradicted evidence showing that the government has historically known about the dangers of greenhouse gases but has continued to take steps promoting a fossil fuel based energy system, thus increasing greenhouse gas emissions. As the Court noted in the November 2016 Order, climate science and our ability to understand the effects of climate change are constantly evolving. *Juliana,* 217 F. Supp 3d at 1245 (quoting 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.")). *Bellon* does not foreclose standing in any suit simply because it is based on actions causing dangerous levels atmospheric carbon emissions.

In further contrast to *Bellon,* the pattern of federally authorized emissions challenged by plaintiffs in this case do make up a significant portion of global emissions. Federal defendants have admitted that "from 1850 to 2012, CO_2 emissions from sources within the United States including from land use "comprised more than 25 [percent] of cumulative global CO_2 emissions." Answer at ¶ 151. At oral argument, federal defendants noted that plaintiffs' evidence only shows "United States' current global contribution to current emissions is around 14 to 15 percent." July 18, 2018 Hearing Trans. 29. In a different context the Supreme Court held that United States motor-vehicle emissions which were responsible for six percent of worldwide CO_2 "make

a meaningful contribution to greenhouse gas concentrations" when "judged by any standard."[9] *Mass. v. EPA,* 549 U.S. at 524-25. The emissions implicated by federal defendants' conduct in the case outstrip either of those considered in either *Bellon* or *Massachusetts.*

Still, federal defendants contend that plaintiffs do not adequately show a causal connection between a specific action taken by federal defendants and their climate change related injuries. They argue that plaintiffs' causal connection is based on the actions of third-party emitters. However, plaintiffs challenge not only the direct emissions of federal defendants through their use of fossil fuels to power its buildings and vehicles[10], but also the emissions that are caused and supported by their policies. Plaintiffs have alleged that federal defendants' systematic conduct, which includes "government policies practices, and actions, showing how each Defendant permits, licenses, leases, authorizes, and/or incentivizes the extraction, development, processing, combustion, and transportation of fossil fuel" caused plaintiffs' injuries. Plaintiffs' Resp. to Mot. for Summ

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[9] The court in *Bellon* declined to extend the rationale of *Massachusetts* in part because while the 6 percent of Washington state emissions at issue in that case might be significant in that state, the plaintiffs did not "provide any evidence that places this statistic in national or global perspective to assess whether the refineries' emissions are a meaningful contribution to global greenhouse gas levels." 732 F.3d 1131, 1146 (9th Cir. 2013) (internal citation omitted).

[10] These emissions are not insignificant. In 2016, the federal government had 1,340,000 cars and 1,810,000 trucks in its fleet. Olson Decl. Ex. 136. In 2015, the federal fleet consumed 310,416 gallons of gasoline and 66,736 gallons of diesel. *Id.* The Department of Defense uses enough electricity to power 2.6 million average American homes. *Id.* at Ex. 217

J. 11. And plaintiffs provide evidence that federal defendants' actions (or inaction), such as coal leasing, oil development, fossil fuel industry subsidies, and the setting of fuel efficiency standards for vehicles, led to plaintiffs' injuries.

For example, regarding federal leasing policy, more than five million acres of National Forest lands are currently leased for oil, natural gas, coal, and phosphate development. Olsen Decl. Ex. 73. In 2016, the Department of Interior administered some 5000 active oil and gas leases on nearly 27 million acres in the Outer Continental Shelf. *Id.* Ex. 215. In 2015, 782 million barrels of crude oil, five trillion cubic feet of natural gas, and 421 million tons of coal were produced on federal lands managed by the Department of Interior. *See Id.* Ex. 74. Between 1905 and 2016, the United States Department of Agriculture authorized the harvest of 525,484,148 billion board feet of timber from federal land, thus reducing the country's carbon sequestration capacity. *Id.* Ex. 45. Federal defendants permit livestock grazing on over 95 million acres of National Forest lands in 26 states, further reducing carbon sequestration capacity and increasing methane emissions. *Id.* 42, 46, 52, 50-55, 70. It is uncontested that federal defendants control leasing and permitting on federal land. Third parties could not extract fossil fuels or make other use of the land without Federal Defendants' permission.

Federal defendants also set energy and efficiency standards that do impact the rate at which individual and businesses emit greenhouse gases. The Department of Energy sets energy conservation standards for more than 60 categories of appliances and equipment,

which covers roughly 90 percent of home energy use. *Id.* Ex. 92. Likewise, passenger cars and light trucks cannot be sold in the United States unless they comply with the Fuel Economy Standards set by the Department of Transportation, which historically have been lower in the United States than other developed nations. *Id.* Ex. 151.

Federal defendants' actions impact the import, export, and transport of fossil fuels. For example, in 2015, Congress lifted a ban on crude oil exports and exports rose rapidly thereafter. *Id.* Ex. 96. No offshore liquefied natural gas or oil import and export facility can legally operate without a license from the Department of Transportation. *Id.* at 120 189. The Federal Energy Regulatory Commission must approve interstate transport of fossil fuel, and Department of Transportation permitting is required for transportation of hazardous material including fossil fuels. *Id.* at 384, 385. These examples are merely illustrative of the evidence proffered by plaintiffs.

Plaintiffs' expert declarations also provide evidence that federal defendants' actions have led to led to plaintiffs' complained of injuries. Plaintiffs' expert Dr. James Hansen asserts that "[t]he United States is, by far, the nation most responsible for the associated increase in global temperatures. The [United States] alone is responsible for a 0.15°C increase in global temperature." Hansen Decl. 28. Plaintiffs' expert Dr. Joseph Stiglitz offers that "the current national energy system, in which approximately 80 percent of energy comes from fossil fuels, is a direct result of decisions and actions taken by Defendants." Stiglitz Decl. Ex. 1 ¶ 27. That is echoed by plaintiffs' expert Dr.

Mark Jacobson who notes that "fossil fuels supply more than 80 [percent] of our all-purpose energy in the United States, not out of necessity, but because of political preference and historic government support that led to the development and maintenance of a widespread fossil-fuel infrastructure." Jacobson Decl. Ex. 1, 5. Plaintiffs' expert Peter Erickson submitted that by subsidizing the low cost of oil the United States government has historically and is currently substantially expanding the country's future oil production relative to the production that would occur if these subsidies were not in place. Erickson Decl. Ex. 1, 15.

Plaintiffs' experts tether plaintiffs' specific injuries to climate change and climate change related weather events. *See generally* Section 2.A.ii. Plaintiffs' expert Dr. Harold Wanless opines that sea level rise solely caused by fossil fuel-induced climate change poses clear and irreversible harm to plaintiffs like Levi whose community will likely be uninhabitable in future. Wanless Decl. Ex. 1 at 1-2. Likewise, plaintiffs' expert Dr. Kevin Trenberth offers, as an example of climate change related weather events harming plaintiffs, localized extreme weather events like the flooding affecting plaintiff Jayden and her home were heightened by climate change. Trenberth Decl. Ex. 1 at 20-22. The magnitude of rainfall and the extent of flooding near Jayden's home would not have occurred without fossil fuel-induced climate change. *Id.* Dr. Steven Running notes that the pattern of drought that led plaintiff Jaime to move from her home on the Navajo Reservation in New Mexico is directly linked to climate change. Running Decl. 6.

At this stage of the proceedings, the Court finds that plaintiffs have provided sufficient evidence show-

ing that causation for their claims is more than attenuated. Plaintiffs' "need not connect each molecule" of domestically emitted carbon to their specific injuries to meet the causation standard. *Bellon*, 732 F.3d 1142-43. The ultimate issue of causation will require perhaps the most extensive evidence to determine at trial, but at this stage of the proceedings, plaintiffs have proffered sufficient evidence to show that genuine issues of material fact remain on this issue. A final ruling on this issue will benefit from a fully developed factual record where the Court can consider and weigh evidence from both parties.

iii. *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 that a favorable decision is certain to redress her injury, but must show a substantial likelihood that it will do so. *Id.* For the redressability inquiry, it is sufficient to show that the requested remedy would "slow or reduce" the harm.[11] *Mass. v. EPA*, 549 U.S. at 525 (citing *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)).

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[11] "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Mass. v. EPA*, 549 U.S. at 525

Federal defendants contend that there is no possible redress in this case because the remedies sought by plaintiffs are beyond the Court's authority to provide.[12] Further, they argue that even if this Court did find in favor of plaintiffs, any remedy it fashioned would not redress the harms alleged by plaintiffs, because fossil fuel emissions from other entities would still contribute to continuing global warming. Thus, they argue that there is no evidence that any immediate reduction in emissions caused by the United States would manifest in a reduction of climate change induced weather phenomena. As the Court has stated before, whether the Court could guarantee a reduction in greenhouse gas emission is the wrong inquiry because redressability does not require certainty. Rather, at this stage, it only requires a substantial likelihood that the Court could provide meaningful relief. Moreover, the possibility that some other individual or entity might later cause the same injury does not defeat standing; the question remains whether the injury caused by the defendants in this suit can be redressed. *Juliana*, 217 F. Supp. 3d at 1247; *See also WildEarth Guardians v. US. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[T]he mere existence of multiple causes of an injury does not defeat redressability, particularly for a procedural injury. So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue

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[12] Federal defendants rely on *Norton v. Southern Utah Wilderness Alliance* for the proposition that the Court may only compel ministerial action. 542 U.S. 55, 57-58 (2004). However, that case involved a claim brought under the APA. The Court has already held that these claims are not governed by the APA. *See* Sections 1.B. and 2.C.

that defendant, even if the defendant is just one of multiple causes of the plaintiffs injury.").

Here, plaintiffs request declaratory and injunctive relief as well as any other relief as the Court deems just and proper. They ask the Court, *inter alia,* to "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emission and draw down excess atmospheric CO_2." First Am. Compl. ¶ 94. Plaintiffs dispute federal defendants' contention, however, that they are asking this Court to create a highly specific plan that federal defendants must use remedy any constitutional violations. Instead, plaintiffs urge that their request for relief, at its core, is one for a declaration that their constitutional rights have been violated and an order for federal defendants to develop their own plan, using existing resources, capacities, and legal authority, to bring their conduct into constitutional compliance. Plaintiffs point to various statutory authorities by which they claim federal defendants could affect the relief they request. Plaintiffs' Resp. to Mot. for Summ. J. 24-25. *See inter alia* 30 U.S.C §§ 351-359; 33 U.S.C. § 1344; 42 U.S.C. §§ 7112; 6291-6296; 7401-7431;[13] 49 U.S.C. § 32902; 33 U.S.C. § 1344.

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[13] Judge Coffin cited to § 7409 (providing the Environmental Protection Agency with the authority to regulate national ambient air quality standards for the attainment and maintenance of the public welfare) in his F&R as supporting a "strong link between all the supposedly independent and numerous third party decisions given the government's regulation of CO_2 emissions." (doc. 68 at *10); *See also Mass. v. EPA,* 549 U.S. 497, 524 (2007). (A "reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.")

Plaintiffs also offer evidence that the injuries they allege can be redressed through actions by federal defendants. *See* Hansen Decl. Ex. 1, 4 (staving off the effects of catastrophic climate change "remains possible if [the United States] phases out [greenhouse gas emissions] within several decades and actively draw[s] down excess atmospheric CO_2[,]" which can be largely achieved "via reforestation of marginal lands with improved forestry and agricultural practices."); Robertson Decl. Ex 1 at 6 ("All told, technology is available today to store carbon or avoid future greenhouse gas emissions from agriculture in the U.S. equivalent to more than 30 [gigatonnes of carbon] by 2100); Jacobson Decl. Ex. 1 at 7 ("[I]t is technologically and economically possible to electrify fully the energy infrastructures of all 50 United States and provide that electricity with 100 [percent] clean, renewable wind, water, and sunlight (WWS) at low cost by 2030 or 2050."); Williams Decl. Ex. 1 at 3 & 64 ("[I]t is technically feasible to develop and implement a plan to achieve an 80 [percent] greenhouse gas reduction below 1990 levels by 2050 in the United States . . . with overall net [greenhouse gas] emissions of no more than 1,080 [million tons of carbon], and fossil fuel combustion emissions of no more than 750 [million tons of carbon]."); Stiglitz Decl. Ex. 1, ¶¶ 44-49 (explaining that transitioning the United States economy away from fossil fuels is feasible and beneficial).

It is clearly within a district court's authority to declare a violation of plaintiffs' constitutional rights. *See,* e.g., *Obergefell v. Hodges,* ___ *U.S.* ___ 135 S. Ct. 2584 (2015); *Brown v. Bd of Educ.,* 347 U.S. 483 (1954); *Lawrence v. Texas,* 539 U.S. 558 (2003). "Once a right and a violation have been shown, the scope of a district

court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15. (1970). As mentioned elsewhere in this opinion, should the Court find a constitution violation, it would need to exercise great care in fashioning any form relief, even if it were primarily declaratory in nature.[14] The Court has considered the summary judgment record regarding traceability and plaintiffs' experts' opinions that reducing domestic emissions, which plaintiffs contend are controlled by federal defendants' actions, could slow or reduce the harm plaintiffs are suffering. The Court concludes, for the purposes of this motion, that plaintiffs have shown an issue of material fact that must be considered at trial on full factual record.

Regarding standing, federal defendants have offered similar legal arguments to those in their motion to dismiss. Plaintiffs, in contrast, have gone beyond the pleadings to submit sufficient evidence to show genuine issues of material facts on whether they satisfy the standing elements. The Court has considered all of the arguments and voluminous summary judgment record, and the Court finds that plaintiffs show that genuine issues of material fact exist as to each element. As the Court notes elsewhere in this opinion, the Court will revisit all of the elements of standing after the factual record has been fully developed at trial. For now, the Court simply holds that plaintiffs have met their burden to avoid summary judgment at this time.

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[14] Indeed, the "remedial powers of an equity court . . . are not unlimited." *Whitcomb v. Chavis,* 403 U.S. 124, 161 (1971).

B. *Failure to State a Claim under the APA*

Federal defendants next argue that even if the Court finds that plaintiffs have established standing, plaintiffs still have not identified a valid right of action. Essentially, federal defendants argue once again that this case must be dismissed because the APA provides the "sole mechanism" by which plaintiffs must bring their claims. Defs.' Mot. for Summ. J. 18. This issue is substantively explored in Section I.B, *infra*, and applies with equal force to this motion for summary judgment. Plaintiffs' claims are not governed by the APA. Thus, federal defendants are not entitled to summary judgment on this issue.

C. *Separation of Powers*

Federal defendants contend, once again that plaintiffs' claims and the relief sought are broader than what can be entertained as a case or controversy under Article III of the United States Constitution. The Court has already discussed similar arguments in the November 2016 Order and in Section I.C of this Opinion.

Federal defendants offer no new evidence or controlling authority on this issue that warrant reconsideration of the Court's previous analysis.[15] Nor do they

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[15] Federal defendants point to a recent public nuisance case from the Northern District of California to support their position that this case violates separation of powers principles. *See City of Oakland v. BP P.L.C., et al.*, 2018 WL 3109726 (N.D. Cal. 2018). There, a district court dismissed claims brought by certain cities in California against several large oil and natural gas producers. The plaintiffs alleged that the worldwide production and sale of fossil fuels by the defendants were causing climate change, the effects of which caused damage to the cities. *City of Oakland* is readily distinguishable. Here, plaintiffs allege constitutional violations against

offer a rationale as to why the outcome should be different under the summary judgment standard. Indeed, they contend that the issue here is "purely legal" in nature and that "factual development" is not relevant to whether plaintiffs' requested remedy violates separation of powers issues. Defs.' Reply to Mot. for Summ. J. 26.

As the Court noted above, the allocation of powers between the branches of government is a critical consideration in this case, but it is the clear province of the judiciary to say what the law is. *Marbury,* 5 U.S. at 177. After a fuller development of the record and weighing of evidence presented at trial, should the Court find a constitutional violation, then it would exercise great care in fashioning a remedy determined by the nature and scope of that violation. Additionally, many potential outcomes and remedies remain at issue in this case. The Court could find that there is no violation of plaintiffs' rights; that plaintiffs fail to meet one or more of the requirements of standing; or, after

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the federal government based on federal defendants' domestic carbon emissions as well as a promulgation of a domestic energy market based on fossil fuels in spite of their awareness of the dangers of such emissions. The court in *City of Oakland* focused on nuisance claims, brought for money damages, and the resulting balancing test, as well as extraterritoriality concerns stemming from the plaintiffs' attempt to impose liability on the defendants for the production and sale of fossil fuels worldwide. *Id* at *7. ("Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution.") Here, plaintiffs' claims are limited to the territorial boundaries of the United States. The Court is not persuaded that *City of Oakland* offers relevant guidance for the Court's consideration of this motion given the vastly different nature of the claims, requested remedies, and parties.

the full development of the factual record, that the requested remedies would indeed violate the separation of powers doctrine. As has been noted before, even should plaintiffs prevail at trial, the Court, in fashioning an appropriate remedy, need not micromanage federal agencies or make policy judgments that the Constitution leaves to other branches. The record before the Court at this stage of the proceedings, however, does not warrant summary dismissal. To grant summary judgment on these grounds at this stage—when plaintiffs have supplied ample evidence to show genuine issues of material fact—would be premature.[16]

Federal defendants also contend that merely participating in ongoing discovery and a court trial violates separation of powers principles. Federal defendants previously made this argument in their Motion for Protective Order and Stay of All Discovery. (doc. 196) This rationale was rejected by Judge Coffin in his Order denying the motion (doc. 212), which the Court later affirmed over Federal Defendant's objections. (doc. 300) Moreover, the Ninth Circuit considered this argument in federal defendant's latest petition for mandamus. The panel noted in its opinion that the government made the same argument in their first

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[16] Respect for separation of powers might, for example, permit the Court to grant declaratory relief, directing federal defendants to ameliorate plaintiffs' injuries without limiting its ability to specify precisely how to do so. 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). Here the Court has not yet determined the scope, if any, of federal defendants' constitutional violations or plaintiffs' injuries.

mandamus petition, and the panel "rejected" it for the purposes of the mandamus. *In re United States*, ___ F.3d ___, 2018 WL 3484444 at *9 (citing *In re United States*, 884 F.3d at 836). Once again, the Court does not find federal defendants' argument persuasive and concludes that generally participating in discovery and trial here does not in and of itself violate separation of powers concerns. Federal defendants have been free to raise objections to specific discovery requests and orders which they believe implicate separation of powers concerns.

D. *Due Process Claims*

Federal defendants argue that plaintiffs' individual due process claims fail as a matter of law. The Court addresses each in tum.

i. *Fundamental Right to an Environment Capable of Sustaining Human Life*

Federal defendants argue, as they did in their previous motion to dismiss that there is no right to a climate system capable of sustaining human life. They note that this issue is "a purely legal question" and that factual development at trial is not necessary to resolve it. Defs.' Reply to Mot. for Summ. J. 29. Federal defendants offer substantially similar arguments to those from their motion dismiss here.[17] The Court ad-

[17] Federal defendants do cite a recent case from D.C. Circuit Court of Appeals arguing that it rejected the notion of a federal due process right to a stable environment. *Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102, (D.C. Cir. 2018). However, the analysis in that case involved the Environmental Rights Amendment to the Pennsylvania State Constitution, and the court ultimately held that the rights created by the

dressed these arguments in the previous order, and nothing in the current briefing persuades the Court to change its previous rationale. As stated in the November 2016 order, this Court has simply held that:

> where a complaint alleges knowing 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.

Juliana, 217 F. Supp. 3d at 1250.

Reviewing the summary judgment record, plaintiffs have offered expert testimony on the catastrophic harms of climate change. *See* Section 2.A. They also submitted evidence, in the form of expert declarations and government documents, supporting their argument that the federal defendants' actions have led to these changes and are linked to the harms alleged by plaintiffs. At this stage, federal defendants have offered

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amendment in question bound only "only state and local governments." *Id.* at 110. The court noted that the plaintiffs grounded their claims on the right outlined in the Pennsylvania Constitution as creating "a protected liberty or property interest as a matter of federal due process." *Id.* at 108. The court found that "the Amendment is too vague and indeterminate to create a federally cognizable property interest." *Id.* at 109. Because the court's analysis centered on the specific Pennsylvania Environmental Rights Amendment, it is not controlling here.

no legal or factual rationale significantly different from those offered in their previous motion to dismiss. As such, the Court finds no reason to re-examine the previous ruling on the existence of this due process right. Moreover, further factual development of the record will help this Court and other reviewing courts better reach a final conclusion as to plaintiffs' claims under this theory.

ii. *State-Created Danger Theory*

Federal defendants urge that plaintiffs' claims based on the state created danger doctrine must fail. First, they argue that plaintiffs do not show a special relationship between themselves and the government. More importantly, federal defendants argue that plaintiffs cannot show that government conduct proximately caused a dangerous situation in deliberate indifference to plaintiffs' safety or that harm or loss of life has resulted from such conduct. Plaintiffs contend that they have proffered ample evidence to show genuine issues of material fact as to whether federal defendants have liability for the conduct alleged in their complaint.

With limited exceptions, the Due Process Clause does not impose an affirmative obligation on the government 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 as-

sumes 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).

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).

Federal defendants' main argument is that plaintiffs' allegations regarding the government's knowledge of the dangers posed to plaintiffs by climate change do not rise to the required level of "deliberate indifference." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011) ("Deliberate indifference is a stringent standard of fault, requiring proof that a municipal

actor disregarded a known or obvious consequence of his action." (internal citation and quotations omitted.)). Plaintiffs' point to their expert declarations to demonstrate that federal defendants have known of, and disregarded, the consequences of continued fossil fuel use on the United States and its citizens. Federal defendants do not meaningfully refute the factual allegations, but instead deny their bearing on the issue. Therefore, there is a genuine issue of disputed facts surrounding the government's knowledge of climate change's dangers and summary judgment before trial, is inappropriate.

Plaintiffs specifically refer to the declaration from their expert Gus Speth, former chairman of the Council on Environmental Quality under President Jimmy Carter. Mr. Speth's declaration examines a historical record spanning ten presidential administrations and references a number of documents, statements of government officials, and federal policy actions that go directly to the government's knowledge of the links between fossil fuels and increasing global mean temperature and the dangers associated therein, such as sea level rise to Americans at the time and in future.

For example, in 1969 Daniel Moynihan, then counselor to the President Richard Nixon, wrote to John Ehrlichman, President Nixon's Assistant for Domestic Affairs, summarizing the climate problem:

> The process is a simple one. Carbon dioxide in the atmosphere has the effect of a pane of glass in a greenhouse. The CO_2 content is normally in a stable cycle, but recently man has begun to introduce instability through the burning of fossil fuels. At the tum of the century several persons raised the

> question whether this would change the temperature of the atmosphere. Over the years the hypothesis has been refined, and more evidence has come along to support it. It is now pretty clearly agreed that the CO_2 content will rise 25 [percent] by 2000. This could increase the average temperature near the earth's surface by 7 degrees Fahrenheit. *This in turn could raise the level of the sea by 10 feet. Goodbye New York. Goodbye Washington, for that matter.*

Speth Decl. ¶ 18. (citing Olsen Dec. Ex. 2) (emphasis added)

In 1977, President Jimmy Carter's science advisor Frank Press wrote to the President explaining:

> Fossil fuel combustion has increased at an exponential rate over the last 100 years. As a result, the atmospheric concentration of CO_2 is now 12 percent above the pre-industrial revolution level and may grow 1.5 to 2.0 times that level within 60 years. Because of the greenhouse effect of atmospheric CO_2, the increased concentration will induce a global climatic warming of anywhere from 0.5° to 5° C. . . . The urgency of the problem derives from our inability to shift rapidly to non-fossil fuel sources once the climatic effects become evident not long after the year 2000; the situation could grow out of control before alternate energy sources and other remedial actions become effective.

Id. ¶ 21 (citing Olsen Decl. Ex. 4.)

Another example of the alleged knowledge and deliberate indifference of the federal defendants cited by plaintiffs is the United Nations Framework Convention

on Climate Change, which was signed by the President George H.W. Bush and ratified by the U.S. Senate in 1992. Speth Decl. ¶ 44. The preamble to the Convention provided that:

> [H]uman activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind

Olson Decl. Ex. 23

Plaintiffs further contend that the dangers of global warming were well known during the administration of Presidents William Clinton and George W. Bush. In 1996, the Council on Environmental Quality reported to Congress: "[t]he average global temperature is projected to rise 2 to 6 degrees over the next century . . . the longer we wait to reduce our emissions, the more difficult the job, and the greater the risks." Olson Decl., Ex. 25, at xi. Further, a 2007 report from the House of Representatives Committee on Oversight and Government Reform alleged that the Bush Administration misled the public regarding the effects of climate change, concluding:

> The Committee's 16-month investigation reveals a systematic White House effort to censor climate scientists by controlling their access to the press and editing testimony to Congress. The White House was particularly active in stifling discussions of the link between increased hurricane intensity and global warming. The White House also sought to mini-

> mize the significance and certainty of climate change by extensively editing government climate change reports. Other actions taken by the White House involved editing EPA legal opinions and op-eds on climate change.

Olson Decl., Ex. 34, at ii.

In June 2009, the U.S. Global Change Research Program ("USGCRP"), government advisory council, released its Second National Climate Assessment which noted that "[c]limate change is likely to exacerbate these challenges as changes in temperature, precipitation, sea levels, and extreme weather events increasingly affect homes, communities, water supplies, land resources, transportation, urban infrastructure, and regional characteristics that people have come to value and depend on." Olson Decl. Ex. 35 at 100. Recently, in August 2017, the USGCRP Fifth National Climate Assessment found "that reversing course on climate, as expected with the passage of time, is more urgent than ever." Speth Decl. ¶ 76.

At this stage of the proceedings, plaintiffs have introduced sufficient evidence and experts' opinions to demonstrate a question of material fact as to federal defendants' knowledge, actions, and alleged deliberate indifference. Once this claim is reviewed with a full factual record, plaintiffs must still clear a very high bar to ultimately succeed.

Additionally, based on the proffered evidence and the complex issues involved in this claim, the Court exercises its discretion to "deny summary judgment in a case where there is reason to believe that the better

course would be to proceed to a full trial." *Anderson,* 477 U.S. at 256.

The Ninth Circuit has reserved summary judgment in the past to obtain a more robust record. *See Anderson v. Hodel,* 899 F.2d 766, 770 (9th Cir 1990) ("[A]ppellate courts, including the Supreme Court, have reversed summary judgments where the lower court records have not been sufficiently developed to allow the courts to make fully informed decisions on particularly difficult and far reaching issues." (internal quotation marks omitted) (alterations omitted)); *see also Eby v. Reb Realty, Inc.,* 495 F.2d 646, 649 (9th Cir. 1974) ("In certain cases summary judgment may be inapposite because the legal issue is so complex, difficult, or insufficiently highlighted that further factual elucidation is essential for its prudently considered resolution."). The Ninth Circuit has further explained that

> [C]ourts must not rush to dispose summarily of cases—especially novel, complex, or otherwise difficult cases of public importance—unless it is clear that more complete factual development could not possibly alter the outcome and that the credibility of the witnesses' statements or testimony is not at issue. Even when the expense of further proceedings is great and the moving party's case seems to the court quite likely to succeed, speculation about the facts must not take the place of investigation, proof, and direct observation.

TransWorld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 684 (9th Cir. 1990)

Undoubtedly, this claim involves complicated and novel questions about standing, historical context, and

constitutional rights. To allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to the case, which is certainly a complex case of "public importance."[18] *Id.*

E. *Public Trust Doctrine*

Federal defendants again ask this Court to reconsider the previous ruling on the applicability of the public trust doctrine to the federal government. They allege no new circumstances or any substantially new arguments for the Court to consider on summary judgment. Indeed, federal defendants repeatedly stresses that "[n]o discovery or expert opinion is necessary" for this Court to decide "the purely legal question of whether the public trust doctrine provides a cause of action against the federal government." Defs.' Reply to Mot. for Summ. J. 38.

Similar to the issues discussed in Sections I.C, II.C, and II.D, the November 2016 Order extensively covered this legal argument, and the Court finds no need to revisit its analysis based on the nearly identical arguments in this motion. *See Juliana*, 217 F. Supp. 3d at 1252-1261. The Court does not find that its previous order, holding that the public trust doctrine is deeply rooted in our nation's history and that plaintiffs' claims are viable was clearly erroneous. *Id.* at 1259, 1261. There have been no changes in the factual record or legal authority that would justify a different outcome given the current record and the fact that the arguments presented by federal defendants in this mo-

[18] This analysis applies with equal force to all of the issues raised in federal defendants' motion for summary judgment.

tion are substantively the same, the Court declines to revisit its previous ruling. Genuine issues of material fact remain as to the specific allegations made by plaintiffs. The application of the public trust doctrine to these claims would be better served with a full factual record to help guide this Court and any reviewing courts.

F. *Plaintiffs' Remaining Claims*

In their motion for summary judgment, federal defendants state that "[t]his Court's order [denying the motions to dismiss] did not address [federal d]efendants' arguments concerning [p]laintiffs' Equal Protection claim under the Fifth Amendment or Plaintiffs' Ninth Amendment Claim." Defs.' Mem. of Law in Supp. of Mot. for Summ. J. 4. They assert that "the Equal Protection and Ninth Amendment claims are no longer at issue." *Id.* 24 n.8. Although federal defendants overstate their position with respect to the equal protection and Ninth Amendment claims, they are correct that the prior opinion and order was somewhat unclear with respect to those claims and some clarification is warranted.

The Court begins with plaintiffs' third claim for relief, which is pleaded as a freestanding claim under the Ninth Amendment. This claim is not viable as a matter of law. The Ninth Amendment "has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986). Federal defendants are therefore entitled to summary judgment on plaintiffs' third claim for relief.

Plaintiffs' equal protection claim requires a more substantive discussion, as it is linked to the allegation of fundamental rights violations.

When a federal court is presented with an equal protection claim, the first step is to "ascertain the appropriate level of scrutiny to employ[.]" *Aleman v. Glickman,* 217 F.3d 1191, 1197 (9th Cir. 2000). The default level of scrutiny is rational basis review, which affords governmental classifications "a strong presumption of validity." *Id.* at 1200 (quoting *Heller v. Doe,* 509 U.S. 312, 319 (1993)). The applicable analysis changes, however, when the plaintiff alleges either discrimination against a "suspect or semi-suspect class" or infringement of a fundamental right. *Wright v. Incline Vill. Gen. Improvement Dist.,* 665 F.3d 1128, 1141 (9th Cir. 2011). A classification withstands rational basis review so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 1201 (quoting *FCC v. Beach Commc'ns,* 508 U.S. 307, 313 (1993)).

Plaintiffs contend that "posterity"—which they defined to include both unborn members of plaintiff "future generations" and minor children who cannot vote —is a suspect classification. They contend that, for decades, federal defendants have prioritized present-day political and economic advantage over prevention of future environmental damage. Plaintiffs assert that young people and future generations will be disproportionately harmed by climate change because climate change and its effects are worsening over time. They assert that federal defendants' climate and energy policy treats "posterity" differently than other, sim-

ilarly situated individuals, in violation of the Equal Protection Clause.

Judge Coffin recommended against recognizing "a new separate suspect class based on posterity." *Juliana*, 217 F. Supp. 3d at 1271 n.8. Although the Court stated in the introduction to the opinion and order that the Court was adopting Judge Coffin's findings and recommendation "as elaborated in this opinion," the Court expressly declined to decide whether youth or future generations were suspect classes. *Id.* at 1233 & 1249 n.7.

Both the Supreme Court and the Ninth Circuit have held that age is not a suspect class. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008). Plaintiffs argue that the Supreme Court has rejected only *old* age as a suspect classification, but that is not the case. *Stanglin* upheld "modest impairment of the liberty of teenagers"—specifically, 14- to 18-year-olds—in the form of an age-based restriction on entry to a dance hall. 490 U.S. at 28 (Stevens, J., concurring). *Flores-Villar* addressed the constitutionality of an immigration policy that treated United States citizen fathers differently depending on whether they lived in the United States for at least five years after the age of fourteen.[19] 536 F.3d at 993. *Stanglin* and *Flores-Villar* both applied rational basis review to governmental action that discriminated against teenagers of a

[19] *Flores-Villar* also upheld the immigration policy in question against the argument that it impermissibly treated mothers and fathers differently. *Sessions v. Morales-Santana*, 137 S. Ct. 1698 (2017), abrogated *Flores-Villar*'s gender-discrimination holding but left untouched its age-discrimination holding.

similar age to plaintiffs in this case. In both cases, that discrimination was found to be permissible if it had a rational basis.

Even if plaintiffs' suspect-class argument were not foreclosed by precedent, the Court would not be persuaded to break new ground in this area. *See Cunningham v. Beavers,* 858 F.2d 269, 273 (5th Cir. 1988) ("No cases have ever held, and we decline to hold, that children are a suspect class."). Suspect classification triggers strict scrutiny, a famously difficult test to survive. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 832 (2007) (discussing strict scrutiny's somewhat-exaggerated reputation as "strict in theory, but fatal in fact"). Balancing competing interests is at the heart of executive and especially legislative decision-making, and it is the rare governmental decision that does not have *some* effect on children or posterity. Holding that "posterity" or even just minor children are a suspect class would hamstring governmental decision-making, potentially foreclosing even run-of-the-mill decisions such as prioritizing construction of a new senior center over construction of a new playground or allocating state money to veterans' healthcare rather than to the public schools. Applying strict scrutiny to every governmental decision that treats young people differently than others is unworkable and unsupported by precedent.

However, the rejection of plaintiffs' proposed suspect class does not fully resolve their equal protection claim. As explained above, strict scrutiny is also triggered by alleged infringement of a fundamental right. *Wright,* 665 F.3d at 1141. Plaintiffs' equal protection

claim rests on alleged interference with their right to a climate system capable of sustaining human life—a right the Court has already held to be fundamental. *Juliana,* 217 F. Supp. 3d at 1249-50; *see also id.* at 1271 n.8 ("Nonetheless, the complaint does allege discrimination against a class of younger individuals with respect to a fundamental right protected by substantive due process."); *Stop H-3 Ass'n v. Dole,* 870 F.2d 1419, 1430 (9th Cir. 1989) (stopping short of identifying a fundamental right but stating that "[h]uman life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources"). Plaintiffs' equal protection and due process claims both involve violation of a fundamental right and, as such, must be evaluated through the lens of strict scrutiny, which would be aided by further development of the factual record.

III. *Request to Certify for Interlocutory Appeal*

Federal defendants seek certification for interlocutory appeal any portion of this opinion and order denying their motions for judgment on the pleadings or summary judgment.

The final judgment rule gives the federal courts of appeal jurisdiction over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Congress created a narrow exception to this rule: a district judge may certify for appeal an order that "involves a controlling question of law as to which there is substantial ground for difference of opinion" if "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" *Id.* § 1292(b). The requirements of § 1292(b) are jurisdictional, so a district court may not certify an order

for interlocutory appeal if they are not met. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Congress did not intend district courts to certify interlocutory appeals "merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Rather, certification pursuant to § 1292(b) is reserved for "the most extraordinary situations." *Penk v. Or. State Bd. of Higher Educ.*, 99 F.R.D. 508, 509 (D. Or. 1982). Even when all three of § 1292(b)'s criteria are met, the district court retains unfettered discretion to deny a motion to certify for interlocutory review. *Mowat Constr. Co. v. Dorena Hydro, LLC*, 2015 WL 5665302, at *5 (D. Or. Sept. 23, 2015).

As a preliminary matter, the Court notes that to the extent federal defendants seek to certify for interlocutory appeal the legal rulings contained in the November 2016 Opinion and Order denying the motion to dismiss, the Court already declined to certify those questions for interlocutory appeal. *Juliana*, 2017 WL 2483705, at *2. That denial is now the law of the case. The Court therefore denies federal defendants' request to certify the rulings on standing, the political question doctrine, the viability of public trust claims against the federal government, and the existence of a fundamental right to a climate system capable of sustaining human life.

As to the argument that plaintiffs' claims must proceed (if at all) under the APA, the "substantial ground for difference of opinion" standard is not met.

> To determine if a 'substantial ground for difference of opinion' exists under § 1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial

> ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented."

Couch, 611 F.3d at 631 (quoting 3 Federal Procedure, Lawyers Edition § 3:212 (2010)). As explained in Section I.B, *supra,* Supreme Court and Ninth Circuit precedent make it abundantly clear that plaintiffs may (and frequently do) challenge agency action outside the framework of the APA. Moreover, even if the "substantial ground for difference of opinion" standard were met, certification of the APA issue in isolation would not materially advance the litigation. Instead, it would protract the litigation by requiring the parties to proceed on dual tracks.

The request for interlocutory appeal as to the issues raised in the summary judgment motion must also fail. As to standing, the issues presented are not purely legal questions, but rather implicate mixed questions of law and fact regarding all three prongs of the standing inquiry. As genuine issues of material fact remain, this case would benefit from the further development of the factual record both for this Court and any reviewing court on final appeal. This is also true for plaintiffs' state created danger theory, which directly implicates disputed factual questions.

The Court has already explained why it would be inappropriate to certify an appeal on the issue of the applicability of the APA. As to the legal questions involving in federal defendants' arguments regarding separation of powers, the viability of public trust claims

against the federal government, and the existence of a due process right to a climate system capable of supporting human life, the Court has already denied certification on these issues.[20] Moreover, certifying a narrow piecemeal appeal on some of these legal issues would not materially advance this litigation, rather it would merely reshuffle the procedural deck and force the parties to proceed on separate tracks for separate claims, which is precisely what the final judgment rule seeks to prevent.[21] Accordingly, the requests to certify for interlocutory appeal made both in the motion

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[20] Federal defendants argue in their motion that this Court's previous holding is at odds with certain out of circuit cases. The Court has addressed these concerns in this order and see no need to revisit the Court's analysis of those cases. Federal defendants also argue in a Notice to this the Court (doc. 330) that the Supreme Court's recent ruling denying their application implies that this Court should certify an interlocutory appeal. The Court has considered the concerns raised in the one paragraph order, both in this order and previous orders. The Court does not find that Order removes the Court's discretion to deny the request for interlocutory appeal.

[21] The Supreme Court has cautioned that:

> [i]t would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress.

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440 (1985) (internal quotations omitted)

for judgment on the pleadings and motion for summary judgment are denied.

CONCLUSION

Federal defendants' Motion for Judgment on the Pleadings (doc. 195) is GRANTED IN PART and DENIED IN PART as follows: the motion to dismiss President Trump as a defendant is granted, without prejudice, and is otherwise denied. Federal defendants' Motion for Summary Judgment (doc. 207) is GRANTED in part and DENIED in part as explained in this opinion. Federal defendants' requests to certify this opinion and order for interlocutory appeal are DENIED.

IT IS SO ORDERED.

Dated this 15th day of Oct. 2018.

/s/ ANN AIKEN
ANN AIKEN
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-71928

IN RE: UNITED STATES OF AMERICA; CHRISTY GOLDFUSS; MICK MULVANEY; JOHN HOLDREN; RICK PERRY; U.S. DEPARTMENT OF THE INTERIOR; RYAN ZINKE; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO; U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS; U.S. DEPARTMENT OF DEFENSE; JAMES N. MATTIS; 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; MICHAEL R. POMPEO; ANDREW WHEELER,

UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, IN HER OFFICIAL CAPACITY AS DIRECTOR OF 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; UNITED STATES DEPARTMENT OF INTERIOR; RYAN ZINKE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF INTERIOR; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, IN HER OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; UNITED STATES DEPARTMENT OF DEFENSE; JAMES N. MATTIS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE; UNITED STATES DEPARTMENT OF STATE;

ANDREW WHEELER, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE EPA; MICHAEL R. POMPEO, IN HIS OFFICIAL CAPACITY AS SECRETARY 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, 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

Filed: July 20, 2018

OPINION

Before: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

PER CURIAM.

In this petition for a writ of mandamus, the government asks us for the second time to direct the district court to dismiss a case seeking various environmental remedies, or, in the alternative, to stay all discovery and trial. We denied the government's first mandamus petition, concluding that it had not met the high bar for relief at that stage of the litigation. *In re United States*, 884 F.3d 830, 833 (9th Cir. 2018). No new circumstances justify this second petition, and we again decline to grant mandamus relief. The factual and procedural history of this case was detailed in our prior opinion, and we need not recount it here. *In re United States*, 884 F.3d at 833-34.

I

We have jurisdiction over this mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651. 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).

"Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

II

The government does not satisfy the *Bauman* factors at this stage of the litigation. It remains the case that the issues that the government raises in its petition are better addressed through the ordinary course of litigation. We thus decline to exercise our discretion to grant mandamus relief.

A

The government does not satisfy the first *Bauman* factor. The government argues that mandamus is its only means of obtaining relief from potentially burdensome or improper discovery. However, the government retains the ability to challenge any specific dis-

covery order that it believes would be unduly burdensome or would threaten the separation of powers.

In our opinion denying the first mandamus petition, we stated:

> 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.

In re United States, 884 F.3d at 835 (emphasis added).

Since that opinion, the government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery. Instead, the government sought a protective order barring all discovery, which the district court denied. The government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling discovery, then the government can seek mandamus relief as to that order. Preemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief. Absent a specific discovery order, mandamus relief remains premature.

This fact distinguishes this case from *In re United States*, ––– U.S. –––, 138 S. Ct. 443, 199 L. Ed. 2d 351 (2017) (per curiam), in which the Supreme Court granted mandamus relief based on a challenge to an

order compelling discovery. In that case, the district court had issued an order compelling the government to complete the administrative record over the government's objection that it had filed a complete record properly limited to unprivileged documents. *See id.* at 444. The district court had also declined the government's request to stay its order until after the court resolved the government's motion to dismiss. *Id.* at 444-45. In this case, the government does not challenge any such specific discovery order from the district court, and the district court has already denied the government's motion to dismiss. The government continues to have available means to obtain relief from improper discovery requests. It does not satisfy the first *Bauman* factor.

B

Nor does the government satisfy the second *Bauman* factor. The government makes two arguments for why it will be prejudiced in a way not correctable on appeal. Neither is persuasive.

The government argues, for the first time, that merely eliciting answers from agency officials to questions on the topic of climate change could constitute "agency decisionmaking," which the government contends could not occur without following the elaborate procedural requirements of the Administrative Procedure Act ("APA"). But the government cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA.

The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial. This distinguishes this case from others in which we have granted mandamus relief. *See Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997) (granting mandamus relief when a discovery order would force defendants "to choose between being in contempt of court for failing to comply with the district court's order, or violating Swiss banking secrecy and penal laws by complying with the order").

The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836. As we stated in our prior opinion, allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal. *Id.* No new circumstances disturb that conclusion.[22] *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

C

As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors. *In re United States*, 884 F.3d at 836-37. No new circumstances give us cause to reevaluate these conclusions.

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[22] Following our previous opinion, the government moved for the first time in the district court for judgment on the pleadings with respect to the inclusion of the President as a named party, and a decision is pending on that motion.

III

Because petitioners have not satisfied the *Bauman* factors, we deny the mandamus petition without prejudice. The government's fear of burdensome or improper discovery does not warrant mandamus relief in the absence of a single specific discovery order. The government's arguments as to the violation of the APA and the separation of powers fail to establish that they will suffer prejudice not correctable in a future appeal. The merits of the case can be resolved by the district court or in a future appeal. At this stage of the litigation, we decline to exercise our jurisdiction to grant mandamus relief.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

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

KELSEY CASCADIA ROSE JULIANA, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: June 29, 2018

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.

[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.

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).

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.

/s/ ANN AIKEN
ANN AIKEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 6;15-cv-1517-TC

KELSEY CASCADE ROSE JULIANA; ET AL.

v.

THE UNITED STATES OF AMERICA; ET AL., DEFENDANTS

Filed: May 25, 2018

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 "Plaintiffs 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 of 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 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 in 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.

/s/ THOMAS M. COFFIN
Thomas M. Coffin
United States Magistrate Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-71692

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 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

Filed: Mar. 7, 2018

OPINION

Before: SIDNEY R. THOMAS, Chief Judge, and MARSHA S. BERZON and MICHELLE T. FRIEDLAND, Circuit Judges.[*]

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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.

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, 67 S. Ct. 1558, 91 L. Ed. 2041 (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, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (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, 85 S. Ct. 234, 13 L. Ed. 2d 152 (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.

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, 124 S. Ct. 2576 (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 'claim will obviously be moot by the time an appeal is possible,' or in which one 'will not have the

[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*, —— U.S. ——, 138 S. Ct. 443, 199 L. Ed. 2d 351 (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.

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

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[2] See U.S. Courts, Federal Judicial Caseload Statistics 2017, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload

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, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (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 has been committed." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (quot-

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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.).

ing *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.

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.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

No. 6:15-cv-01517-TC

KELSEY CASCADIA ROSE JULIANA, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL, DEFENDANTS

OPINION AND ORDER

Filed: Nov. 10, 2016

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 Dr. James Hansen,

[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 Metier (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.)

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.

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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.

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 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 De-

partment 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

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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," Presi-

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 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.*,

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dent 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.

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, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (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'I 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (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, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (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, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). This limitation on the federal courts was recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (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 Tocqueviile 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 Tocqueviile, 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 de-

> partment; [(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, 82 S. Ct. 691. The *Baker* tests "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (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, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (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, 116 S. Ct. 1737. 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, 110 S. Ct. 701, 107 L. Ed. 2d 816 (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, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (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, 82 S. Ct. 691. 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, 82 S. Ct. 691. 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*, 566 U.S. 189, 132 S. Ct. 1421, 1431, 182 L. Ed. 2d 423 (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, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993), a former federal judge sought to challenge the Senate's processes for taking evidence during impeachment trials. *Id.* at 226, 113 S. Ct. 732. The Court found his claim nonjusticiable due to the Constitution's clear statement granting the Senate "the sole Power to try ail Impeachments." *Id.* at 229, 113 S. Ct. 732 (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, 113 S. Ct. 732. 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, 113 S. Ct. 732.

In *Davis v. Passman*, 442 U.S. 228, 235 n.11, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (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, 99 S. Ct. 2264.

Most recently, in *Zivotofsky ex rel. Zivotofsky v. Kerry*, the Court held that the Constitution gives the president the exclusive authority to recognize foreign nations and governments. ––– U.S. –––, 135 S. Ct. at 2086, 192 L. Ed. 2d 83. 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 ques-

tion 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, 82 S. Ct. 691 ("[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 ra-

ther 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, 127 S. Ct. 1955 (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, 78 S. Ct. 99, 2 L. Ed. 2d 80 (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 provi-

sions, 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, 82 S. Ct. 691. I conclude neither of the two final *Baker* factors deprives this Court of subject matter jurisdiction.

D. *Summary: This Case Does Not Raise a Non-justiciable 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, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (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, 82 S. Ct. 691. Sixty years of population growth without legislative reapportion-

ment had led to some votes carrying much more weight than others. *Id.* at 192-93, 82 S. Ct. 691. 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, 82 S. Ct. 691. 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.*, 67 N.J. 151, 336 A.2d 713, 734 (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

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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.

fashion practical remedies when confronted with complex and intractable constitutional violations." *Brown v. Plata*, 563 U.S. 493, 526, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (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, 82 S. Ct. 691 ("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.

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*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (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, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (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, 112 S. Ct. 2130. 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, 120 S. Ct. 693, 145 L. Ed. 2d 610 (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 wellbeing." *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 Zea-

land 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,

> Flood waters 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 waterlogged 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.*, ––– U.S. –––, 134 S. Ct. 1377, 1387 n.3, 188 L. Ed. 2d 392 (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, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (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, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (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, 118 S. Ct. 1777 ("[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. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (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, 112 S. Ct. 2130 (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 worldwide, 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, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011). 1 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, 1 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 "overlAPAnd 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 al-

leged 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, 127 S. Ct. 1438 (citing *Larson v. Valente*, 456 U.S. 228, 243 n.15, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (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 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

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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."

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, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (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, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (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,

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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.

720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (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 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, ––– U.S. ––––, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (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, 93 S. Ct. 705, 35 L. Ed. 2d 147 (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, 93 S. Ct. 705. 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, 93 S. Ct. 705. Similarly, in *Obergefell*, the Court's recognition of a fundamental right to many 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, 8 S. Ct. 723, 31 L. Ed. 654 (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, 109 S. Ct. 998, 103 L. Ed. 2d 249 (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

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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.

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 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]

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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

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, 25 L. Ed. 1079 (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, 25 L. Ed. 710 (1879). 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

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opinion, the political question doctrine sharply limits judicial review of decisions inherently entangled with the conduct of foreign relations.

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, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (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, 108 S. Ct. 791, 98 L. Ed. 2d 877 (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 Rev-

olution, 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, 14 S. Ct. 548, 38 L. Ed. 331 (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, 13 S. Ct. 110, 36 L. Ed. 1018 (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, 13 S. Ct. 110, 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, 13 S. Ct. 110. "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, 13 S. Ct. 110.

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*, 263 Or. App. 463, 328 P.3d 799 (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 defen-

dants 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 States v. Causby*, 328 U.S. 256, 261, 66 S. Ct. 1062, 90 L. Ed. 1206 (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*, 95 N.J. 306, 471 A.2d 355, 365 (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, 2015 WL 7721362 (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*, 623 Pa. 564, 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 unaf-

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 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, 108 S. Ct. 791 (discussing *Shively*, 152 U.S. at 57, 14 S. Ct. 548 and *Knight v. U.S. Land Ass'n*, 142 U.S. 161, 183, 12 S. Ct. 258, 35 L. Ed. 974 (1891)); *Alabama v. Texas*, 347 U.S. 272, 278, 74 S. Ct. 481, 98 L. Ed. 689 (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, 74 S. Ct. 481 (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 exer-

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fected 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, 13 S. Ct. 110 (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").

cised 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.

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, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012). A close examination of that case reveals that it cannot fairly be read to fore-

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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.").

close 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, 132 S. Ct. 1215. 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, 132 S. Ct. 1215. 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, 132 S. Ct. 1215. 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, 132 S. Ct. 1215 (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, 117 S. Ct. 2028, and *Appleby v. City of New York*, 271 U.S. 364, 395, 46 S. Ct. 569, 70 L. Ed. 992 (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, 117 S. Ct. 2028. 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, 117 S. Ct. 2028. 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 vari-

ety 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 matter of state law." *Id.* at 15 (quoting *PPL Montana*, 565 U.S. at 603, 132 S. Ct. 1215). 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 Fed. Appx. 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 deter-

mination 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, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (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, 96 S. Ct. 2285. 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, 96 S. Ct. 2285. 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, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (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, 131 S. Ct. 2527. 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 carbondioxide emissions from fossil-fuel fired power plants." *Id.* at 424, 131 S. Ct. 2527.

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 "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, 131 S. Ct. 2527).

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.

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

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 Tones & 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 lights and that governments were established by consent of the governed for the purpose of securing those rights.[13] Accordingly, the Declaration of Inde-

[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

pendence 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 public trust doctrine. *Illinois Central*, 146 U.S. at 459-60, 13 S. Ct. 110.

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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/vlch2s23.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.

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, 130 S. Ct. 3020 (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. Gonzales*, 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, 99 S. Ct. 2264 (1979); *see also Carlson v. Green*, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (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 stat-

ute 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*, 254 Or. 584, 462 P.2d 671, 672-73 (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. Straten, *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.

"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

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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.").

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.

ORDER and FINDINGS & RECOMMENDATION

Coffin, Magistrate Judge:

The motions before the court are directed against a relatively unprecedented lawsuit that, in essence, seeks relief from government action and inaction that allegedly results in carbon pollution of the atmosphere, climate destabilization, and ocean acidification. The government action and inaction allegedly threatens catastrophic consequences which have already began and will progressively worsen in the near future.

Plaintiffs include a group of younger individuals (aged 8-19) who assert concrete harm from excessive carbon emissions. Also among the plaintiffs are associations of activists who assert they are beneficiaries of a federal public trust which is being harmed by allegedly substantial impairment and alienation of public trust resources through ongoing actions to allow fossil fuel exploitation. Finally, plaintiff Dr. James Hansen participates as a guardian for plaintiff "future generations."

Plaintiffs are suing the United States and various government officials and agencies because, they assert, the government has known for decades that carbon dioxide (CO_2) pollution has been causing catastrophic climate change and has failed to take necessary action to curtail fossil fuel emissions. Moreover, plaintiffs allege that the government and its agencies have taken action or failed to take action that has resulted in increased carbon pollution through fossil fuel extraction, production, consumption, transportation, and exportation. Plaintiffs assert that a reduction of global CO_2 concentrations to less than 350 parts per million is possible, but action must be taken immediately to prevent further ocean acidification and ocean warming. Plaintiffs allege the current actions and omissions of defendants make it extremely difficult for plaintiffs to protect their vital natural systems and a livable world. Consequently, plaintiffs seek immediate action to restore energy balance and implementation of a plan to put the nation on a trajectory (that if adhered to by other major emitters) will reduce atmospheric CO_2 concentrations to no more than 350 parts per million by 2100.

Plaintiffs assert the actions and omissions of defendants that increased CO_2 emissions "shock the conscience," and are infringing the plaintiffs' right to life and liberty in violation of their substantive due process rights. Plaintiffs also allege defendants have violated plaintiffs' equal protection rights embedded in the Fifth Amendment by denying them protections afforded to previous generations and by favoring short term economic interests of certain citizens. Plaintiffs further allege defendants' acts and omissions violate the implicit right, via the Ninth Amendment, to a stable

climate and an ocean and atmosphere free from dangerous levels of CO_2. Finally, plaintiffs allege defendants have violated a public trust doctrine, secured by the Ninth Amendment, by denying future generations essential natural resources.

Through this action, plaintiffs ask the court to:

1. Declare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of CO_2 in the atmosphere, and that, in so doing, Defendants dangerously interfere with a stable climate system required by our nation and Plaintiffs alike;

2. Enjoin Defendants from further violations of the Constitution underlying each claim for relief;

3. Declare the Energy Policy Act, Section 201, to be unconstitutional on its face;

4. Declare DOE/FE Order No. 3041, granting long-term multi-contract authorization to Jordan Cove Energy for LNG exports from its Coos Bay terminal, to be unconstitutional as applied and set it aside;

5. Declare Defendants' public trust violations and enjoin Defendants from violating the public trust doctrine underlying each claim for relief;

6. Order Defendants to prepare a consumption-based inventory of U.S. CO_2 emissions;

7. Order Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect

> the vital resources on which Plaintiffs now and in the future will depend . . .

First Amended Complaint (# 7) at 94. Plaintiffs also seek to have this court retain jurisdiction over this action to monitor and enforce defendants' compliance with a national remedial plan and associated orders requiring the above.

In essence, plaintiffs assert a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit to force the government to take action to reduce harmful pollution. Although, plaintiffs, for the most part, do not challenge a specific agency action and urge the court to order government-wide action for the benefit of the earth and mankind, they also seek "other relief as the Court deems just and proper." Id.

The court has previously granted the National Association of Manufacturers (NAM), American Fuel & Petrochemical Manufacturers (AFPM), and American Petroleum Institute (API) motion to intervene in this action. These organizations represent various entities in the coal, oil, and gas industry, including businesses that extract, refine, and use such energy sources. The intervenors move to dismiss the amended complaint. The government similarly moves to dismiss all claims.[1]

Movants assert plaintiffs lack standing to bring this suit, raise non-justiciable political questions, and they fail to state a constitutional claim. In addition, the

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[1] The government also moves to strike various exhibits to declarations and declarations submitted by plaintiffs in opposition to the motion to dismiss. This recommendation is made without resort to these materials. Accordingly, the motion to strike is denied.

movants assert the public trust doctrine does not provide a cognizable federal cause of action.

A. Standing

Plaintiffs must demonstrate standing for each claim they seek to press and for each form of relief sought. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). For Article III standing, plaintiffs must satisfy three "irreducible constitutional minimum" requirements: (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at 560-61, 112 S. Ct. 2130.

1. Concrete, Particularized, Imminent Injury

Plaintiffs allege that climate change endangers humanity and nature and is a consequence of human caused or influenced green house gases, primarily CO_2, derived from the combustion of fossil fuels. First Amended Complaint (FAC) (# 7) at ¶ 202. Plaintiffs allege because CO_2 persists in the atmosphere, future emissions will lead to severe impacts on children and future generations and the current level of CO_2 has already taken our country into the "danger zone." Id. At 206-07. Plaintiffs aver emissions must be rapidly and systematically reduced in order to avoid crossing the tipping points that set in motion disastrous, irrevocable impacts to human civilization and nature. Id.

At 208. According to plaintiffs it will be nearly impossible for them to adapt to all of the current climate change impacts in the quick time-frame in which they will occur and that, therefore, "the survival and well-being of plaintiffs is significantly threatened by climate destabilization." Id. at ¶ 208, ¶ 211. Plaintiffs further allege that climate change is "already damaging human and natural systems, causing loss of life and pressing species to extinction." Id. at ¶ 213. Plaintiffs allege specifics regarding global changes that also lead to local harm such as: disintegration of both the West and East Antarctic ice sheets with concomitant sea level rise damaging coastal regions; changing rainfall and atmospheric conditions affecting water and heat distribution causing severe storm surges, floods, hurricanes, droughts, insect infestation, reduced crop yields, increased invasive vegetation, and fires; ocean acidification damaging sea life; increase in allergies, asthma, cancer, and other diseases; and harm to national security causing destabilization in various regions of the world. Id. at ¶¶ 213-241.

However, plaintiffs also assert injuries that are personal in nature such as: jeopardy to family farms resulting from the planned Jordan Cove gas line,[2] in-

[2] Following oral argument on the motions, the Federal Energy Regulatory Commission denied applications to locate the Jordan Cove Energy Project in Coos Bay, Oregon and its associated pipeline. The decision, balancing the need of the project against adverse impacts on landowners and the environment appears to be primarily based on a lack of current market need from natural gas customers in Asia. The applicants, Veresen Inc. and the Williams Partners, are free to reapply in the future and the Commission will reconsider the planned pipeline if they can demonstrate a market need for liquified natural gas. In addition, the applicants plan to

creased temperatures, and wildfires (FAC at ¶¶ 31-34, 23-30); lost recreational opportunities (e.g., FAC at ¶¶ 28-29, 31-34); and harm to family dwellings from superstorms (e.g., FAC at ¶ 71-72),[3] etc. See, Memorandum of Plaintiffs in Opposition to Federal Defendants' Motion to Dismiss (# 41) at pp. 29-33. While the personal harms are a consequence of the alleged broader harms, noted above, that does not discount the concrete harms already suffered by individual plaintiffs or likely to be suffered by these plaintiffs in particular in the future. See Federal Election Com'n v. Akins, 524 U.S. 11, 24, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998):

> Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact." See Public Citizen [v. U.S. Dept. of Justice], 491 U.S. [at 440,] 449-50, 109 S. Ct.

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file a request to rehear the decision. For purposes of the motion to dismiss, the court takes as true the allegations of an imminent threat from the proposed project.

[3] Plaintiff Victoria B's allegations (in addition to other plaintiffs) raise another issue not addressed in the motions to dismiss regarding this court's jurisdiction to address harms arising outside of the district from action and inaction by various government agencies that often also arise outside of the District of Oregon. *See, e.g.*, FAC at ¶ 72-73 (damage to home and school in New York as a result of superstorm Sandy). While such allegations highlight the unwieldy nature of the case, the allegations establish that CO_2 emissions cross geographic boundaries and cause harm within the district and outside the district from many of the same sources regulated by the defendants.

> at [2558,] 2564-2565[, 105 L. Ed. 2d 377 (1989)] ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [their] asserted injury"). Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) 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." This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. C.f. Lujan, supra, at 572, 112 S. Ct. at 2142-2143: Shaw v. Hunt, 517 U.S. 899, 905, 116 S. Ct. 1894, 1900-1901, 135 L. Ed. 2d 207 (1996).

The court must accept the allegations as true and those allegations plausibly allege harm, though widespread, that is concrete.

Of course, federal courts are not forums in which to air generalized grievances about the conduct of government. See Flast v. Cohen, 392 U.S. 83, 106, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). The constitutional limits on standing eliminate claims in which a plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, a plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. Duke Power Co. v. Carolina Environmental Study

Group, Inc., 438 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978).

> Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. at 499, 95 S. Ct. at 2205. He also must assert his own legal interests rather than those of third parties, [footnote omitted] Ibid. Accord, Arlington Heights v. Metropolitan Housing Dev. Corp., supra, 429 U.S. at 263, 97 S. Ct. at 561. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979).

Given the allegations of direct or threatened direct harm, albeit shared by most of the population or future population, the court should be loath to decline standing to persons suffering an alleged concrete injury of a constitutional magnitude. See U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973):

> standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in Sierra Club demonstrated the patent fact that persons across the Nation could be adversely affected by major govern-

> mental actions. See, e.g., Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 428 F.2d 1093, 1097 [(D.C. Cir. 1970)] (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Reade v. Ewing, 205 F.2d 630, 631-632 [(2d Cir. 1953)] (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

While the FAC identifies numerous climatic, meteorologic, and political harms that the Earth and its inhabitants will suffer as a result of the government's action and failure to act with respect to CO_2 emissions, the plaintiffs differentiate the impacts by alleging greater harm to youth and future generations.[4] At this stage of the proceedings, the allegations, which must be taken as true, establish action/inaction that injures plaintiffs in a concrete and personal way.

The debate about climate change and its impact has been before various political bodies for some time now. Plaintiffs give this debate justiciability by asserting harms that befall or will befall them personally and to a greater extent than older segments of society. It may be that eventually the alleged harms, assuming the cor-

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[4] The plaintiffs essentially allege that the defendants have "discounted" emissions so as to pass on more severe impacts to younger and future generations to allow the present (and older) generations to reap the economic benefits of higher carbon emissions.

rectness of plaintiffs' analysis of the impacts of global climate change, will befall all of us. But the intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government. This is especially true when such harms have an alleged disparate impact on a discrete class of society.

To reiterate, at this stage of the proceedings the court must accept the allegations of concrete particularized harm or imminent threat of such harm as true. The question then becomes whether the alleged harm is traceable to defendants' conduct and whether the court can redress such harm.

2. Causation

As noted above, there must be a causal connection between the injury and the conduct of which plaintiffs complained. In other words, the injury has to be 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. Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976).

At the pleading stage, general factual allegations of injury resulting from the defendants' conduct may suffice because the court must presume that general allegations embrace those specific facts that are necessary to support the claim. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The government asserts that the asso-

ciation between the complained of conduct (such as subsidizing the fossil fuel industry, favorable revenue code provisions, allowing transport of fossil fuels, and authorizing fossil fuel combustion in the energy/refinery/transportation/manufacturing sectors) and the associated greenhouse gas emissions that ultimately cause the harm is tenuous and filled with countless intervening actions by unidentified third parties. However, as alleged, without the complained of conduct, the third parties would not be able to engage as extensively in the activities that allegedly cause climate change and the resulting harm.

To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a line of causation between defendants' action and their alleged harm that is more than attenuated. Allen v. Wright, 468 U.S. 737, 757, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). A causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible. Nat'l Audubon Soc., Inc. v. Davis, 307 F.3d 835, 849 (9th Cir. 2002). In cases where a chain of causation involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, the causal chain may be too weak to support standing at the pleading stage. See Allen, 468 U.S. at 759, 104 S. Ct. 3315.

But here, there is an alleged strong link between all the supposedly independent and numerous third party decisions given the government's regulation of CO_2 emissions. See, e.g., 42 U.S.C. § 7409 (providing the EPA the authority to regulate national ambient air quality standards for the attainment and maintenance

of the public health); Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (EPA has power to regulate greenhouse gas emissions). If the allegations in the complaint are to be believed, the failure to regulate the emissions has resulted in a danger of constitutional proportions to the public health. Presumably, sweeping regulations by this agency (the EPA) alone could result in curtailing of major CO_2 producing activities by not just the defendant agencies, but by the purported independent third parties as well.[5] At this pleading stage, the court need not sort out the necessity or propriety of all the various agencies and individuals to participate as defendants, at least with respect to issues of standing. For now, it is sufficient that EPA's action/inaction with respect to the regulation of greenhouse gases allegedly results in the numerous instances of emissions that purportedly cause or will cause the plaintiffs harm. Assuming lack of EPA or other government action to reduce emissions, the analysis turns to redressability.

3. Redressability of the Injury

At this stage of the proceedings, the court's job is not to determine whether increased greenhouse gases

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[5] The court is aware that there are administrative procedures to petition EPA to make rules and that a denial of that decision is reviewable by the courts. The plaintiffs have apparently not sought such rulemaking to limit CO_2 emissions, but the court does have jurisdiction to address alleged constitutional violations by government agencies and to provide equitable relief. C.f. Reeves Brothers, Inc. v. EPA, 956 F. Supp. 665 (W.D. Va. 1995) (CERCLA general prohibition against federal court jurisdiction over challenges to remedial actions did not bar constitutional challenges to actions of EPA).

have impacted the climate and will have dire consequences for future generations. The issue is whether the court can fashion a remedy to address that alleged harm should plaintiffs prove it. Redressability does not require certainty, but it does require a substantial likelihood that the injury will be redressed by a favorable judicial decision. Wolfson v. Brammer, 616 F.3d 1045, 1056 (9th Cir. 2010).

Assuming plaintiffs are correct that the United States is responsible for about 25% of the global CO_2 emissions, the court cannot say, without the record being developed, that it is speculation to posit that a court order to undertake regulation of greenhouse gas emissions to protect the public health will not effectively redress the alleged resulting harm. The impact is an issue for the experts to present to the court after the case moves beyond the pleading stage. And although this court has no authority outside of its jurisdiction, it is worth noting that a Dutch court, on June 24, 2015, did order a reduction of greenhouse gas emissions nationwide by at least 25% by 2020. See Urgenda Foundation v. The State of The Netherlands, The Hague District Court, Chamber for Commercial Affairs, Case No. C/09/456689/HAZA 13-1396 (June 24, 2015) (http://deeplink.rechtspraak.n1/uitspraak?id=ECLI:NL:RBDHA:2015:7196) (rejecting arguments that a reduction of Netherlands' emissions would be ineffectual in light of other nations' practices, observing that "The state should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country the Netherlands should take the lead in this."). Thus, regula-

tion by this country, in combination with regulation already being undertaken by other countries, may very well have sufficient impact to redress the alleged harms. The effect may or may not be scientifically indiscernible, but that is an issue better resolved at summary judgment or trial rather than on a motion to dismiss. See Washington Environmental Council v. Bellon, 732 F.3d 1131, 1142-43 (9th Cir. 2013) (deciding at the summary judgment stage that numerous greenhouse gas sources inside and outside the U.S. contribute to the effect and that the nexus between the state's refinery emissions and localized impacts was too scientifically uncertain). Plaintiffs allege that expert evidence will show that the effect resulting from a court order for the government to take action to deter fossil fuel production and regulate emissions will have a discernible impact on the alleged constitutional harms likely to befall plaintiffs if the court does nothing.

At this stage, the court will not dismiss the premise that an order to regulate, per EPA's statutory authority to regulate CO_2, will result in that impact. The allegations establish that, for instance, the EPA's failure to regulate impacts the younger population within this district and it may very well be that an order to act to protect the public health as directed will address that harm.[6] Given the complexities of the allegations and the need for expert opinion to establish the harm associated with government action and the extent to which a court order can limit that harm, the issue may be better addressed at the summary judgment stage.

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[6] Plaintiffs allege that 'events, omissions, and harms giving rise to the claims herein arise in substantial part in this judicial district.' (FAC at ¶ 15)

In sum, for the above reasons, the court should decline to dismiss the case for a lack of standing.

B. Political Question

Closely related to the standing issue, is the issue of non-justiciable political questions. As plaintiffs note, "Standing is just the obverse of political question. If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question." Plaintiffs' Memorandum in Opposition to Intervenors' Motion to Dismiss (# 56) at p. 16, n.12 (citing Howard Fink & Mark Tushnet, *Federal Jurisdiction: Policy and Practice* 231 (2d ed. 1987).

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

While on the surface this case appears to implicate authority of the Congress, courts can order agencies delegated that authority (via Congress) to craft regulations, to engage in such process. Some defendant agencies have undertaken regulation of greenhouse gases allegedly exercising their discretion to prioritize relatively cheap energy over deleterious impacts to the environment. While courts cannot intervene to assert "better" policy, see, e.g., Massachusetts v. E.P.A., 549 U.S. at 533, 127 S. Ct. 1438 (once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute), they can address constitutional violations by government agencies and provide equitable relief. C.f. Reeves Brothers, Inc. v. EPA, 956 F. Supp. 665 (W.D. Va. 1995) (CERCLA general prohibition against federal court jurisdiction over challenges to remedial actions did not bar constitutional challenges to actions of EPA). The complaint does raise issues of whether government action/inaction violates the Constitution and these are issues committed to the courts rather than either of the political branches.

As implied above, the amended complaint's broad request for relief does implicate some unmanageable issues, but that does not bar the case completely. As also noted, at a minimum, the EPA is charged with regulating greenhouse gas emissions to protect the public health. While the efficacy of any proposed regulations is perhaps beyond the expertise of the court, it can evaluate the competing experts on either side of the issues and direct the EPA to take a hard look at the

best available scientific evidence. The court need not dictate any regulations, only direct the EPA to adopt standards that prevent the alleged constitutional harm to the youth and future generation plaintiffs, should plaintiffs prevail in demonstrating such is possible.[7] Again, it is too early in the proceedings to determine whether the issue can be resolved without expressing lack of respect due to the executive branch in conducting its rule-making authority delegated it by Congress. The motion to dismiss, on this basis, should be denied at this time.

Turning to the next issue, plaintiffs' standing and the lack of political questions require a valid constitutional claim.

C. Valid Constitutional Claim

Defendants argue that there is no constitutional right to be free from CO_2 emissions, that the complaint fails to allege a classification appropriate for an equal protection claim, that the Ninth Amendment does not provide any substantive rights, and that the plaintiffs have failed to allege an otherwise complete lack of any rational basis for the purported aggregate action/inaction taken by defendants. However, at this stage

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[7] Although not the route plaintiffs have expressly chosen in the prayer for remedies, they have asked for "other relief [deemed] just and proper" and, the court can compel EPA to perform non-discretionary acts or duties. 42 U.S.C. § 7604(a)(2); *see, e.g., Sierra Club v. Thomas,* 828 F.2d 783, 787-92 (D.C. Cir. 1987). The court's authority in this regard demonstrates that simply ordering an agency to take action delegated it by Congress in order to avoid constitutional harms does implicate justiciability and negates a finding that the issue is committed solely to another branch of government.

of the proceedings, defendants take an overly simplistic approach in construing the constitutional claims raised by plaintiffs. The complaint does not assert a right to be free from CO_2 emissions.[8] Plaintiffs assert that the defendants' action/inaction with respect to their obligations regarding regulating environmental pollutants has violated their substantive due process rights and has done so in favor of older generations.

The Fifth Amendment provides in part that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Courts must employ caution and restraint when employing substantive due process protections to government action. See Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977). However, courts must not abandon substantive due process rights either. Id. Accordingly, substantive due process rights are limited by careful respect for the teachings of history and recognition of the basic values that underlie our society. Id. at 503, 97 S. Ct. 1932. Therefore, only official conduct that "shocks the conscience" is cognizable as a due process violation. Porter v. Osborn, 546 F.3d 1131, 1137 (9th Cir. 2008).

Generally, the Due Process Clause limits the government's power to act, but does not guarantee certain minimal levels of safety and security. DeShaney v.

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[8] Plaintiffs do, however, assert that future generations are a suspect class. The court should decline to create a new separate suspect class based on posterity. Nonetheless, the complaint does allege discrimination against a class of younger individuals with respect to a fundamental right protected by substantive due process.

Winnebago County Dept. of Social Services, 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). The language of the Due Process Clause does not impose an affirmative obligation on the government to ensure that those interests do not come to harm through other means. Id. However, there is an exception where government action creates the danger. See L.W. v. Grubbs, 974 F.2d 119, 121-22 (9th Cir. 1992). In such cases, deliberate indifference may suffice to establish a due process violation. See L.W. v. Grubbs, 92 F.3d 894, 896 (9th Cir. 1996). Deliberate indifference requires creation of a dangerous situation with actual knowledge or willful ignorance of impending harm. Id. at 900. Plaintiffs allege that the defendants' action in this case has created a life-threatening situation and that defendants have willfully ignored long-standing and overwhelming scientific evidence of that impending harm to the young and future generations.

The government argues that the complaint fails to allege a clear and present danger of imminent harm, an overt government act that proximately causes the dangerous situation, deliberate indifference on the part of the government to plaintiffs' safety, or subsequent physical harm or loss of life. For purposes of a motion to dismiss, plaintiffs need only plead government action, or failure to act where it has a duty to do so, which creates a threat of imminent harm, and the government's deliberate indifference to that threat of harm.

In this case, the government has allegedly taken action through subsidies, regulations, etc. that creates massive CO_2 emissions, and has failed to limit such emissions despite a duty to do so. Plaintiffs further allege they are prevented any means of escape from

the resulting climate that threatens their property, health, and even existence. As noted above, the EPA has a duty to regulate CO_2 emissions for the benefit of the public health and plaintiffs allege a deliberate indifference to the purported catastrophic risk to their health and well-being. Whether such action, or inaction in the face of a duty to act, shocks the conscience cannot be determined on a motion to dismiss, which is focused solely on the plaintiffs' complaint and is bereft of any evidentiary record.[9] Accordingly, the court should decline to dismiss the complaint for failure to allege a substantive due process claim.

D. Public Trust Doctrine

Similarly, the court should decline to dismiss any notions in the amended complaint that the Due Process Clause also provides a substantive right under the public trust doctrine. As noted above, the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," Moore, 431 U.S. at 503, 97 S. Ct. 1932; Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

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[9] For example, discovery may produce evidence regarding when defendants and intervenors were aware of the harmful effects of CO_2 emissions and whether the public was purposely misled about those effects, which evidence would be relevant to the "shocks the conscience" standard.

Defendants argue that the Supreme Court and the Ninth Circuit have already foreclosed on the possibility of an independent cause of action under the doctrine against the federal government by a private individual. See PPL Montana, LLC v. Montana, 565 U.S. 576, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012) (the public trust doctrine remains a matter of state law); U.S. v. 32.42 Acres of Land. More or Less. Located in San Diego County, Cal., 683 F.3d 1030, 1038 (9th Cir. 2012) (While the equal-footing doctrine is grounded in the Constitution, "the public trust doctrine remains a matter of state law").

However, the cases cited by defendants are distinguishable. In PPL Montana, LLC, the Supreme Court essentially held that the State of Montana did not hold title to riverbeds under segments of river that were non-navigable at the time of statehood. Under the equal footing doctrine, which is embedded in the Constitution, a State takes title to all riverbeds of navigable rivers upon statehood. In response to the State of Montana's argument that "denying the State title to the riverbeds here in dispute will undermine the public trust doctrine," the Court observed:

> While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, see Shively, 152 U.S. at 49, 15-17, 24, 46, 14 S. Ct. 548, 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.

PPL Montana, LLC, 132 S. Ct. at 1235.

In other words, Montana's argument essentially was an attempt to conflate the equal footing doctrine with the public trust doctrine resulting in the State having title to even non-navigable riverbeds pursuant to the latter doctrine. The Court merely rejected this contention as "apples and oranges," pointing out that the equal footing doctrine requires that a State take title to riverbeds of *navigable* rivers upon statehood, and that thereafter state law determines the scope of the public trust over such waters. The question whether the United States has public trust obligations for waters over which it alone has sovereignty (e.g., the territorial seas of its coastline) was simply not presented to or decided by the Court in PPL Montana, LLC.

The seminal case for the public trust doctrine is Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892) which likewise implicated an equal footing question and in which the Court noted:

> That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on

> commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.

Id. at 452, 13 S. Ct. 110.

Once the State obtains sovereignty over navigable riverbeds, the United States has ceded all its title and thus the public trust doctrine governing the State's disposition of such lands "remains a matter of state law." PPL Montana, LLC, 132 S. Ct. at 1235.

Likewise, in U.S. v. 32.42 Acres of Land, More or Less, Located in San Diego County, Cal., the Ninth Circuit dealt with a case wherein the federal government exercised its powers of eminent domain to acquire San Diego Port District tidelands (for use by the United States Navy) which had been transferred to the State of California under the equal footing doctrine in 1850 when California was admitted to the Union. In response to the California Lands Commission argument that the public trust doctrine restricted the ability of both federal and State governments to alienate public trust lands free of the public trust, the Ninth Circuit held:

> While the equal-footing doctrine is grounded in the Constitution, "the public trust doctrine remains a matter of state law," the contours of which are determined by the states, not by the United States Constitution. PPL Montana, 565 U.S. 576, 132 S. Ct. 1215 at 1235, 182 L. Ed. 2d 77. Holding that California's public trust interest in the Property survives the federal government's attempt to condemn it would subjugate the federal government's eminent domain power to California's state law pub-

> lic trust doctrine. See [U.S. v.] Carmack, 329 U.S. at [230,] 240-42, 67 S. Ct. 252[, 91 L. Ed. 209 (1946)]; United States v. 11.037 Acres of Land, 685 F. Supp. 214, 217 (N.D. Cal. 1988) (holding that California's public trust is extinguished by United States' declaration of taking because state law public trust is trumped by federal power). The Supremacy Clause prevents this outcome. U.S. Const., art. VI, cl. 2.

U.S. v. 32.42 Acres of Land, More or Less, Located in San Diego County, Cal., 683 F.3d at 1038.

I also note that in the 32.42 Acres case the district court had specifically found, over the government's objection, that a portion of the land acquired by the United States within the tidelands (4.88 acres) was acquired subject to its own federal trust. See Order dated April 28, 2006 (# 24) at p. 11 in United States v. 32.42 Acres of Land, Case No. 05-cv-1137-DMS, (S.D. Cal. April 28, 2006) (emphases added). The government did not cross-appeal this part of the district court's order and it was not disturbed or addressed by the Ninth Circuit.

This case is different in that it does not at all implicate the equal footing doctrine or public trust obligations of the State of Oregon. The public trust doctrine invoked instead is directed against the United States and its unique sovereign interests over the territorial ocean waters and atmosphere of the nation.

The doctrine is deeply rooted in our nation's history and indeed predates it. See, e.g., Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894) (recounting the American history of the doctrine). As observed in Shively :

> At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the constitution to the United States.
>
> Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.
>
> The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

Id. at 57-58, 14 S. Ct. 548.

While the scope of the public trust doctrine may only reach the low water mark on the regions of the sea and great lakes, the water over those lands, and the waters and streams of any consequence, see, e.g., *The Public Trust Doctrine in Natural Resource Law:*

Effective Judicial Intervention, 68 Mich. L. Rev. 471, 556 (1970), the complaint touches upon protected areas (territorial ocean waters at a minimum) impacted by the government's alleged conduct and harm to many plaintiffs given the alleged sea level rise, ocean acidification, and atmosphere change.

What emerges from an analysis of the public trust doctrine is that it is rare to find instances where the United States retains vestiges of trust obligations once territories become states and title vests in the newly formed state pursuant to the equal footing doctrine of the Constitution. Some guidance is found, however, in those cases wherein the United States has reacquired tidelands through eminent domain from the State. One such case is United States v. 32.42 Acres of Land, supra. Another is City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447 (N.D. Cal. 1986), wherein the court squarely held that "The United States may not abdicate the role of trustee for the public when it acquires land by condemnation." Id. at 1450. See also United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk County, Com. of Mass., 523 F. Supp. 120, 124-25 (D. Mass. 1981):

> we hold that the federal government may take property below the low water mark 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 sovereign jus publicum in the land. So restricted, neither the Commonwealth's nor the federal government's trust responsibilities are destroyed by virtue of this taking, since neither gov-

ernment has the power to destroy the trust or to destroy the other sovereign.

The court's intervention in this area may seemingly touch upon powers committed to Congress under Article IV, § 3, C1. 2 (Congress shall have the power to dispose and make all needful rules and regulations respecting the territory and other property of the United States). In addition, it is not for the courts to say how the trust in resources and the territory shall be administered, that is for Congress to determine. State of Alabama v. State of Texas, 347 U.S. 272, 273, 74 S. Ct. 481, 98 L. Ed. 689 (1954) (citing United States v. California, 332 U.S. 19, 27, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947) ("the constitutional power of Congress under Article IV, § 3, C1. 2 is without limitation."). However, even defendant Department of the Interior has recognized limits on government control over the territorial sea. See United States Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Solicitor Department of the Interior, *Administration of Coral Reef Resources in the Northwest Hawaiian Islands,* 2000 WL 34475732 at *7 (September 15, 2000) (the public trust doctrine, which the Court did not address in Alabama, might limit in some ways the extent of the Government's control over the territorial sea). The Department further noted that doctrine does grant the government power to exercise dominion over that area to protect it and its resources for public enjoyment and noted the government's role as public trustee. Id. And, as noted above, courts have noted and restricted the federal government's actions with respect to tidelands based on the federal public trust. United States v. 32.42 Acres of Land, Case No.

05-cv-1137-DMS, supra; City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447, supra.

At the hearing on defendants and intervenors' motions to dismiss, the court their queried counsel whether, hypothetically, Congress could alienate the territorial waters of the United States off the West Coast to a private corporation, or whether that would implicate a public trust issue under the Constitution. Both parties suggested Congress could cede the territorial waters to a private corporation, and that PPL Montana, LLC, forecloses any argument that the public trust doctrine applies to the federal government.

As explained above, I cannot read PPL Montana, LLC, given the context of the argument being addressed by the Courts to have such a sweeping and profound effect.[10] Nor can I imagine that our coastal sea waters could possibly be privatized without implicating principles that reflect core values of our Constitution and the very essence of the purpose of our nation's government.

When combined with the EPA's duty to protect the public health from airborne pollutants and the government's public trust duties deeply ingrained in this country's history, the allegations in the complaint state,

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[10] In Shively, which the Court cited in its PPL Montana, LLC decision, expressly held that "[u]pon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory. Shively, 152 U.S. at 57, 14 S. Ct. 548. Thus, a federal public trust doctrine was recognized in Shively, and PPL Montana, LLC did not overrule this precedent.

for purposes of a motion to dismiss, a substantive due process claim. At this stage of the proceedings, the court cannot say that the public trust doctrine does not provide at least some substantive due process protections for some plaintiffs within the navigable water areas of Oregon. Accordingly, the court should not dismiss any claims under the public trust doctrine to that extent.

The nascent nature of these proceedings dictate further development of the record before the court can adjudicate whether any claims or parties should not survive for trial. Accordingly, the court should deny the motions to dismiss.

CONCLUSION

For the reasons stated above, the intervenors' motion to dismiss (# 19) and the government's motion to dismiss (# 27) should be denied. The government's motion to strike (# 58) is denied.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a

waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.