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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants hereby move the Court for judgment on the pleadings as to Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief (ECF No. 7) with prejudice pursuant to Federal Rule of Civil Procedure 12(c). This Court lacks jurisdiction over Plaintiffs' claims against the President, and Plaintiffs fail to state valid claims against all other Defendants. The bases for this motion are more fully set forth in the accompanying Memorandum of Law. Per Local Rule 7-1(a), the parties have conferred and Plaintiffs oppose this motion.

Dated: May 9, 2018

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

This suit is a fundamentally misguided attempt to change federal environmental and energy policy through the courts rather than the political process. In considering Defendants' petition for a writ of mandamus, the Ninth Circuit observed that "some of plaintiffs' claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress." *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018). The court of appeals instructed that "the district court needs to consider those issues further in the first instance," adding that "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that the court had "no reason to assume this case will be any different." *Id.* at 838.

In keeping with the court of appeals' directive, Defendants reassert their earlier arguments that this suit should be dismissed for the reasons previously stated. ECF No. 27. In addition, Defendants move for judgment on the pleadings on three other grounds.

First, Defendants ask this Court to "dismiss the President as a party," *In re United States*, 884 F.3d at 836, because a federal court has "no jurisdiction" to "enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (quoting *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475, 501 (1866)).

Second, Defendants seek judgment on Plaintiffs' claims against federal agencies and officials. Congress established the Administrative Procedure Act ("APA") as the sole mechanism for challenging federal administrative actions and inactions of the kind that underlie Plaintiffs' claims. But the APA requires litigants to challenge discrete, "final agency action," 5 U.S.C. § 704, and Plaintiffs' sweeping programmatic claims do not comply with that requirement. Unless Plaintiffs amend their claims to comply with the APA, they fail as a matter of law.

Third, even if Plaintiffs could bring this action outside the APA, their asserted claims and requested relief violate the constitutional separation of powers by effectively requiring the district court to supplant the President in calling on the expertise and resources of the Executive Branch and making recommendations to Congress concerning possible changes to federal environmental and energy policy.

BACKGROUND

I. The Amended Complaint

As the Court has recognized, Plaintiffs' claims are "unprecedented." ECF No. 83 at 52. Plaintiffs assert an unenumerated and previously unimagined constitutional right to a "climate system capable of sustaining human life." *Id.* They ask this Court to order President Obama (and later President Trump), the Executive Office of the President, and eight federal agencies to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." ECF No. 7 ("Am. Compl."), Prayer for Relief ¶ 7. Plaintiffs claim that Defendants have known about the risks of climate change "for decades" but have nevertheless "continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation—activities producing enormous quantities of CO_2 emissions that have substantially caused or contributed to the increase in the atmospheric concentration of CO_2." Am. Compl. ¶¶ 5-7. With one exception, Plaintiffs do not identify or challenge specific agency actions, but instead challenge what they term Defendants' "affirmative aggregate actions." *See, e.g.*, *id.* ¶¶ 1, 5, 163, 282-83, 289, 292, 294, 301, 306, 310.[1]

[1] Plaintiffs allege that the Jordan Cove LNG Terminal in Coos Bay, Oregon will produce significant greenhouse gas emissions that will harm Plaintiffs. Am. Compl. ¶¶ 198-201. As discussed further below, this Court lacks jurisdiction over that claim.

Plaintiffs predicate their demands on the Due Process Clause of the Fifth Amendment, equal protection principles in the Fifth Amendment, unenumerated rights reserved by the Ninth Amendment, and an asserted "public trust" duty—an infrequently invoked doctrine under state law whose principal purpose has been to govern state property rights in lands submerged beneath tidal and navigable waterways. Specifically, Plaintiffs complain that (1) the agencies have taken "deliberate actions" that have "cumulatively resulted in dangerous levels of atmospheric CO_2, which deprive Plaintiffs of their fundamental rights to life, liberty, and property," Am. Compl. ¶ 280; (2) Plaintiff youths are a protected class and, as such, are discriminated against by laws and actions that "favor the present, temporary economic benefits of certain citizens, especially corporations, over Plaintiffs' rights to life, liberty, and property," *id.* ¶¶ 294, 301; (3) Defendants have infringed on Plaintiffs' "right to be sustained by our country's vital natural systems, including our climate system," and their "right to a stable climate system," which are "implicit liberties protected from government intrusion by the Ninth Amendment," *id.* ¶¶ 303-04; and (4) Defendants have "failed in their duty of care as trustees to manage the atmosphere in the best interests of the present and future beneficiaries," including Plaintiffs, *id.* ¶ 310.

Plaintiffs seek a declaration that Defendants have violated their constitutional rights and the supposed public trust described above, that Section 201 of the Energy Policy Act is unconstitutional on its face, and that DOE/FE Order No. 3041 is unconstitutional as applied. *Id.*, Prayer for Relief ¶¶ 1, 3-5. They also seek an injunction prohibiting Defendants from future violations of the Constitution and alleged public trust obligations, and they ask the Court to order Defendants to "prepare a consumption-based inventory of U.S. CO_2 emissions," and "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." *Id.*, Prayer for Relief ¶ 2, 5, 6-7. They request that the Court

retain jurisdiction over the case for an indefinite period of time to monitor the government's compliance with the "national remedial plan." *Id.*, Prayer for Relief ¶ 8. Plaintiffs indicate that "[g]lobal atmospheric CO_2 concentrations must be reduced to below 350 [parts per million] by the end of the century," Am. Compl. ¶ 257, a goal that would require a "global reduction in CO_2 emissions of at least 6% per year, alongside approximately 100 gigatons of carbon drawdown this century from global reforestation and improved agriculture." *Id.* ¶ 258.

II. Procedural History

In November 2015, Defendants moved to dismiss Plaintiffs' claims on several grounds, including lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim under a public trust theory. ECF No. 27. The magistrate judge recommended that the Court deny the motion. ECF No. 68. Defendants objected to the magistrate judge's recommendations. ECF No. 74. The Court adopted the magistrate judge's recommendations and denied Defendants' motion to dismiss. ECF No. 83.

On March 7, 2017, Defendants moved to certify the Court's order for interlocutory appeal. ECF No. 120. The magistrate judge recommended that the Court deny the motion. ECF No. 146. Defendants objected to the magistrate judge's findings and recommendations, ECF No. 149, but the Court adopted them and denied the motion on June 8, 2017. ECF No. 172. The next day, Defendants petitioned for a writ of mandamus in the Ninth Circuit, arguing that the Court erred in finding that Plaintiffs have judicially enforceable rights in a "climate system capable of sustaining human life" and that mandamus was the only means of obtaining timely and effective relief. ECF No. 177-1.

On December 11, 2017, the Ninth Circuit heard argument on mandamus petition. The panel members expressed skepticism about the breadth of plaintiffs' claims. As Judge Berzon

put it, "I would hope that if this case did go forward, that it would be pared down and focused and directed at particular orders and agencies." Oral Arg. Recording at 11:23-11:33, *United States v. U.S. Dist. Court for Dist. of Or.*, No. 17-71692 (9th Cir. Dec. 11, 2017), https://www.ca9.uscourts.gov/media/.

On March 7, 2018, the Ninth Circuit denied Defendants' mandamus petition without prejudice. *In re United States*, 884 F.3d at 838. The court recognized that "some of plaintiffs' claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress." *Id.* at 837. The court "also underscore[d] that this case is at a very early stage, and that the defendants have ample opportunity to raise legal challenges to decisions made by the district court on a more fully developed record, including decisions as to whether to focus the litigation on specific governmental decisions and orders." *Id.* The court added that "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that the court had "no reason to assume this case will be any different." *Id.* at 838. Ultimately, however, the court "decline[d] to exercise [its] discretion to grant mandamus relief at [that] stage of the litigation." *Id.* The court reiterated that Defendants could continue to "raise and litigate any legal objections they have," including by moving to "dismiss the President as a party," "seeking mandamus in the future," or "asking the district court to certify orders for interlocutory appeal of later rulings." *Id.* at 836-38.

The district court has ordered the parties to proceed with discovery, and has set trial for October 29, 2018. ECF Nos. 181, 189, 192.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed . . . a party may move for judgment on the pleadings." In reviewing a motion for judgment on the pleadings,

the court "accept[s] the factual allegations in the complaint as true, and view[s] them in a light most favorable to the plaintiff." *LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015). "Judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citing *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 979 (9th Cir. 1999)). "A Rule 12(c) 'motion for judgment on the pleadings faces the same test as a motion under Rule 12(b)(6).'" *Goldingay v. Progressive Cas. Ins. Co.*, No. 3:17-CV-1491-SI, 2018 WL 561850, at *2 (D. Or. Jan. 25, 2018) (quoting *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988)). "Dismissal for failure to state a claim under Rule 12(b)(6) 'is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Id.* (quoting *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)).

ARGUMENT

As an initial matter, Defendants continue to assert that they are entitled to judgment as a matter of law for the reasons set forth in their November 2015 motion to dismiss, which Defendants reincorporate here. ECF No. 27. In particular, "the causal chain is too tenuous to support [Plaintiffs'] standing" to challenge their alleged injuries from the complex phenomenon of global climate change, because "a multitude of independent third parties are responsible for the changes" allegedly harming Plaintiffs. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1144 (9th Cir. 2013) (citation omitted). Plaintiffs' asserted injuries, many of which are shared by all others on the planet, are also generalized grievances that cannot be redressed by any remedy within an Article III court's jurisdiction. And even if Plaintiffs could establish standing, their novel assertion of a judicially enforceable fundamental right to a "climate system capable of

sustaining human life" lacks any support in the Constitution or this Nation's history and tradition. ECF No. 83 at 32. In light of the Ninth Circuit's direction that "the district court needs to consider those issues further in the first instance," and its observation that "[c]laims and remedies often are vastly narrowed as litigation proceeds," *In re United States*, 884 F.3d at 838, this Court should revisit its order denying the motion to dismiss and grant judgment to Defendants on some or all of Plaintiffs' claims.

Defendants are independently entitled to judgment for three reasons this Court has not yet addressed. First, Plaintiffs cannot obtain relief against the President, because the Court has "no jurisdiction" to "enjoin the President in the performance of his official duties." *Franklin*, 505 U.S. at 802–03 (quoting *Johnson,* 71 U.S. at 500). Second, barring amendment of the complaint, the vast majority of Plaintiffs' remaining challenges are unfocused programmatic challenges not cognizable under the APA, which presents the sole mechanism for challenging agency actions and inactions of the kind that underlie Plaintiffs' claims. Third, even if Plaintiffs could bring an equitable action outside the APA framework, their claims are inconsistent with the constitutional separation of powers because they would require this Court to displace Congress and the Executive in overseeing agencies of the Executive Branch, broadly assessing issues relating to climate change, and recommending and adopting new measures to address these issues.

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

The court of appeals contemplated that Defendants could move to "dismiss the President as a party." *In re United States*, 884 F.3d at 836. Defendants now ask this Court to do so.

Under unbroken legal authority dating back more than 150 years, the separation of powers generally bars federal courts from issuing an injunction against the President of the United States for official acts. *See Franklin,* 505 U.S. at 802–03 ("[I]n general, 'this court has no

jurisdiction of a bill to enjoin the President in the performance of his official duties.'"); *Johnson*, 71 U.S. at 500 ("Neither [the Congress nor the President] can be restrained in its action by the judicial department"); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (per curiam), *vacated and remanded on other grounds*, 138 S. Ct. 377 (2017) ("[T]he Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the Government is well taken."); *Newdow v. Bush*, 355 F. Supp. 2d 265, 280-82 (D.D.C. 2005) ("The prospect of this Court issuing an injunction against the President raises serious separation of powers concerns."); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) ("The President's unique status under the Constitution distinguishes him from other executive officials.").

The Supreme Court has left open the possibility that the President "might be subject to a judicial injunction requiring the performance of a purely 'ministerial" duty," *Franklin*, 505 U.S. at 802—that is, a duty "in respect to which nothing is left to discretion," *Mississippi*, 71 U.S. at 498. But Plaintiffs challenge no such ministerial acts here. To the contrary, Plaintiffs allege that the President has "failed to utilize his Office to initiate [a] comprehensive effort to phase out fossil fuel emissions" and has otherwise exercised his discretion in a manner that "permitted and encouraged fossil fuel exploitation, utilization, and exports." Am. Compl. ¶ 99. That is an "extraordinary" allegation that should do far more than "raise[] judicial eyebrows," *Franklin*, 505 U.S. at 802, because the claims and requested relief—and indeed the very litigation of this case—would entangle the Court in areas of policymaking that are committed to the political Branches: the general oversight of federal agencies in their administration of existing laws and the assessment, recommendation, and adoption of new components in the Nation's environmental and energy policy. Indeed, preventing such interference with the President's exercise of his official, constitutionally prescribed duties is the very reason that courts generally

prohibit an injunction against the President. *See Clinton v. Jones*, 520 U.S. 681, 718–19 (1997) (Breyer, J., concurring) ("[C]onstitutional principles counsel caution when judges consider an order that directly requires the President properly to carry out his official duties"); *Franklin*, 505 U.S. at 827 (Scalia, J., concurring) (describing the "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular Executive acts); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other.").

Plaintiffs cannot evade this constitutional problem by recasting their claims to seek only a declaratory judgment against the President. "A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010). Indeed, the D.C. Circuit has explained that "similar considerations regarding a court's power to issue relief against the President himself"—that is, similar separation of powers concerns—"apply to [a plaintiff's] request for a declaratory judgment." *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996).

Moreover, agency actions or inactions that are subject to challenge under existing law may be brought in a suit against another Defendant to the extent Plaintiffs would have standing to bring such a challenge and the other prerequisites to judicial review are satisfied. *See Franklin*, 505 U.S. at 803 (finding that plaintiffs' injuries could be redressed by entry of declaratory relief against the Secretary of Commerce, but ultimately rejecting underlying claim); *Swan*, 100 F.3d at 979-81 (bypassing issue of injunction against President by finding that plaintiffs' alleged injuries are redressable against subordinate executive officials, but ultimately rejecting underlying claim); *Trump*, 859 F.3d at 788 ("We conclude that Plaintiffs' injuries can be

redressed fully by injunctive relief against the remaining Defendants."). Notably, Plaintiffs do not identify a single executive action attributable to the President alone. Any injuries that Plaintiffs may claim arising from executive action can be redressed through a properly framed APA action against the agency defendants. *See Franklin*, 505 U.S. at 803. Accordingly, "the extraordinary remedy of enjoining the President is not appropriate here," and Defendants are entitled to judgment on Plaintiffs' claims against the President. *Trump*, 859 F.3d at 788.

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

The Ninth Circuit observed that the "[c]laims and remedies often are vastly narrowed as litigation proceeds" and that there is "no reason to assume this case will be any different." *In re United States*, 884 F.3d at 838. The proper way to "narrow[]" the claims and remedies is for Plaintiffs to "focus the litigation on specific governmental decisions and orders." *Id.* at 837; *see* Oral Arg. Recording at 11:23-11:33 (Judge Berzon: "I would hope that if this case did go forward, that it would be pared down and focused and directed at particular orders and agencies."). Such a focus on particular agency action is compelled by the APA, which provides the sole mechanism for Plaintiffs to challenge the administrative decisions that underlie this action.[2] In their current form, however, Plaintiffs' claims (with one exception) fail to comply with the APA's requirement to challenge discrete and final agency action. Unless Plaintiffs amend their complaint to comply with the APA, Defendants are entitled to judgment.

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

A. Any Justiciable Claims Plaintiffs Have Asserted Must Proceed Under the Administrative Procedure Act

To bring suit in a federal court, a plaintiff must have a valid cause of action. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). Plaintiffs appear to suggest that the Constitution itself provides an across-the-board cause of action for constitutional claims. Am. Compl. ¶ 13 ("This action . . . is authorized by Article III, Section 2, which extends the federal judicial power to all cases arising in equity under the Constitution."). But no such generic constitutional cause of action exists. The only case cited by Plaintiffs in describing a potential cause of action is *Obergefell v. Hodges*, Am. Compl. ¶ 13, but *Obergefell* was an action against state officials under a *statutory* cause of action: 42 U.S.C. § 1983. *See* 135 S. Ct. 2584, 2593 (2015).

Although the Supreme Court has repeatedly addressed the cause-of action requirement, it has never adopted the position that the Constitution itself provides an across-the-board cause of action for all constitutional claims—and especially for the sweeping constitutional claims Plaintiffs advance here and the sweeping relief they seek. Indeed, the Court recently decided that "the Supremacy Clause does not confer a right of action," a decision that would make no sense if Plaintiffs were right that constitutional claims are automatically cognizable. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 618 (2012) (Roberts, C.J., dissenting) (noting that "the parties have debated broad questions, such as whether and when constitutional provisions as a general matter are directly enforceable," and concluding that the Supremacy Clause does not create a cause of action).

As the Court explained in *Armstrong*, federal courts have equitable authority in some circumstances "to enjoin unlawful executive action." 135 S. Ct. at 1385; *see, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Critically, however, that equitable power is "subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (citation omitted). That limitation traces back to foundational principles of equity jurisprudence. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Armstrong*, 135 S. Ct. at 1385 (quoting *INS v. Pangilinan*, 486 U.S. 875, 883 (1988)); *see Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874) (A court of equity may not "create a remedy in violation of law, or even without the authority of law"); 1 JOHN N. POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 425, 704-05 (3d ed. 1905) ("Equity follows the law.").

Here, the APA provides "express . . . statutory limitations" that "foreclose" an equitable cause of action to enforce Plaintiffs' asserted constitutional claims, *Armstrong*, 135 S. Ct. at 1385, outside of the provisions for judicial review in the APA itself. The first sentence of Section 702 of the APA sets forth the cause of action contemplated by the statute: "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 term "agency action" includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity," among other legal defects, *id.* § 706(2), and to "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1). The APA thus provides a "comprehensive remedial scheme" for "persons adversely affected by agency action." *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009).

Plaintiffs' claims boil down to allegations that a large number of (mostly unspecified) "agency action[s]" and inactions are "contrary to constitutional right"—and are thus within the scope of the APA. *See* 5 U.S.C. §§ 702, 706. Plaintiffs allege, in various forms, that "Defendants have knowingly endangered Plaintiffs' health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion, and by subsidizing and promoting this fossil fuel exploitation." Am. Compl. ¶ 280. They allege Defendants have done so through a series of unspecified agency actions: the leasing of lands for mineral development; the permitting of oil and gas wells, coal mines, pipelines, and power plants; the development of management plans for federal lands; and the implementation of rulemakings that govern mineral development, to name a few. *See, e.g.*, *id.* ¶¶ 5, 7, 12, 163, 292, 298, 305. Plaintiffs' own decision to sue executive agencies and officials reflects their understanding that the government's decisions regarding fossil fuel development are made by many individual federal agencies and officials, all of which are operating pursuant to the APA and their respective governing statutes. *See, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950) (describing APA's "comprehensive" system of procedures for agencies).

Each of the individual agency decisions implicitly challenged by Plaintiffs—each lease, each permit, each rulemaking, each management plan—is thus an "agency action" reviewable, if

at all, under the APA. 5 U.S.C. §§ 551(13), 701, 702, 704, 706. And because the APA constitutes a "carefully crafted and intricate remedial scheme" for challenging agency action, courts are not free "to supplement that scheme with one" of their own creation. *Seminole Tribe*, 517 U.S. at 73-74 (citation omitted); *see W. Radio*, 578 F.3d at 1122-23. As in *Armstrong*, Congress' provision of the APA mechanism for challenging unlawful agency action demonstrates its "intent to foreclose" any other relief, including an equitable cause of action. *Armstrong*, 135 S. Ct. at 1385; *see id.* (explaining that "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others'" (quoting *Alexander*, 532 U.S. at 290)). The APA accordingly "describes the exclusive mechanism . . . by which the federal district courts may review" challenges to agency action of the kind that underlie Plaintiffs' claims here. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1220 (D.N.M. 2014); *accord, e.g.*, *Occupy Eugene v. U.S. Gen. Serv. Admin.*, No. 6:12-CV-02286-MC, 2013 WL 6331013, at *6 (D. Or. Dec. 3, 2013) (dismissing constitutional claims against federal officials because APA provides appropriate remedy); *see also Webster v. Doe*, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting) (explaining that the APA "is an umbrella statute governing judicial review of all federal agency action" and that "if review is not available under the APA it is not available at all").

There is nothing talismanic about Plaintiffs' assertion of constitutional claims. Section 706 of the APA expressly states that judicial review extends to alleged constitutional violations: "The reviewing court shall — . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B); *see Webster*, 486 U.S. at 603-04 (finding Due Process Clause and Equal Protection claims can proceed under APA judicial review provisions). Indeed, the legislative

history of the APA confirms Congress's intent that the statute provide the exclusive means of "judicial review of *all* administrative rules and of *all* administrative decisions and orders," including review of alleged constitutional violations. S. Rep. No. 76-442, at 6 (May 17, 1939) (emphasis added); S. Rep. No. 79-752, at 26 (Nov. 19, 1945); H. Rep. No. 79-1980, at 42 (May 3, 1946). Plaintiffs' assertion of constitutional claims thus does not change the fact that the APA provides the exclusive mechanism for raising their challenges to agency action. "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, [courts] have not created additional . . . remedies." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

The admonition against fashioning implied rights of action for constitutional claims against federal officials—especially where Congress has enacted a statutory procedure for judicial review—is rooted in the separation of powers. In the context of damages actions against federal officers for constitutional violations, the Supreme Court has permitted implied causes of action in a narrow range of circumstances, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), but in recent decades has repeatedly refused to extend that right of action "to any new context or new category of defendants," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). As Justice Scalia explained, there "is even greater reason" for caution in implying constitutional causes of action than in implying statutory causes of actions, because "an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Id.* at 75 (Scalia, J., concurring). Of particular relevance here, both the Supreme Court and the Ninth Circuit have refused to imply rights of action to seek damages against federal officials for constitutional claims involving public lands, precisely because the APA

provides an alternate remedy. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *W. Radio*, 578 F.3d at 1122-23.

In sum, beyond the fundamental threshold defect that Plaintiffs' claims are nonjusticiable in an Article III court, any such claims could be brought only under the purview of APA Section 706, which Congress has established as the vehicle to review Plaintiffs' constitutional claims concerning action or inaction by government agencies. Because Congress has provided a statutory remedy in Section 706 for constitutional claims seeking equitable relief, it "obviates the need to imply a constitutional remedy on the plaintiffs' behalf." *Mahone v. Waddle*, 564 F.2d 1018, 1024-25 (3d Cir. 1977).

B. Plaintiffs' Challenges to Government Programs and Policies Fail to State a Permissible Claim Under the APA

Because the APA provides the sole mechanism for Plaintiffs to bring their claims, they must comply with the APA's requirements for judicial review. Of particular relevance here, they must direct their challenges to "circumscribed, discrete" final agency action, rather than launching a "broad programmatic attack" on agency policies in general. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62, 64 (2004); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 801-06 (9th Cir. 2013); *see also* 5 U.S.C. §§ 702, 704.

As Plaintiffs' complaint is currently formulated, only one allegation even arguably can be read to challenge a discrete, final agency action. The complaint alleges injuries resulting from the Department of Energy's Order No. 3041, issued in December 7, 2011, which granted approval for certain exports of liquefied natural gas from a proposed liquefaction facility and export terminal in Coos Bay, Oregon. Am. Compl. ¶¶ 192-201. DOE issued this Order pursuant to Section 201 of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which

was codified as Section 3(c) of the Natural Gas Act ("NGA"), and provides that the exportation of natural gas to "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such . . . exportation shall be granted without modification or delay." 15 U.S.C. § 717b(c). Plaintiffs allege that the export of natural gas through the Coos Bay facility pursuant to Section 201 will "increase carbon pollution and exacerbate already-dangerous climate instability," and thereby violate Plaintiffs' asserted constitutional rights.[3] Am. Compl. ¶ 288. Plaintiffs ask this Court to declare Section 201 "unconstitutional on its face," and to declare Order No. 3041 "unconstitutional as applied" and "set it aside." *Id.*, Prayer for Relief ¶¶ 3-4.

Plaintiffs' challenge to Order No. 3041, however, is not properly before this Court because, if viable at all, it should have been brought in the appropriate court of appeals. Section 19(b) of the NGA vests the courts of appeals with exclusive jurisdiction to review orders regarding the import or export of natural gas pursuant to the NGA. 15 U.S.C. § 717r(b); *see, e.g.*, *Sierra Club v. United States Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017). Because the specific provisions of the NGA direct review exclusively to the court of appeals, neither the general review provisions of the APA nor any other statutory provisions provide a basis for this Court to review Plaintiffs' challenge to Order No. 3014. *See Elgin v. Dep't of Treasury*, 567

[3] Whether any LNG will ever be exported from the proposed Jordan Cove LNG Terminal remains unclear. The Terminal has not been built because it has not yet obtained the required approval from the Federal Energy Regulatory Commission ("FERC"). FERC Docket Nos. CP17-495 (Jordan Cove Terminal), CP17-494 (Pacific Connector Pipeline). After FERC denied the initial applications in December 2016, Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, L.P. submitted new applications for the proposed Terminal and the associated pipeline on September 21, 2017. *Id.* FERC is currently reviewing the proposed project pursuant to the National Environmental Policy Act ("NEPA"), among other statutes, and has not yet approved the applications. *Id.*

U.S. 1, 9 (2012) (holding that district court jurisdiction is barred by a specific provision vesting review in a court of appeals).[4]

Aside from their allegations directed at Order No. 3041, Plaintiffs have not identified any discrete, final agency actions as required to assert a valid challenge under the APA. *See Norton*, 542 U.S. at 62-64 (2004); *Lujan*, 497 U.S. at 891; *San Luis Unit Food Producers*, 709 F.3d at 801-06.[5] To the contrary, Plaintiffs expressly cast their claims as a challenge to "affirmative aggregate actions" by the numerous Defendant agencies that "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels." Am. Compl. ¶¶ 1, 5. A challenge to "aggregate actions," however is the antithesis of the "*discrete* agency action" that the Supreme Court has explained must be challenged under the APA. *Norton*, 542 U.S. at 64; *see id.* at 63 ("The important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13) [defining 'agency action'], to a *discrete* action.").

Plaintiffs' challenge to "aggregate actions" is instead precisely the kind of sweeping "programmatic" challenge that the Supreme Court foreclosed in *Lujan*. 497 U.S. at 891. There, plaintiffs challenged "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and

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[4] Further, as Defendants explained in conjunction with their mandamus petition, a challenge to Order No. 3041 may not succeed in the court of appeals because Plaintiffs lack standing. *See* Pet'rs' Reply in Supp. of Pet. for Writ of Mandamus 14-15, *In re United States*, No. 17-71692 (9th Cir. Sept. 11, 2017), Dkt. No. 34.

[5] Plaintiffs cannot use one example of a specific agency action to justify a challenge to a range of other unidentified programs and policies. *See Sierra Club v. Peterson*, 228 F.3d 559, 563 & n.6, 567 (5th Cir. 2000) (en banc) (rejecting challenge to Forest Service general timber management practices even though plaintiff had identified twelve specific example timber sales because "they merely used these sales as evidence to support their sweeping argument that the Forest Service's 'on-the-ground' management of the Texas forests over the last twenty years violates the [National Forest Management Act].").

developing land use plans as required by the [Federal Land Policy Management Act]." *Id.* at 890. The Court explained that the challengers could not "seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* at 891. In the courts, the challengers were required to "direct [their] attack against some particular 'agency action' that causes [them] harm. *Id.* The *Lujan* plaintiffs tried to make the actions of the BLM appear more discrete by calling them a "land withdrawal review program," but the Court rebuffed that effort and found that the so-called "land withdrawal review program . . . is no more an identifiable 'agency action'—much less a 'final agency action'—than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id.* That is, the term is an umbrella for thousands of discrete agency actions that must be challenged individually. *Id.* at 891.

Notably, the *Lujan* plaintiffs challenged the actions of only one agency and identified a particular type of action ("land withdrawal") under a particular statute (FLPMA)—and that challenge was rejected as too sweeping and diffuse to constitute final agency action under the APA. Plaintiffs' asserted challenge here is dramatically more sweeping and diffuse than even the failed effort in *Lujan*. Plaintiffs challenge the actions of eight federal agencies and the President without identifying those actions in any specific or meaningful way. That is because the categories of activities that Plaintiffs purportedly challenge—the "permitting, authorizing, and subsidizing" and "approving and promoting" of fossil fuels—are so broad as to be meaningless. *See, e.g.,* Am. Compl. ¶¶ 5, 7, 12, 279-80. Federal agencies do not "permit," "authorize," "subsidize," "approve," or "promote" "fossil fuels" in the abstract. They instead perform particular agency actions tailored to particular purposes and needs in a particular

location, and they are subject to a range of different statutory and regulatory requirements. Without the identification of specific agency actions, Plaintiffs' challenge to "affirmative aggregate actions" is plainly unreviewable under the principles announced in *Norton* and *Lujan*. *See San Luis Unit Food Producers*, 709 F.3d at 803-06 (rejecting farmers' suit to compel the Bureau of Reclamation to provide more water to irrigation districts because it "amount[s] to a broad programmatic attack on the way the Bureau generally operates the Central Valley Project").

The failure of Plaintiffs' claims to meet the requirements of the APA is made particularly clear by their requested relief: an order that the government prepare and implement a "national remedial plan" to address climate change over which the Court retains jurisdiction "to monitor and enforce" compliance. Am. Compl., Prayer for Relief ¶ 7. In the course of explaining why the APA must be limited to claims against discrete agency actions, the Supreme Court rejected just such a potential remedy, warning that "[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved-which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *Norton*, 542 U.S. at 66–67. The flaws in Plaintiffs' suit here are far more fundamental because they seek judicial supervision of the President and eight executive departments, without regard to controlling statutory mandates, by relying on a supposed right under the Due Process Clause that Plaintiffs claim imposes obligations on the political branches of the United States Government as a whole to every person in the United States, individually and collectively. This Court, in short, has no authority to issue a "general order" dictating the political branches' approach to climate

change writ large, let alone to instruct the government how to prepare and implement a new approach as Plaintiffs expressly ask it to do.

The APA's requirement that plaintiffs challenge discrete "agency actions" is not an administrative formality; it serves to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. It is hard to imagine a lawsuit that more squarely implicates those concerns than this one, in which Plaintiffs ask a single district court to direct the development and implementation of environmental and energy policy for the entire Nation. Such a request is precisely what the Supreme Court foreclosed when it explained that the APA prevents a challenger from seeking "*wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891. While this "case-by-case approach" may be "frustrating" to litigants like Plaintiffs, it is "the traditional, and . . . normal, mode of operations of the courts." *Id*. at 894. "[M]ore sweeping actions" are the province of "the other branches" of government. *Id.*

None of this is to say that Plaintiffs could not potentially amend their complaint or file a different lawsuit that asserts cognizable challenges to some discrete agency actions. So long as they meet timeliness and jurisdictional requirements, for example, Plaintiffs could potentially challenge discrete final agency actions like coal leases, oil and gas leases, oil and gas drilling permits, pipeline permits, facility permits, and rulemakings. *See, e.g.,* Am. Compl. ¶¶ 164-70, 179-82, 185-91. Focusing their claims in this manner would be a proper way to "vastly narrow[]" the case, as the Ninth Circuit envisioned. *In re United States*, 884 F.3d at 838; *see* Oral Arg. Recording at 11:23-11:33 (Judge Berzon: "I would hope that if this case did go

forward, that it would be pared down and focused and directed at particular orders and agencies."). If Plaintiffs decline to do so, however, this Court must enter judgment for the United States.

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

Even if this Court were to conclude that Plaintiffs' challenges to agency action are cognizable outside the framework of the APA, Defendants are still entitled to judgment on the pleadings because adjudicating Plaintiffs' claims would violate the separation of powers. At its most basic level, Plaintiffs' suit is an improper attempt to make and impose environmental and energy policy writ large through constitutional litigation under a clause of the Bill of Rights designed to protect true individual liberties, not the general interests of the citizenry at large. Because adjudicating Plaintiffs' claims, as currently formulated, would effectively place this Court in the position of the President or Congress, those claims should be dismissed.

Article III, Section 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article I, Section 1, similarly vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." And Article II, Section I, vests "[t]he executive Power . . . in a President of the United States of America." It is a central feature of the separation of powers "that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996) (citation omitted); *see, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

The judicial power is "one to render dispositive judgments" in "Cases or Controversies" as defined by Article III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quotation and citation omitted). The "[j]udicial power" can "come into play only in matters that were the

traditional concern of the courts at Westminster," and only when those matters arise "in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (citation omitted); *see Stern v. Marshall*, 564 U.S. 462, 485 (2011). Aside from the extensive standing problems that Defendants have already identified, Plaintiffs fail to present this Court with a cognizable case or controversy because they seek an adjudication and relief that stretches far beyond anything on which the "courts at Westminster"—or any court in this country—has ever rendered judgment. *Stevens*, 529 U.S. at 774. Plaintiffs' breathtakingly broad request that this Court "[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 so as to stabilize the climate system," and then "[r]etain jurisdiction over this action to monitor and enforce" the government's "compliance with the national remedial plan" crosses the line from adjudication into legislation and execution of the law. Am. Compl. ¶ 99, Prayer for Relief ¶¶ 7-8.

As a unanimous Supreme Court recently explained, "Congress designated an expert agency, [the] EPA, as best suited to serve as primary regulator of greenhouse gas emissions." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (Ginsburg, J., for a unanimous Court). "The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* Among other reasons, "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal

district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Id.* (internal citation omitted).

Plaintiffs would have this Court eviscerate those carefully constructed limitations on the judicial role and instead supplant the President by ordering federal executive agencies and their principal officers "to prepare and implement" a particular kind of plan designed to achieve Plaintiffs' sweeping policy goal, subject to the Court's continuing oversight for compliance. Am. Compl. ¶ 99 & Prayer for Relief ¶ 7. Providing that relief would vastly exceed the judicial power vested by Article III in the district court and would invade the power of Congress to enact laws for the governance of the Nation and the President's exclusive power to supervise federal agencies as the Nation's Chief Executive. *See Free Enter. Fund*, 561 U.S. at 496; *Clinton*, 520 U.S. at 712-713 (Breyer, J., concurring in the judgment) (explaining that Article II "makes a single President responsible for the actions of the Executive Branch").

An order from this Court directing executive officials to "prepare and implement" a plan to achieve a particular policy objective with respect to climate change would also trench on the President's exclusive constitutional authority to "require the Opinion . . . of the principal Officer in each of the executive Departments," U.S. CONST. art. II, § 2, cl. 1, and to "recommend to" Congress for "Consideration such Measures as he shall judge necessary and expedient," U.S. CONST. art. II, § 3; *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004). Those are the mechanisms the Constitution contemplates for marshalling expertise and resources across the Executive Branch outside the framework for administering particular agency programs and for proposing new measures to the extent existing laws are thought to be inadequate. There is neither constitutional nor statutory authority for "the grand scale action plaintiffs delineate," in which this Court is "cast . . . as nationwide overseer or pacer of procedures government agencies

use to" address climate change. *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 744 (D.C. Cir. 1990) (R.B. Ginsburg, J.). "It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Because Plaintiffs' claims cannot be adjudicated consistently with core separation of powers principles, Defendants are entitled to judgment as a matter of law.

CONCLUSION

Plaintiffs' complaint fails as a matter of law. Plaintiffs' policy disagreements with the federal government are not judicially cognizable claims. The relief they seek—an injunction against the President and programmatic change in the government's approach to climate change—is not relief that this Court can provide. And the challenges they make against "affirmative aggregate actions" are not claims that this Court has jurisdiction to entertain. Accordingly, Defendants are entitled to judgment on the pleadings.

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