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**UNITED STATES DISTRICT COURT**
**DISTRICT OF OREGON**
**EUGENE DIVISION**

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

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

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY PENDING RESOLUTION OF OBJECTIONS**

**Expedited Hearing Requested**

On June 1, 2018, Defendants filed objections to the Magistrate Judge's order denying Defendants' motion for a protective order. ECF No. 215. Simultaneously, Defendants moved for a stay of all discovery pending resolution of Defendants' objections. ECF No. 216. In that motion, Defendants explain they are likely to succeed on the merits of their objections because (1) the Administrative Procedure Act ("APA") provides the exclusive right of action for Plaintiffs' claims and requires that those claims be reviewed on an administrative record, *id.* at 3-5; (2) requiring agencies to respond to Plaintiffs' discovery requests forces Defendants to take positions on policy and make factual judgments outside of the procedures prescribed by the APA, *id.* at 5-6; and (3) requiring agencies to formulate factual and policy positions in the context of litigation usurps the role of the President and violates the separation of powers, *id.* at 6-7. Defendants also explained that a short stay of discovery pending the resolution of their objections is necessary because Defendants would otherwise be prejudiced by allowing discovery that violates the APA and the Constitution to go forward. *Id.* at 9. In contrast, Plaintiffs would face only a short delay of discovery that would not meaningfully disrupt their preparation for trial. *Id.*

In their response to Defendants' stay motion, Plaintiffs largely regurgitate—indeed, block quote—the arguments in their opposition to Defendants' motion for a protective order. ECF No. 208. They argue that Defendants are unlikely to succeed on the merits of their objections because: (1) Plaintiffs contend the APA does not provide the right of action for their claims, and thus, they contend their claims can proceed directly under the Constitution, ECF No. 222 at 4; (2) Plaintiffs deny that their discovery requests force the defendant agencies to articulate policy positions or make factual determinations outside the decisionmaking procedures in the APA, *id.* at 5-6; and (3) Plaintiffs deny that their discovery requests infringe on the separation of powers,

*id.* at 6-7. Plaintiffs argue that the harms they will allegedly experience due to climate change, resulting from a delay of discovery, outweigh Defendants' alleged injuries. *Id.* at 8-11.

As the parties have briefed the APA and separation of powers issues, and as Plaintiffs largely repeat arguments made in other briefs, Defendants do not respond point-by-point. Instead, Defendants incorporate by reference the arguments made in their Motion for Judgment on the Pleadings, ECF No. 195, and their Objections to the Magistrate Judge's Order Denying their Motion for Protective Order, ECF No. 215 ("Objections"), which are incorporated herein by reference.[1]

One issue that merits additional discussion, however, is Plaintiffs' assertion that Ninth Circuit precedent is "dispositive" on the issue of whether Plaintiffs' claims must be brought under the APA. ECF No. 222 at 4-5 (citing *Navajo Nation v. Dep't of the Interior*, 876 F. 3d 1144, 1170 (9th Cir. 2017); *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989); *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). This is incorrect and confuses two distinct and important concepts: sovereign immunity and right of action.

To bring a claim against the United States, a litigant must identify a waiver of sovereign immunity and a right of action. Section 702 of the APA provides both. Its first sentence provides a right of action against agency action or inaction:

> 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. Its second sentence provides a waiver of sovereign immunity:

[1] Pages 7-11 of Defendants' Objections, ECF No. 215, and pages 10-22 of Defendants' motion for judgment on the pleadings, ECF No. 195, show that Plaintiffs' claims must be brought under the APA pursuant to that statute's requirements for judicial review. Pages 22-25 of the motion for judgment on the pleadings explain that Plaintiffs' claims are foreclosed by the separation of powers, and pages 13-17 of the Objections explain that any discovery in this case would violate the separation of powers and the APA's procedural limitations on agency decisionmaking.

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . .

*Id.*; *see also Navajo Nation*, 876 F.3d at 1168 ("Section 702, notably, does double duty, nestling a broad waiver of sovereign immunity (its second sentence) within an 'omnibus judicial-review provision, which permits suit for violations of numerous statutes . . . that do not themselves include causes of action for judicial review.'" (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014))).

In *Navajo Nation*, the district court had held there was no applicable waiver of sovereign immunity for the Tribe's breach-of-trust claim, and the Ninth Circuit then addressed that issue in its appeal—specifically, the scope of the waiver of sovereign immunity contained in the second sentence of Section 702. It held that the second sentence operates independently from the first sentence and provides a waiver of sovereign immunity that applies to non-monetary claims against the United States, including non-APA claims, *i.e.*, those not eligible for the right of action provided by the first sentence of Section 702. 876 F.3d at 1172. In reaching this decision, the court confirmed its prior holding in *Presbyterian Church* finding that Section 702's waiver of sovereign immunity is not limited "to instances of 'agency action' as technically defined in § 551(13)." 870 F.2d at 524-26.

*Navajo Nation's* holding turned on the fact that the first sentence of Section 702 provides a right of action specifically for challenges to "agency action," which the APA defines as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). In contrast, the second sentence does not reference "agency action." *Navajo Nation*, 876 F.3d at 1171; *Presbyterian Church*, 870 F.2d at

525. Thus, even though the challenged conduct in each case—INS surveillance in *Presbyterian Church* and a breach of trust in *Navajo Nation*—was not an "agency action" under Section 551(13), and thus was not reviewable under the APA, Section 702's waiver of sovereign immunity applied.

Those two cases' holdings regarding Section 702 are limited to the issue of sovereign immunity and thus have nothing to say about this case. *See Navajo Nation*, 876 F.3d at 1168 (distinguishing between "the § 702 cause of action and the § 702 waiver"). Defendants' argument here focuses on the first sentence of Section 702 and contends that claims against agency action and inaction alleging violations of the Constitution must be brought via the right of action provided by the first sentence of Section 702. 5 U.S.C. §§ 702, 706(2); *see also* ECF No. 195 at 11-16. Neither *Navajo Nation* nor *Presbyterian Church* addresses this point.

Plaintiffs' citation to *Franklin v. Massachusetts* is equally unavailing. *See* ECF No. 222 at 5. Plaintiffs cite that case for the proposition that constitutional claims against the government do not have to be brought under the APA because, in *Franklin*, the Supreme Court addressed plaintiffs' claims under the provision of the APA allowing a court to set aside "arbitrary" or "capricious" agency actions, 5 U.S.C. § 706(2)(A), separately from their constitutional claims. *See Franklin*, 505 U.S. at 795-96. *Franklin*, however, does not hold that constitutional claims against the government can always be brought outside the APA.

In *Franklin*, plaintiffs brought claims against the Secretary of Commerce and the President challenging the Census Bureau's apportionment of federal employees living overseas amongst the states. 505 U.S. at 795. The plaintiffs alleged both that the apportionment decisions were "arbitrary" and "capricious" under the APA, 5 U.S.C. § 706(2)(A), and that the decisions violated the Actual Enumeration Clause of the Constitution. *See Franklin*, 505 U.S. at 795-96.

The Court dismissed the claims against the Secretary of Commerce under the APA for lack of finality under 5 U.S.C. § 704.[2] The Court then turned to the President and held that the President is not an "agency" for purposes of the APA, so his actions are not reviewable under that statute. *Id.* at 800-01. It instead found that "the President's actions may still be reviewed for constitutionality" outside of the APA—subject to numerous caveats and limitations on remedy. *Id.* at 801; *see also id.* at 802-03. Thus, *Franklin* is not, as Plaintiffs suggest, an instance where the Court analyzed constitutional claims *against an agency* outside of the APA.

For similar reasons, the two cases raised by Magistrate Judge Coffin at the most recent status conference do not in any way excuse Plaintiffs' failure to invoke the right of action in the APA. *Ogden v. United States*, quoted by Judge Coffin, addressed only the second sentence of Section 702 regarding the waiver of sovereign immunity, which is irrelevant here:

> Generally, sovereign immunity has no application where a plaintiff claims that a government official has acted in violation of the Constitution or statutory authority. Alternatively, a number of courts have held that § 702 of the Administrative Procedure Act (5 U.S.C. § 702) constitutes a waiver of sovereign immunity in actions seeking nonmonetary relief under 28 U.S.C. § 1331.

758 F.2d 1168, 1177 n.5 (7th Cir. 1985). No party in *Ogden* argued, nor did the court address, whether plaintiffs should have brought their constitutional claim under the right of action provided by the first sentence of the APA. Equally important, *Ogden* was decided in 1985, before the Supreme Court developed its line of caselaw refusing to imply rights of action in the Constitution when Congress provides a specific statutory remedy. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Wilkie v. Robbins*, 551 U.S. 537, 550

[2] Because the Secretary of Commerce merely sends census results to the President, and it is up to the President to submit the census to Congress, the Court found that the Secretary's report to the President "serves more like a tentative recommendation than a final and binding determination" and therefore is not "final agency action" subject to judicial review under the APA. *Id*. at 798 (citation omitted).

(2007); *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996); *see also W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009). It is clear from that caselaw that a party seeking to enforce a constitutional right must avail itself of the appropriate statutory right of action.

*Knight First Amendment Institute at Columbia University v. Trump*, No. 17 Civ. 5205 (NRB), 2018 WL 2327290 (S.D.N.Y. May 23, 2018)—also referenced by Judge Coffin during the status conference as an example of a case involving constitutional claims not brought under the APA—is equally unavailing. That case challenged President Trump's blocking of certain persons from his Twitter account. *See id.* at *9-11 (finding no evidence that a defendant other than the president blocked any accounts). Per *Franklin*, because the President is not an "agency" for purposes of the APA, the case did not involve an "agency action." For that reason, the case has no bearing on whether the Plaintiffs here may assert constitutional claims against federal agencies without invoking the APA's right of action.

Plaintiffs have not identified a single case that directly addresses whether they must bring their claims under the right of action provided in the first sentence of Section 702 of the APA. Plaintiffs' efforts to obfuscate the issues by conflating the APA's right of action requirement with other aspects of the APA, *see, e.g.*, ECF No. 208 at 7-14, should not be permitted to succeed.

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Respectfully submitted,

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