JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

LISA LYNNE RUSSELL, Chief
GUILLERMO A. MONTERO, Assistant Chief
SEAN C. DUFFY (NY Bar. No. 4103131)
MARISSA A. PIROPATO (MA Bar. No. 651630)
CLARE BORONOW (admitted to MD bar)
FRANK J. SINGER (CA Bar No. 227459)
Trial Attorneys
Natural Resources Section
601 D Street NW
Washington, DC 20004
Telephone: (202) 305-0445
Facsimile: (202) 305-0506
sean.c.duffy@usdoj.gov

Attorneys for Defendants

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' OBJECTIONS TO ORDER DENYING MOTION FOR A PROTECTIVE ORDER AND STAY OF DISCOVERY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

In denying Defendants' petition for a writ of mandamus, the Ninth Circuit stated its expectation that the "[c]laims and remedies" in this case would be "vastly narrowed as litigation proceeds." *United States v. U.S. Dist. Court for Dist. Of Or.*, 884 F.3d 830, 836, 838 (9th Cir. 2018). Specifically, the Ninth Circuit contemplated that the government would "seek protective orders," move to "dismiss the President as a party," and seek "summary judgment on the claims." *Id.* at 835-38. The court added that Defendants could continue to "raise and litigate any legal objections they have," including by "seeking mandamus in the future" or "asking the district court to certify orders for interlocutory appeal of later rulings." *Id.*

The government has now moved for each of the forms of relief contemplated by the Ninth Circuit, as well as a stay of discovery pending resolution of those motions. *See* ECF Nos. 195 (Motion for Judgment on the Pleadings), 196 (Motion for a Protective Order and Stay of Discovery), 207 (Motion for Summary Judgement). None of those motions has yet been resolved by this Court. Nevertheless, the magistrate judge has denied the motion for a protective order and for a stay without substantively engaging with any of Defendants' arguments. ECF No. 212. That was clear error. Absent the protective order Defendants seek, or, at a minimum, a stay of discovery pending resolution of the motions now pending before this Court, Defendants—the President of the United States and eight federal agencies and officials—will very soon be subjected to discovery on the "broad" claims that the Ninth Circuit expected to be "vastly narrowed" and that Defendants seek to dismiss in their entirety in the motions before this Court. *United States v. U.S. Dist. Court for Dist. Of Or.*, 884 F.3d at 837-38. This Court's immediate intervention is warranted.

This Court should grant the protective order that the magistrate judge denied. The magistrate judge's decision—which was issued before Defendants had the opportunity to reply—fundamentally misconceives Defendants' arguments and the procedural history of this litigation. The decision is "clearly erroneous" and "contrary to law" for multiple reasons. Fed. R. Civ. P. 72(a).

First, the decision fails to address Defendants' argument that the Administrative Procedure Act ("APA") provides the sole right of action for Plaintiffs' claims challenging agency action or alleged inaction by a federal agency, including on constitutional grounds, *see* 5 U.S.C. § 706, and it requires Plaintiffs to direct their challenge to specifically identified and discrete agency actions or failures to act. The magistrate judge's decision instead conflates this argument with prior distinct and independent contentions. Indeed, the magistrate judge completely disregarded the Ninth Circuit's express statement that Defendants could seek "to focus the litigation on specific governmental decisions and orders." *United States v. U.S. Dist. Court for Dist. Of Or.*, 884 F.3d at 837; *see also* 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/ (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."). Defendants' argument that Plaintiffs have failed to state a valid right of action by failing to comply with the requirements of the APA is a serious and previously unaddressed argument that could remove the need for *any* discovery in this case. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). The magistrate judge's failure to grapple with this argument requires this Court's review.

Second, the magistrate judge's decision misunderstands Defendants' two additional arguments: even aside from the APA's judicial review mechanism, the discovery Plaintiffs seek would violate the procedures provided by the APA for agency decision-making and the separation of powers. Judge Coffin's order completely fails to address Defendants' argument that requiring agencies to articulate policy positions and express views on factual issues directly in court through discovery and a trial *de novo* bypasses these administrative procedures required by the APA, including notice-and-comment procedures to ensure an opportunity for broad public input before an agency reaches particular conclusions and adopts measures within its authority. This Court's review of that argument in the first instance is warranted. As for Defendants' separation-of-powers concerns, Judge Coffin treated that argument as turning on "hypothetical" discovery requests that "may implicate matters of privilege," ECF No. 212 at 3, rather than engaging with Defendants' argument that *any* discovery seeking policy positions and recommendations of agency officials, and seeking a judicial determination and order addressing such issues, outside the agency procedures required by the APA, violates the separation of powers by usurping the role of the President in marshalling the resources and opinion of Executive Branch agencies to develop proposals and recommendations. Given the magistrate judge's apparent misconception of the argument, this Court should address it in the first instance.

At a minimum, the Court should grant a stay of all discovery pending the resolution of Defendants' dispositive motions—a request that the magistrate judge denied without explanation. ECF No. 212 at 3. Subjecting Defendants to extensive discovery that is barred by the APA and the Constitution in this suit, before the Court rules on motions *that could remove the need for that discovery entirely*, would both waste public and judicial resources and invade statutory obligations and constitutional prerogatives of the Executive. Out of fairness to the

parties and respect for the separation of powers—and in keeping with the Ninth Circuit's vision of this litigation—this Court should stay discovery pending resolution of Defendants' dispositive motions. Given the imminence of upcoming discovery deadlines, Defendants respectfully ask the Court to rule expeditiously on this request.[1]

Finally, if the Court is inclined to agree with Judge Coffin's resolution of Defendants' motion for a protective order and a stay, the Court should certify its order "for interlocutory appeal . . . pursuant to 28 U.S.C. § 1292(b)," as the Ninth Circuit expressly contemplated. *United States v. U.S. Dist. Court for Dist. Of Or.*, 884 F.3d at 838. In the absence of relief from discovery pending decision of its dispositive motions, the government will have little choice but to seek further review in the Ninth Circuit and/or the Supreme Court. *Cf. id.* at 835 ("If the defendants become aggrieved by a future discovery order, they can seek mandamus relief as to that order.").

BACKGROUND

On May 9, 2018, Defendants moved for a protective order and for a stay of discovery pending resolution of Defendants' motion for a protective order, Defendants' motion for judgment on the pleadings, and Defendants' summary judgment motion. ECF No. 196 at 19-20. With respect to the protective order, Defendants argued that discovery is barred in this case for three reasons: (1) the APA, which requires that Plaintiffs challenge specifically identified agency action or inaction and that review be based on an administrative record, provides the exclusive right of action for Plaintiffs' claims; (2) requiring agencies to take policy positions in the context of a discovery process conflicts with the APA's provisions governing agency decision-making;

[1] In addition, the government has filed with the magistrate judge a motion for a stay of discovery pending this Court's resolution of these objections. If the magistrate judge denies that motion, the government will ask this Court to enter such a stay.

and (3) the separation of powers bars any discovery seeking the policy positions or factual judgments of agency officials outside of the procedures that govern agency decision-making. *Id.* at 8-19. With respect to the stay of discovery, Defendants argued that a stay was appropriate because any of three separate motions—the motion for a protective order, motion for judgment on the pleadings, and summary judgment motion—had the potential to remove any need for discovery. *Id.* at 19-20.

That same day, Defendants moved for judgment on the pleadings. ECF No. 195. Specifically, Defendants argued that the Court lacks jurisdiction over Plaintiffs' claims against the President; the APA provides the exclusive right of action for Plaintiffs' claims but Plaintiffs have failed to state a valid claim under that statute; and Plaintiffs' claims are foreclosed by the separation of powers. *Id.*

On May 23, 2018, Plaintiffs filed a response in opposition to the motion for a protective order. ECF No. 208. That same day, this Court extended the deadline for Plaintiffs to respond to the motion for judgment on the pleadings to June 15, 2018. ECF No. 210. The Court has set argument for the motion for judgment on the pleadings for July 18, 2018. ECF No. 214.

On May 25, 2018—two days after Plaintiffs filed their response to the motion for a protective order and before Defendants had an opportunity to reply—Magistrate Judge Coffin denied the motion in a brief order. ECF No. 212. Judge Coffin determined that the Complaint does not assert claims arising under the APA as the claims are "based on alleged violations of constitutional rights." *Id.* at 2. He also found that this Court had already rejected Defendants' argument that Plaintiffs must bring their claims under the APA. *Id.* Judge Coffin then refused to grant a protective order based on the separation of powers, finding instead that, "[s]hould a specific discovery request arise during discovery in this case that implicates a claim of privilege

the government wishes to assert, the government may file a motion for a protective order directed at any such specific request." *Id.* at 3. Finally, Judge Coffin denied—without explanation—Defendants' motion for a stay of all discovery pending resolution of their motion for judgment on the pleadings and motion for summary judgment. *Id.*

LEGAL STANDARD

Parties may file timely objections to a magistrate judge's order on pretrial matters that are not dispositive. Fed. R. Civ. P. 72(a). On review of the magistrate judge's order, the district court must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.*; *see also* 28 U.S.C. § 636(b)(1)(A). "The 'clearly erroneous' standard applies to the magistrate judge's findings of fact; legal conclusions are freely reviewable de novo to determine whether they are contrary to law." *Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 422 (C.D. Cal. 1999); *see also Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002). There is clear error when the court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

ARGUMENT

Judge Coffin denied Defendants' motion for a protective order for two reasons, both of which misunderstand—and therefore fail to address—Defendants' arguments. First, Judge Coffin rejected Defendants' contention that the APA provides the sole right of action for Plaintiffs' claims because Plaintiffs have not purported to bring their claims under the APA and because the District Court already found that the APA does not provide the "sole avenue of relief" for Plaintiffs' claims. ECF No. 212 at 2. Second, Judge Coffin found that Defendants' separation of powers argument is based on "wholly hypothetical scenarios that may implicate

matters of privilege" and ruled that Defendants should instead raise any such concerns in response to "specific discovery requests." *Id.* at 3. Because both of these reasons misconstrue Defendants' arguments and past proceedings in this case, they represent clear error. And to the extent they include any response to Defendants' substantive arguments in support of a protective order, the magistrate judge's denial is contrary to law.

In addition, Judge Coffin denied without explanation Defendants' motion for a stay of discovery pending resolution of their pending motions for judgment on the pleadings and for summary judgment. ECF No. 212 at 3. That unreasoned ruling also constitutes clear error and is contrary to law.

I. Because the APA Provides the Exclusive Right of Action for Challenging An Agency's Action or Failure to Act, Discovery Is Inappropriate and the Claims Must Be Reviewed on an Administrative Record.

A. The Magistrate Judge Clearly Erred in Concluding that this Court Has Already Addressed Whether the APA Provides the Exclusive Right of Action for Plaintiffs' Claims.

Contrary to Judge Coffin's order, Defendants' motion for a protective order (and their motion for judgment on the pleadings), raise a new issue that has not yet been decided by this Court: whether the APA provides the exclusive right of action under which Plaintiffs may bring constitutional claims. Judge Coffin held that this Court already decided that issue in its order denying Defendants' motion to dismiss. But that is incorrect. Defendants did not argue that the APA provides the sole right of action for Plaintiffs' claims in their motion to dismiss. Instead, Defendants argued that Plaintiffs had failed to state a claim under the Fifth and Ninth Amendments of the Constitution because (1) there is no constitutional right to particular climate conditions, (2) Plaintiffs are not a discrete minority for purposes of the Equal Protection Clause, (3) the Ninth Amendment guarantees no substantive rights, and (4) Defendants acted with a

rational basis. ECF No. 27-1 at 19-27. The Court's order denying Defendants' motion to dismiss likewise did not address whether the APA provides the sole right of action for Plaintiffs' claims. In fact, the order never refers to the APA. ECF No. 83.

As evidence that the Court "already rejected this very argument" that Defendants now assert, Judge Coffin quotes a portion of this Court's order that addresses the former Intervenors' argument that Plaintiffs' claims are barred by the political question doctrine. ECF No. 212 at 2; ECF No. 83 at 13. The quoted portion of the order was responding to the argument 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." ECF No. 83 at 13. The Court rejected that argument finding that it could apply "the legal standards governing due process claims to new sets of facts." *Id.* This portion of the Court's order, therefore, addressed whether there are standards to apply in evaluating the merits of Plaintiffs' due process claim absent standards set forth in a statute or regulation. It did not in any way address the issue of whether the APA provides the exclusive right of action for constitutional challenges to an agency's action or alleged failure to act with respect to regulatory measures, permitting, and other administrative measures.

Like Plaintiffs' arguments in response to the motion for a protective order and in the joint letter brief recently filed with this Court, ECF Nos. 206, 208, Judge Coffin's order conflates two distinct issues. Whether the Constitution provides a judicially enforceable right to a climate system of a particular composition is a separate question from whether Plaintiffs have identified a private right of action to enforce any such right. The former turns on whether the asserted constitutional right exists. The latter turns on whether the APA provides the exclusive right of action to enforce any such right, and, if so, whether Plaintiffs' claims comply with the judicial

review standards imposed by the APA. Although the Court found that Plaintiffs properly pled cognizable constitutional claims, it has never had before it—and has never reached—the question now presented, i.e., whether those claims must be brought under the APA.

In finding that Defendants' new argument "is simply a recasting" of their motion to dismiss, Judge Coffin's order inappropriately merges these two distinct questions. ECF No. 212 at 2. A party may assert constitutional claims pursuant to a range of different rights of action, such as 42 U.S.C. § 1983 and *Bivens*, depending on the named defendant, the nature of the claim, and the nature of the relief sought. Each of these rights of action has various requirements, and they are not coextensive. For example, Section 1983 allows a party to bring certain claims for damages against a state actor, whereas *Bivens* allows certain damages claims against an agent of the federal government. Whether a party has brought its constitutional claim under a right of action that applies to the circumstances of that particular case is a separate question from whether the party has satisfied the elements of the underlying constitutional claim.

Here, the relevant, and exclusive, right of action is contained in the APA and Plaintiffs cannot avoid it by simply choosing not to invoke the APA in their Complaint. Just as a plaintiff asserting a damages claim under the Constitution against a state actor cannot circumvent the requirements of 42 U.S.C. § 1983 by failing to invoke that statute in their complaint, and a prisoner challenging the fact of their imprisonment under the Constitution cannot avoid the exhaustion requirements of the habeas statute by failing to invoke it, so, too, are Plaintiffs bound by the statutory requirements governing constitutional claims against agency action and inaction. *See Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam) (holding complaint seeking damages from city for violation of constitutional rights effectively asserts claims under Section 1983 even though the complaint did not invoke that statute); *Preiser v. Rodriguez*, 411

U.S. 475, 489-90 (1973) (finding prisoner cannot bring constitutional claims challenging the fact or duration of imprisonment under Section 1983 to avoid the exhaustion requirement contained in the habeas statute). "It would wholly frustrate explicit congressional intent to hold that [Plaintiffs] in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 490.

Plaintiffs' claims remain constitutional claims to be evaluated under the legal standards that govern constitutional claims even if they are brought under the APA. But the APA is the statutorily mandated vehicle that Congress has provided to assert claims for declaratory and injunctive relief from grievances caused by agency action and inaction with respect to regulatory measures, permitting, and other such undertakings. Contrary to the magistrate judge's apparent view that constitutional claims are mutually exclusive from claims under the APA, *see id.*, the APA expressly contemplates judicial review of constitutional challenges to agency action, *see* 5 U.S.C. § 706(2)(B) (directing a reviewing court to hold unlawful agency action that is "contrary to constitutional right, power, privilege, or immunity,"). Indeed, the Supreme Court has decided constitutional claims under the APA. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603-04 (1988); *see also* ECF No. 196 at 12-13. Where Congress has provided 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 of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996) (citation omitted); *see also W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009). Congress's provision of the APA mechanism for challenging allegedly unlawful agency action demonstrates its "intent to foreclose" any other relief, including an equitable cause of action under the Constitution itself. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (explaining that "the 'express provision of one method of enforcing a

substantive rule suggests that Congress intended to preclude others'" (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001))); *see also* ECF No. 196 at 11-16.

In short, Judge Coffin's order denying Defendants' motion for a protective order turns on a misunderstanding of Defendants' APA argument. By issuing the order without allowing Defendants to file a reply brief, Judge Coffin prevented Defendants from clarifying the misunderstanding and instead conflated two distinct concepts: a right of action to assert a constitutional claim and the constitutional claim itself. As no court has addressed the former issue in this case, his dismissal of Defendants' argument as redundant of their prior motion to dismiss is clear error and contrary to law, and this Court should reconsider the motion in the first instance.

B. A Protective Order Is Necessary to Prevent Unlawful Discovery.

Because Plaintiffs' constitutional claims must proceed under the APA, Plaintiffs are not entitled to conduct discovery of Defendants. *See* ECF No. 196 at 9-14. An action under the APA must be directed to a discrete and identified agency action or inaction, and it is a "fundamental principle[] of judicial review of agency action" that review must be based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light*, 470 U.S. at 743 (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id.* at 743-744 (citation omitted). "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.* at 744. "The fact-finding capacity of the district court is thus typically unnecessary

to judicial review of agency decision-making." *Id.*; *see Citizens to Preserve Overton Park v. Volpe*, 411 U.S. 402, 420 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

As explained in Defendants' motion for a protective order, the rule that APA claims must be reviewed based on the administrative record, and that APA plaintiffs are therefore not entitled to discovery, is "black-letter administrative law," *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam), and applies with equal force in cases where plaintiffs assert constitutional claims. *See* ECF No. 196 at 9-14; *see also, e.g.*, *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017) (denying motion for discovery outside the administrative record on plaintiffs' constitutional claims); *Ketcham v. U.S. Nat'l Park Serv.*, No. 16-CV-00017-SWS, 2016 WL 4268346, at *1 (D. Wyo. Mar. 29, 2016) (reviewing constitutional claims against agency action on administrative record and refusing to "distinguish between a 'stand-alone constitutional challenge' and an 'APA challenge'" because it "would run afoul of Congress's intent" in enacting the APA); *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1174 (D. Wyo. 2015) (finding that court "must limit its constitutional review of Defendants' informal adjudication to the administrative record"); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 8 (D.R.I. 2004) (affirming magistrate judge's grant of a protective order limiting review of all claims, including constitutional claims, to administrative record); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1199, 1237 (D.N.M. 2014) (granting motion to preclude discovery outside the administrative record despite constitutional claims); *Evans v. Salazar*, No. C08-0372-JCC, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010) (granting protective order barring discovery on constitutional claims and limiting review to administrative record).

As explained in Defendants' motion for judgment on the pleadings, to proceed under the APA, Plaintiffs must amend their Complaint to challenge specific agency actions and discrete agency failures to take mandatory actions. ECF No. 195 at 16-22. At that point, Defendant agencies could prepare administrative records for those discrete actions and failures to act. If Plaintiffs decline to do so, however, this Court must enter judgment for the United States.

In sum, for the reasons stated in Defendants' motion for a protective order and motion for judgment on the pleadings, Plaintiffs' claims must be brought under the APA and a protective order is necessary to protect Defendants from undue and unlawful discovery in violation of the APA's record review requirement.

II. Discovery Would Separately Violate the APA's Procedural Limitations on Agency Decision-making and the Constitutional Separation of Powers.

Defendants' motion for a protective order made two arguments in addition to the contention that Plaintiffs' claims must be brought under the APA and reviewed on an administrative record. First, Defendants argued that requiring agencies to take policy positions and make factual judgments in discovery conflicts with the APA's provisions governing administrative procedure. ECF No. 196 at 14-16. The APA sets forth a "comprehensive regulation of procedures" for agency decision-making. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950), *modified*, 339 U.S. 908 (1950). "Time and again," the Supreme Court has explained that the APA provides the exclusive procedural requirements for agency decision-making, and the courts are not free to alter those requirements. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (internal quotation marks and citation omitted); *see Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978). To require agencies to comply with discovery seeking official positions on matters of factual assessment and questions of policy would, however, impermissibly conflict with the procedures prescribed

by the APA and deprive the public of the ability to provide input, where the APA's rulemaking provisions or agency procedures require. *See, e.g.*, *In re SEC ex rel. Glotzer*, 374 F.3d 184, 188-192 (2d Cir. 2004) (refusing to authorize discovery request directed at federal agency that violated APA requirements); *cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (*AEP)* (noting, in rejecting climate-change-related claim, that courts "may not . . . issue rules under notice-and-comment procedures"). Indeed, so too would any trial and ultimate rulings by this Court outside the statutory framework for agency decision-making and judicial review.

Judge Coffin entirely failed to consider this argument. His three-page order simply does not address the APA's procedural requirements. Failure to consider an independent ground for relief constitutes clear error, as there can be no doubt that "a mistake has been committed."[2] *Easley*, 532 U.S. at 242; *see also 26 Beverly Glen, LLC v. Wykoff Newberg Corp.*, No. 2:05-cv-862-BES-GWF, 2007 WL 1560330, at *4 (D. Nev. May 24, 2007) (reversing and remanding portion of magistrate judge's order where order provided no indication that magistrate judge considered arguments regarding reliability and relevancy of expert testimony); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, Civ. No. 11-00758 ACK-KSC, 2013 WL 2156469, at *3 (D. Haw. May 16, 2013) (reversing magistrate judge's order where magistrate judge failed to address argument raised by plaintiff).

Second, Defendants argued that the separation of powers bars discovery under the circumstances presented by this case. ECF No. 196 at 16-19. The Constitution provides that

[2] To the extent Judge Coffin lumped this argument in with Defendants' right of action argument because both involve the APA, that is also clear error and contrary to law. The question of whether the APA provides an exclusive right of action for constitutional claims goes to the APA's judicial review provisions. 5 U.S.C. §§ 701-706. The question of whether discovery violates the APA by compelling agencies to state policy positions without complying with the statute's procedural requirements goes to the provisions of the APA governing administrative procedure. 5 U.S.C. §§ 551-559.

"the executive power shall be vested in a President of the United States." U.S. Const. art. II, § 1. As part of the executive power, the "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Plaintiffs' attempt to probe the views of federal agencies concerning questions of national environmental and energy policy and to require them to make factual and predictive judgments outside the scope of governing procedures and authority is fundamentally inconsistent with that constitutional structure. *See* ECF No. 196 at 16-19.

Judge Coffin denied Defendants' request for a protective order prohibiting all discovery on this ground, reasoning that Defendants should instead challenge individual discovery requests "that may implicate matters of privilege" on a case-by-case basis and rejecting Defendants' present concerns as only "hypothetical." ECF No. 212 at 3. In labelling discovery requests that could violate the separation of powers as "hypothetical," however, Judge Coffin ignored the requests that have been propounded thus far in this case, all of which ask for federal agencies to take positions on complex issues involving the nation's energy policy. In their requests for admission, Plaintiffs ask each agency to admit hundreds of statements relating to energy policy and climate change, many of which were made during a previous administration and by other agencies. *See, e.g.*, ECF No. 194-3 at 17 (seeking admission that "most of the urgent FOREST and GRASSLAND management challenges of the past 20 years such as wildfires, changing water regimes, and expanding forest insect infestations, have been driven, in part, by a changing climate."); ECF No. 194-4 at 59 (seeking admission that "The DEPARTMENT OF THE INTERIOR uses economic discounting analyses to inform the DEPARTMENT OF THE

INTERIOR's decisions on whether or not to authorize, lease, permit, or otherwise allow for coal, oil, and gas development, mining, and production on onshore or offshore federal public lands.").

The notices of 30(b)(6) depositions compound this problem. They require the agencies to provide a witness to speak on behalf of the agency for "[e]ach response that is not a full admission provided by [the agency] to each Request for Admission propounded by Plaintiffs in this litigation." ECF Nos. 196-1 at 6; ECF No. 196-2 at 6. They also probe the agencies for "[a]ny analysis or evaluation conducted by, or funded by" the agency "of ATMOSPHERIC CO2 CONCENTRATIONS, CLIMATE CHANGE TARGETS, or GREENHOUSE GAS EMISSION REDUCTION TARGETS that would avoid endangerment of human health and welfare for current and future generations and DANGEROUS ANTHROPOGENIC INTERFERENCE WITH THE CLIMATE SYSTEM." *Id.* And the 30(b)(6) notices seek information regarding the agency's "role in implementing President Trump's America First Energy Strategy, including President Trump's Executive Order to Create Energy Independence." *Id.* Thus, the discovery that has already been served, and which will continue to be served unless this Court enters a protective order, is not hypothetical and seeks to use the judiciary to compel agencies to articulate positions on facts and policies in violation of the separation of powers.

Moreover, Judge Coffin's suggestion that Defendants move for a protective order on a case-by-case basis based on assertions of privilege confuses Defendants' constitutional argument—that discovery that seeks the policy positions and factual assessments of agencies usurps the role of the President in supervising and seeking the opinions and recommendations of Executive Branch agencies and therefore necessarily violates the separation of powers—with a claim of privilege. Defendants are not, at this time, asserting a claim of privilege over a particular document or opinion. They are contending that, because Plaintiffs seek discovery in

aid of requiring the Defendant agencies (and the President) to develop and implement a comprehensive, government-wide climate policy, and because those discovery requests seek policy positions in the context of litigation, without regard to the agencies' existing statutory authorities, *all* discovery in this case infringes upon the constitutional separation of powers. As is clear from the examples above, the discovery that has already been served does exactly that, and the entire process of discovery and trial would be contrary to the constitutional structure and the judicial power under Article III. Responding to these discovery requests risks "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (internal quotation marks and citation omitted).

Because Judge Coffin dismissed Defendants' concerns as "hypothetical" and failed to engage with Defendants' argument that *all* discovery violates the separation of powers, his order is in error and should be reconsidered by this Court.

III. At a Minimum, the Court Should Stay Discovery Pending Resolution of the Defendants' Dispositive Motions.

At a minimum, the Court should reconsider the magistrate judge's unexplained denial of Defendants' motion to stay discovery pending resolution of Defendants' motions for judgment on the pleadings and for summary judgment. ECF No. 212 at 3. Both of those dispositive motions are currently pending before this Court. Defendants' motion for judgment on the pleadings is currently set for hearing before this Court on July 18, and under the Court's local rules, Defendants' motion for summary judgment will be fully briefed and ripe for hearing on the same date. A favorable ruling on either of those motions would either terminate the litigation or substantially narrow it, thus eliminating any need for discovery or substantially affecting its scope. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (finding district court did not

abuse its discretion in staying discovery pending resolution of a motion to dismiss when the motion did not raise factual issues). District courts have frequently granted—and the Ninth Circuit has frequently upheld—stays of discovery while dispositive motions are pending. *See, e.g.*, *Ciuffitelli v. Deloitte & Touche LLP*, No. 3:16-cv-0580-AC, 2016 WL 6963039, at *9 (D. Or. Nov. 28, 2016) ("Delaying discovery . . . will promote the efficient and 'inexpensive determination' of this case by clarifying the appropriate scope of Plaintiffs' claims and, thus, establishing the appropriate scope of discovery."); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("It is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery."); *Wood v. McEwen*, 644 F.2d 797. 801-02 (9th Cir. 1981) (upholding grant of protective order suspending discovery where the legal sufficiency of plaintiff's complaint was challenged).

Indeed, under similar circumstances, the Supreme Court recently held that the Ninth Circuit erred in another case challenging Executive Branch policy by denying the government's petition for a writ of mandamus against orders to produce certain materials before the district court had resolved the government's dispositive motion. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam). In that case, the district court refused to stay all discovery until it resolved the government's motion to dismiss on justiciability grounds, among others, and ordered the expansion of the administrative record that the government had produced. *Id.* at 444. After the Ninth Circuit denied the government's mandamus petition challenging those orders, the government renewed its arguments in the Supreme Court in a petition for mandamus or, in the alternative, certiorari, and further sought a stay of all discovery and the administrative-record order pending consideration of its petition. *Id.* The Supreme Court granted the stay. *Id.* And it

unanimously vacated the Ninth Circuit's denial of mandamus, remanding with instructions that the district court rule on the government's threshold arguments, which "if accepted, likely would eliminate [any] need" for expanding the record before the district court, and then "consider certifying that ruling for interlocutory appeal under 28 U.S.C. § 1292(b) if appropriate." *Id.* at 445. On remand, the district court maintained the stay of all discovery and, although it ultimately rejected the government's motion to dismiss, it *sua sponte* certified its order for interlocutory appeal, which the Ninth Circuit subsequently accepted. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Security*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

The same course is appropriate here. Both of the government's pending dispositive motions present justiciability arguments that, if granted, would eliminate any need for discovery in this case and both can be resolved without any further discovery. A stay of discovery pending this Court's resolution of the dispositive motions will not prejudice Plaintiffs. Only modest discovery has occurred to date, so a stay would not cause any serious disruption. *See Matera v. Google Inc.*, No. 15-cv-04062-LHK, 2016 WL 454130, at *4 (N.D. Cal. Feb. 5, 2016). At most, Plaintiffs may complain of a short-term delay. But it was Plaintiffs who waited years to bring this suit, and even more years to serve their current discovery requests. Thus, any argument of harm arising from a stay would be exceedingly strained, at best. The balance of harms tips strongly in Defendants' favor. For those reasons, Judge Coffin clearly erred by denying Defendants' motion for a stay pending this Court's resolution of the pending dispositive motions without any reasoning. *See Ciuffitelli*, 2016 WL 6963039, at *5-6 (finding courts should not "deny out-of-hand a discovery stay request" but should instead conduct a "case-by-case analysis" to determine if a stay pending resolution of a dispositive motion is appropriate). This Court should reconsider the motion and grant the requested stay.

If the Court declines to reverse Judge Coffin's order, it should certify its order for interlocutory appeal. *See* 28 U.S.C. § 1292(b). This motion plainly "involves [] controlling question[s] of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from" an order denying the protective order on grounds that the APA does not provide the sole right of action for plaintiffs' claims and limit review to the administrative record would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see* p. 12, *supra* (collecting cases in which district courts granted protective orders or otherwise limited review to the administrative record in similar circumstances); *see also United States v. Real Prop. & Improvements Located at 2441 Mission Street, S.F., Cal.*, Docket No. C13-2062-SI, 2014 WL 1350914 (N.D. Cal. Apr. 4, 2014) (certifying the denial of a protective order for interlocutory appeal); *Cazorla v. Koch Foods of Miss.*, 838 F.3d 540, 546-47 (5th Cir. 2016) (accepting certification for interlocutory appeal of a partial denial of protective order).

CONCLUSION

Judge Coffin's order denying Defendants' motion for a protective order and a stay pending resolution of Defendants' dispositive motion is contrary to law and clearly erroneous. The order misconstrues and fails to address key arguments made by Defendants. Defendants object to the order and respectfully ask this Court to reconsider it. Further, if the Court does not reverse Judge Coffin's resolution of Defendants' motion for a protective order and a stay, Defendants ask the Court to certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: June 1, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/ Clare Boronow
LISA LYNNE RUSSELL
GUILLERMO A. MONTERO
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD bar)
FRANK J. SINGER (CA Bar No. 227459)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D Street NW
Washington, DC 20004
Telephone: (202) 305-0445
Facsimile: (202) 305-0506
sean.c.duffy@usdoj.gov

Attorneys for Defendants