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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 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs have attempted to bury the Court in exhibits in an effort to convince it that their claims raise genuine disputes of fact that must be resolved at trial. But quantity is no substitute for relevance, and none of Plaintiffs' expert declarations and numerous attachments change the fact that their claims fail as a matter of law. Even if this Court accepts every exhibit submitted by Plaintiffs as true, Plaintiffs' claims nonetheless fail at the threshold. Plaintiffs' own experts confirm that Plaintiffs' alleged climate-related injuries are shared in common by every human being on this planet. Injuries common to all of humanity, and no more traceable to the U.S. government than to any other nation or private entity, are insufficient to support standing as a matter of law. Likewise, Plaintiffs' failure to bring their claims pursuant to the right of action expressly provided by Congress cannot be papered over by alleged factual disputes. Since the beginning of this case, Plaintiffs have clearly framed their lawsuit as a challenge to "aggregate" government actions. *See* Am. Compl. ¶ 1, ECF No. 7. As a matter of law, a plaintiff cannot opt out of Congress's "comprehensive remedial scheme" for challenging agency action simply by aggregating those actions and labeling them "systemic." Nor can this Court take on the role of the Executive branch in setting national energy and environmental policy merely because Plaintiffs invoke the Constitution.

Even putting aside these threshold defects, Plaintiffs' claims fail as a matter of law on the merits. A fundamental due process right must be grounded in the Nation's history and tradition. It cannot be created whole cloth out of abstract concepts not recognized in any other case. Similarly, as a matter of law, a longstanding policy disagreement with the government cannot support a state-created danger claim. And, per clear precedent, the Public Trust Doctrine simply does not apply to the federal government.

Plaintiffs have tried to turn every aspect of this case into a referendum on climate change. But their decision to challenge a major issue of the day does not exempt them from the law. No amount of expert reports and exhibits can make legally insufficient claims sufficient. Because Plaintiffs' claims fail as a matter of law, the Court should grant judgment for Defendants. If the Court denies summary judgment, it should certify its order for appeal. Where other courts have rejected very similar arguments, the Court itself characterizes these claims as "unprecedented," and the Ninth Circuit expressly contemplated future certifications of interlocutory appeal in this case, certification is appropriate.

II. ARGUMENT

The Court should grant summary judgment because there are no material facts in genuine dispute. Under the legal standard that applies at the summary judgment stage, Plaintiffs do not have standing, have not invoked a valid right of action, and ask this Court to exceed its authority under Article III of the Constitution. Even setting aside those threshold defects, Plaintiffs' claims on the merits fail as a matter of law. For any or all of these reasons, the Court should end this fundamentally flawed case by entering judgment for Defendants.

A. Plaintiffs cannot make the threshold showings that they have standing, a viable right of action, and a case consistent with this Court's Article III authority.

1. Plaintiffs lack Article III standing.

Plaintiffs lack Article III standing because they have identified only generalized grievances shared by every other human being which are not traceable to any particular federal agency action and which this Court lacks the authority to redress.[1]

[1] Plaintiffs accuse Defendants of "mistakenly invok[ing]" a "heightened barrier to standing" by citing *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), because the "rigor outlined in *Clapper*" applies only when "the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs . . . ."

a) Plaintiffs have generalized grievances, not particularized harm.

The declarations attached by Plaintiffs fail to show that their injuries are concrete and particularized as required for Article III standing. The injuries alleged by Plaintiffs are not unique to them. Flooding, wildfires, drought, extreme heat, snow and ice melt, and ocean acidification—to name but a few of the alleged injuries identified by Plaintiffs tied vaguely to climate change writ large—are widespread environmental phenomena confronted daily by people around the globe. Plaintiffs are in the same position as the rest of humanity when it comes to these injuries. Therefore, the alleged injuries do not affect them "in a personal and individual way" as required by Article III. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted).

To hold otherwise would be to find that every human being can assert an injury-in-fact flowing from climate change due to that individual's experience of changing weather patterns and a changing environment. Such a finding conflicts with the Supreme Court's statement that an injury sufficient to support standing cannot be "undifferentiated and 'common to all members

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Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. 3 n.4, ECF No. 255 ("Pls.' Resp."). In fact, nowhere in *Clapper* does the Court state that its analysis is limited to "the fields of intelligence gathering and foreign affairs." Read in context, it is clear that the Court in *Clapper* was broadly concerned with the separation of powers—the same concern that Defendants have continued to raise in this case:

> The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. In keeping with the purpose of this doctrine, [o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. Relaxation of standing requirements is directly related to the expansion of judicial power, and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.

568 U.S. at 408–09 (internal citations and quotation marks omitted).

of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937)); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) ("[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."). It also undermines the purpose of the injury-in-fact requirement of Article III standing. An individual plaintiff's "personal stake" is what gives the court "factual context" for its evaluation of the case and allows for the "framing of relief no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger*, 418 U.S. at 221-22. Environmental phenomena experienced worldwide by every human being on the planet provide no specific factual context that would allow a court to frame its consideration of the claims or its evaluation of the proper relief. As the D.C. Circuit put it: "[C]limate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore Petitioners' alleged injury is too generalized to establish standing." *See Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). Absent a specific factual context arising out of a person's unique injury, a court risks exceeding its "proper, limited role in the constitutional framework of Government" by essentially creating policy-solutions to widespread problems rather than remedies for the injuries experienced by specific individuals. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

b) The injuries that Plaintiffs claim cannot be traced to particular government actions.

Plaintiffs cannot show that the Defendants' "systemic affirmative actions" and "distinct failures to use delegated authority"—which Plaintiffs challenge in broad and undifferentiated

terms—caused their asserted injuries. Pls.' Resp. 11. Plaintiffs' theory that they need only establish "systemic" violations or "causation in the aggregate" cannot be reconciled with the Article III standing requirement that a plaintiff identify with particularity the specific government action or inaction that is the cause of the injury alleged, and that it establish standing for each challenged administrative action. *See Lujan*, 504 U.S. at 560. In lieu of this required proof, Plaintiffs submit reams of exhibits and expert reports, but the overwhelming bulk of Plaintiffs' evidentiary submissions concern abstract questions of climate science—questions that are not material to Defendants' motion for summary judgment. Plaintiffs point to various forms of injury—ranging from aesthetic harms and lost recreational opportunities to asthma, allergies, and psychological harms. But even if one or more of these harms are sufficient to satisfy the Article III element of injury-in-fact, Plaintiffs make no competent showing that these injuries were caused by the Defendants. Neither Plaintiffs' catalogue of government conduct nor their expert reports create a genuine issue of material fact as to standing.

As a threshold matter, Plaintiffs offer no evidence that greenhouse gas ("GHG") emissions attributable directly to the United States government are causing their claimed injuries. This is not surprising, since direct emissions of the United States government are but a drop in the bucket relative to the direct emissions of 323 million Americans. Plaintiffs' documents and lay affidavits do not show how their injuries can be traced to the United States' direct emissions, nor do they show that a court-ordered regime forbidding or drastically curtailing those emissions would eliminate or abate the injuries Plaintiffs proffer.

Plaintiffs attempt to circumvent this problem by arguing that any "indirect harm" resulting from the GHG emissions of third parties is directly attributable to Defendants' policies and actions that intentionally entrenched the nation's energy system in fossil fuels. Pls.' Resp.

11, 15-18.[2] Plaintiffs thus principally complain of the government's regulation (or lack thereof) of private parties not before the district court. What Plaintiffs really seek is a court-ordered regulatory regime that prohibits (or at least severely constrains) the emissions of *private* entities within the United States. But when a plaintiff's alleged harms may have been caused directly by the conduct of parties other than the defendants (and only indirectly by the defendants), it is "substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975); *see also Lujan*, 504 U.S. at 562. Plaintiffs have presented no evidence establishing a causal link between the various policy decisions they describe and the specific harms they allege. Plaintiffs do not even attempt to answer the question of whether, in the absence of such policies and subsidization, third parties in the fossil fuel industry would alter their behavior in a manner that would affect the Plaintiffs in a particularized and concrete way. *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976) (holding that plaintiffs challenging tax subsidies for hospitals serving indigent customers lacked standing where they could only speculate on whether a change in policy would "result in [the plaintiffs] receiving the hospital services they desire").

[2] Plaintiffs list twelve categories of alleged government conduct that they contend cause GHG emissions and therefore climate change. Plaintiffs' categories fall into six areas: (1) general policy decisions or initiatives, including research and development; (2) leasing, grazing, timber harvesting and permitting decisions; (3) financial and tax-based incentives; (4) import and export decisions; (5) laws and regulations setting energy, economy and efficiency standards; and (6) emissions arising from the United States' own conduct. Pls.' Resp. 12-18. But this merely proves that there are a multitude of policy decisions the United States makes concerning energy production. It is one thing to say that because of a complex set of policy decisions the United States has not shifted away from fossil fuel as quickly as Plaintiffs demand; but it is quite another to argue that the failure to do so resulted in every climate-related harm, including those asserted by Plaintiffs.

It is for this reason that the Ninth Circuit's decision in *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), precludes the relief Plaintiffs seek here. Plaintiffs attempt to distinguish *Bellon* on the ground that the Court addressed an alleged failure to regulate private sources, not systemic aggregate acts. Plaintiffs' argument fails for two reasons. First, Plaintiffs here do, in fact, challenge the acts of third parties not before the Court, by alleging and proffering expert opinion that the federal government should compel or incentivize private parties to forgo fossil fuel use. Am. Compl. ¶¶ 5, 7, 12, 164-91, ECF No. 7; *see also* Jacobson Report 5-6, ECF No. 261-1 (listing third-party infrastructure changes needed to meet Dr. Jacobson's fossil-fuel-free economy by 2050); Williams Report 5, ECF No. 268-1 ("All emissions reductions involve the replacement of one kind of infrastructure or equipment with a higher-efficiency and/or lower carbon alternative"); *id.* at 9 ("Anticipatory development of shared institutional structure, both market and regulatory, will be required for efficient coordination of operations, planning, investment, and research."). Second, the *holding* of *Bellon* focused not on the distinction between aggregate government acts and private action, but instead on the fact that "[b]ecause a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries, the causal chain is too tenuous to support standing." 732 F.3d at 1144 (citations omitted).

Also unavailing are Plaintiffs' citations to two cases involving prisoner rights under the Eighth Amendment: *Brown v. Plata*, 563 U.S. 493 (2011), and *Wilson v. Seiter*, 501 U.S. 294 (1991). *Brown* addressed whether the Prison Litigation Reform Act authorized a court to set a population limit to decrease overcrowding in the California prison system. *Brown*, 563 U.S. at 525-26. *Wilson* presented the question of whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the

part of prison officials. *Wilson*, 501 U.S. at 296. Neither case involved Article III standing. Neither case, therefore, can be plausibly read to support Plaintiffs' theory of "causation in the aggregate," Pls.' Resp. 22, for standing purposes.

Plaintiffs attempt to use expert reports about the global or aggregate effects of climate change to adduce causation as to these Plaintiffs is equally unavailing. Plaintiffs proffer three expert reports to buttress their allegations of physical and psychological injury. Drs. Pacheco and Paulson offer a report opining primarily on physical ailments attending a warmer climate. *See generally* Pacheco Report 1-2, ECF No. 272-1. Dr. Frumkin offers largely duplicative opinions in his report. Frumkin Report 2, ECF No. 259-1 (identifying various health risks attending climate change and opining that, "[w]hile these risks, to some extent, will affect everybody, some groups are especially vulnerable, and children comprise one such group"). Dr. Van Susteren opines on how general phenomena associated with climate change can affect psychological well-being. Van Susteren Report 4-15, ECF No. 271- 1. She further opines on the psychological harm that is posed when "a trusted and powerful institution[,]" here the federal government, "affirmatively causes . . . harm, or when the institution fails to take protective, preventative, or responsive actions." *Id.* at 16. Finally, Dr. Van Susteren opines that Plaintiffs are "struggl[ing] with 'pre-traumatic stress disorder' . . . that impedes their ability to experience joy, to think of anything but the doom that lies ahead." *Id.* at 22.

These expert reports do not make a *prima facie* showing of standing. Tellingly, none of the experts have reviewed Plaintiffs' medical records. And none tether Plaintiffs' alleged physical or psychological injuries to specific emissions of greenhouse gases, nor do they opine on whether Plaintiffs' injuries would exist at all or be mitigated should greenhouse gas emissions in the United States be reduced or even prohibited. These experts instead offer abstract,

conclusory opinions associating physical and psychological harms with *global* threats due to *global* emissions of greenhouse gases. Hence, even if some of Plaintiffs' alleged injuries satisfy the injury-in-fact prong of Article III standing, no adequate proffer of causation is made.

The failure of Drs. Pacheco, Paulson, Frumkin, and Van Susteren to tether Plaintiffs' alleged medical and psychological injuries to greenhouse gases attributable to the federal government is echoed in each of the other reports Plaintiffs proffer. Dr. Hansen, for example, points to his prior peer-reviewed publications to highlight his preferred remedy for the risks of climate change. *See, e.g.*, Hansen Report 24, 27-28, 34, ECF No. 274-1 (citing 2013 PLoS ONE). But those peer-reviewed publications speak to *global* reductions in emissions, not the effect that reductions in the United States alone will have on the *global* effects of climate change. Further, while Dr. Hansen proffers an opinion that "the United States alone is responsible for a 0.15° increase in global temperature[,]" *id.* at 26 (citing Matthews, *et al.* (2014)), he offers no opinion on whether and how that 0.15° increase creates or exacerbates the harms he alleges from *global* concentrations of greenhouse gases, much less the specific physical and psychological injuries Plaintiffs allege.

Plaintiffs' other experts offer more of the same. Several of Plaintiffs' experts elaborate on the *global* effects of *global* greenhouse gas concentrations without any reference to specific U.S. emissions whatsoever. *See, e.g.*, Wanless Report 29-30, ECF No. 275-1); Rignot Report 16-17, ECF No. 262-1); Trenberth Report 20-22, ECF No. 267-1 (associating specific weather events with specific Plaintiffs, but not associating the existence or marginal damage from those storms to greenhouse gases of the United States). Other of Plaintiffs' experts offer lengthy opinions on the effects of *global* greenhouse gas concentrations, coupled with short, conclusory opinions that make passing reference relevant to the issues of causation or traceability. *See, e.g.*,

Hoegh-Guldberg Report 28, ECF No. 260-1 ("Eliminating U.S. emissions and keeping U.S. fossil fuels in the ground alone with have a significant impact in limiting CO_2 absorption by the oceans and will slow the rate of ocean warming, even if other nations' emissions do not similarly decline in the same time frame."); Running Report 29, ECF No. 264-1 ("[M]ost system responses are thought to be proportional. Thus reducing carbon emissions reduces CO_2 in the atmosphere proportionally, which reduces temperature increases and impacts proportionally."); Roberson Report 25-26, ECF No. 263-1 (opining that implementation of his various carbon-capture techniques could result in "more than 20% of the global natural sequestration target needed to bring CO_2 concentrations to 350 ppm[,]" without opining on how that reduction would eliminate or ameliorate Plaintiffs' injuries). The first group of experts do not offer opinions that assist the trier of fact in this case, because this case is *not* about the science of climate change. Nor can opinions on the science of climate change generally answer the question of whether emissions of the United States caused Plaintiffs' particular injuries. The second group of experts do not create genuine issues of fact on the questions of traceability because "[a]n expert's opinions that are without factual basis and are based on speculation or conjecture are . . . inappropriate material for consideration on a motion for summary judgment." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (citation omitted). In short, Plaintiffs fail to identify any genuine issues of fact.

c) Plaintiffs' alleged injuries cannot be redressed by the Court.

The third prong of the standing analysis requires that a plaintiff show "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, No. 16-15946, 2018 WL 3149770, at *5 (9th Cir. June 28, 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). A claim "lacks redressability if the plaintiff will nonetheless

suffer the claimed injury if a court rules in its favor." *Id.* at *6 (citation omitted). "In cases where the alleged injury in fact is caused by a third party, a plaintiff must establish that the hoped-for substantive action on the part of the government could alter the third party's conduct in a way that redresses the injury in fact." *Id.* Here, Plaintiffs cannot demonstrate redressability because they cannot show that it is likely that their injuries will be redressed by a favorable decision.

Plaintiffs ask this Court to order Defendants to "prepare and implement a remedial plan to decarbonize the U.S. energy system and protect carbon sinks, thereby substantially reducing GHG emissions, drawing down Defendants' contribution to excess CO_2 in the atmosphere, and redressing Plaintiffs' injuries." Pls.' Resp. 23. This Court, however, lacks authority to order the Executive branch to "prepare and implement a remedial plan to decarbonize the U.S. energy system" because it cannot compel Defendants to take actions beyond the scope of relevant statutory authorities. Defendant agencies may only act in accordance with the limited authority granted by their organic statutes. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power on it"), *superseded by statute on other grounds by Metrophones Telecomms., Inc. v. Global Crossings Telecomms., Inc.*, 423 F.3d 1056 (9th Cir. 2005). Indeed, a court can only compel an agency to take an action that it is "legally required" to take. *Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 63-64 (2004). This Court thus lacks authority to compel Defendant agencies to implement a "remedial plan," even if the Court leaves the details of that plan up to the agencies. *See id.* (explaining that prohibition on "broad programmatic" attacks on agency action derives from limitation on court's authority to compel discretionary actions).

Plaintiffs argue that *Norton v. SUWA* is inapplicable because "this is not an APA case." Pls.' Resp. 24. They are wrong, for reasons explained at length in Defendants' opening brief and below. Defs.' Mot. 14-19; *infra* 16-20. Plaintiffs cannot avoid the APA simply by failing to invoke it in their Complaint. *See* Defs.' Mot. for J. on the Pleadings, ECF No. 195; Defs.' Mot. for Protective Order, ECF No. 196; Defs.' Mot. for Summ. J., ECF No. 207 ("Defs.' Mot."). Equally important, however, the Supreme Court explained in *Norton* that a Court's inability to compel an agency to take discretionary action flows from "the traditional practice prior to [the APA's] passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act." 542 U.S. at 63. Thus, the prohibition on compelling discretionary action reflects a traditional limitation on a court's mandamus authority and applies even outside of the APA context. *Id.* (citing pre-APA mandamus cases).

Plaintiffs' redressability arguments also fail because this Court lacks authority to establish the "minimum safe level of atmospheric CO_2 concentrations" as part of its remedy should Plaintiffs prevail. Pls.' Resp. 26. The Supreme Court rejected a similar request in *Am. Elec. Power Co. v. Connecticut ("AEP")*, where the plaintiffs "propose[d] that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable.'" 564 U.S. 410, 428 (2011).[3]

The Northern District of California recently reached the same conclusion in another case seeking to reduce greenhouse gas emissions:

[3] Plaintiffs claim that *AEP* is irrelevant because the case does not address standing. Pls.' Resp. 26. While it is true that the case does not discuss standing, the case does discuss the authority of a court to set a ceiling on emissions, which goes directly to the question of redressability.

> [Q]uestions of how to appropriately balance these worldwide negatives [of fossil fuel emissions] against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate. Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus.

City of Oakland v. BP P.L.C., No. C 17-06011 WHA, 2018 WL 3109726, at *7 (N.D. Cal. June 25, 2018). Because "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order," they should not be in the business of setting emissions levels. *AEP*, 564 U.S. at 428 (citation omitted).

Even if this Court had authority to enter the order requested by Plaintiffs, however, Plaintiffs would still fail to demonstrate redressability because there is no evidence that such an order would redress Plaintiffs' injuries. Plaintiffs allege that the flooding, extreme heat, drought, snow melt, glacial retreat, and other environmental phenomena they are experiencing are a result of climate change caused by increasing greenhouse gas emissions. *See, e.g.*, Loznak Decl. ¶¶ 14, 19, 59, ECF No. 277; Avery M. Decl. ¶¶ 10, 14, ECF No. 278; Levi D. Decl. ¶¶ 3, 8, 14, ECF No. 287. But, as Plaintiffs' experts recognize, climate change is a global phenomenon. *See, e.g.*, Rignot Report 1, 3, 9, ECF No. 262-1; Wanless Report 14, ECF No. 275-1; *see also City of Oakland*, 2018 WL 3109726, at *9 ("The dangers [of global warming] are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide."). Plaintiffs have the burden to show that an order by this court is "likely" to redress their injuries. But they provide no evidence that if the U.S. government implemented a "remedial plan to decarbonize the U.S. energy system," such a plan would measurably reduce global warming or put a stop to the natural disasters and environmental phenomena that Plaintiffs' complain of. A reduction of emissions from U.S. sources will have no effect on

emissions produced in every other country in the world—emissions which are on the rise in many emerging economies. *See* Hansen Report, Ex. C.3 at 152 of 197, ECF No. 274-1 (graphs of emissions from various countries, including emerging economies like China and India); Hansen Report 26, ECF No. 274-1 ("China is now the largest source of CO_2 from fossil fuels and cement manufacture . . . ."); Hansen Report, Ex. C.3 at 170 of 197, ECF No. 274-1 ("[G]rowth of international ship and air emissions . . . largely offset" reductions achieved by the Kyoto Protocol and "the growth rate of global emissions actually accelerated" after 2000); *id.* at 173 of 197 (questioning whether "top agricultural CH_4 emitters like China, India and Brazil" can regulate methane emissions as effectively as California). And there is no evidence that even an immediate reduction in U.S. emissions would manifest itself in a reduction in flooding, wildfires, snow melt, etc., within the lifetimes of the Plaintiffs. *See* Wanless Decl. ¶ 18, ECF No. 275 (Climate change "is not something that can be stopped in the near term"); Rignot Report 16, ECF No. 262-1 at 15 ("It is not clear how much of this sea level rise can be avoided by slowing down climate warming or even cooling the planet again.").

Plaintiffs' invocation of "structural remedial pathways" like those used in gerrymandering and school desegregation cases misses the point. Pls.' Resp. 28. Those cases involved domestic disputes limited to particular state or school system. What Plaintiffs seek here—a "remedial plan to decarbonize the U.S. energy system"—is of a different magnitude entirely. *Id*. at 23. A "structural" remedy that requires remapping voting districts or integrating a school system does not provide guidance on whether and how a court might require the development and implementation of a nationwide energy policy that conforms to the Court's finding of a "minimum safe level of atmospheric CO_2 concentrations" merely because it uses the word "structural." *Id*. at 26.

Plaintiffs also incorrectly claim that the Supreme Court's decision last month in *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018), "reaffirmed that remedies should be linked to the actions that produced the injury, and where a wholesale structural remedy is necessary to redress a constitutional injury, a court may so order it." Pls.' Resp. 27. *Gill*, in fact, rejects the idea of "a wholesale structural remedy." The decision instead says that "a plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact." 138 S. Ct. at 1930 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). And the Court in that case ultimately held that the assertions of statewide harm relating to voting were too generalized for standing. Here, Plaintiffs' assertions of harm are even more generalized, as they arise from a *global* phenomenon.

"A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1934 (citation omitted). Where the alleged injuries are environmental phenomena occurring worldwide as a result of global climate change, the only possible remedies are necessarily beyond this Court's authority and its ability. *See City of Oakland*, 2018 WL 3109726, at *9 ("The problem [of global warming] deserves a solution on a more vast scale than can be supplied by a district judge or jury."). For all of these reasons, Plaintiffs lack standing.

2. <u>Plaintiffs may not bring claims in the absence of a statutory right of action</u>.

a) This Court has not yet addressed whether Plaintiffs must proceed under a valid right of action.

Plaintiffs argue that this Court need not address whether the APA provides the sole vehicle for Plaintiffs' claims because it already rejected this argument when it stated in its order on Defendants' motion to dismiss that "it is the Fifth Amendment that provides the right of action." Pls.' Resp. 28-29 (quoting *Juliana v. United States*, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016)). Plaintiffs take this language out of context: the quoted language came in response to the

United States' argument that Plaintiffs do not have a cause of action to enforce a public trust in federal court, *Juliana*, 217 F. Supp. 3d at 1260, and not in response to an argument that the APA provides the sole vehicle for Plaintiffs' claims, as argued here. In fact, the Court's decision does not once refer to the APA. This Court thus did not address the United States' present argument that the APA's express provisions for bringing constitutional claims foreclose Plaintiffs' attempt to bring a constitutional claim by other means. That issue has never been decided by this Court and is ripe for determination.

Plaintiffs also suggest that the quoted statement was "affirmed by the Ninth Circuit under the 'no clear error' standard . . . ." Pls.' Resp. 28. This also is incorrect. The Ninth Circuit did not address the substance of *any* of Plaintiffs' merits arguments in its mandamus decision, let alone take a position on the source of Plaintiffs' right of action. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 836-37 (2018). To the contrary, the Ninth Circuit observed that Plaintiffs' claims may well be "too broad to be legally sustainable." *Id.* It stressed that this Court needed to reconsider whether Plaintiffs' claims are too broad or whether "some of the remedies the plaintiffs seek may not be available as redress." *Id.* at 837. And it made clear that it expected that the "[c]laims and remedies" in this case could be "vastly narrowed as litigation proceeds[,]" *id.* at 838, for example, by "focus[ing] the litigation on specific governmental decisions and orders[,]" *id.* at 837. That is precisely what requiring Plaintiffs to bring their claims through the APA, as Congress intended, would accomplish. Thus, contrary to Plaintiffs' assertions, there is no basis for concluding that the Ninth Circuit rejected—even implicitly—that the APA provides the sole vehicle for Plaintiffs' claims.

b) Plaintiffs' claims must proceed, if at all, under the APA.

Plaintiffs have not identified a valid right of action, which is an independent legal requirement. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Davis v. Passman*, 442

U.S. 228, 239 n.18 (1979); *pre Nation v. Dep't of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). Plaintiffs argue instead that they are not required to identify a right of action, but may rest their claims directly "on the Due Process Clause of the Fifth Amendment." Pls.' Resp. 30 (quoting *Davis*, 442 U.S. at 243-44). This argument ignores relevant Supreme Court instruction.

The Supreme Court has long distanced itself from *Davis* and the other cases in the *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), line of caselaw, noting that "*Bivens*, *Davis*, and *Carlson v. Green*, 446 U.S. 14 (1980)] represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). "[I]t is possible that the analysis in [those] three *Bivens* cases might have been different if they were decided today" because "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1856-57 (citation omitted); *see id.* at 1857 (citing long line of recent cases declining to imply a right of action under *Bivens*).

Because the implication of rights of action in the Constitution is now "disfavored," the Court has cabined *Davis* and the other cases, holding that if a "case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new" and the reviewing court should conduct additional analysis before finding an implied right of action in the Constitution. *Ziglar*, 137 S. Ct. at 1859. Plaintiffs' claim here is clearly "different in a meaningful way" from *Davis* and any other previous *Bivens* case. *Id.* As this Court has recognized, Plaintiffs' claims are "unprecedented." *Juliana*, 217 F. Supp. 3d at 1262.

Equally important, the Supreme Court has noted that "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" *Ziglar*, 137 S. Ct. at 1860 (citation omitted). The right of action created by *Bivens* and its progeny is not intended to "deter[] the conduct of a

policymaking entity" but rather to deter the unconstitutional acts of an individual officer. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001). Because Plaintiffs' suit is substantially and meaningfully different from *Davis* and the other *Bivens* cases and is clearly an attempt to change the policy of the government, it is not cognizable under *Davis* and the *Bivens* line of cases.

Plaintiffs argue that the Supreme Court's cabining of *Davis* and the other *Bivens* cases does not apply here because they are seeking equitable relief rather than damages. But as the Supreme Court has explained, a court's equitable authority "to enjoin unlawful executive action" is "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015). Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right,"—including constitutional rights—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); *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." (quotation and citation omitted)). Indeed, the Supreme Court has specifically distinguished later attempts to find an implied right of action in the Constitution from *Davis* on the ground that "[f]or Davis, as for Bivens, 'it [was] damages or nothing,'" whereas in other cases, such as *Wilkie v. Robbins*, the plaintiff had access to alternative statutory remedies such as the APA. 551 U.S. 537, 553, 555 (2007) (quoting *Davis*, 442 U.S. at 245) (refusing to find implied right of action where "Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints").

Here, the APA provides "express . . . statutory limitations" that "foreclose" an equitable right of action to enforce Plaintiffs' asserted constitutional claims outside of the provisions for judicial review in the APA itself. *Armstrong*, 135 S. Ct. at 1385. The courts may not supplement it with one of their own creation. *Seminole Tribe*, 517 U.S. at 73-74; *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1220-21 (D.N.M. 2014); *Occupy Eugene v. U.S. Gen. Servs. 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).

Plaintiffs' claim that language from the Supreme Court's recent decision in *Ziglar* confirms the "right of every citizen to injunctive relief from ongoing and prospective 'official conduct prohibited' by the Constitution . . . ." Pls.' Resp. 32. Plaintiffs then suggest that the implied cause of action they identify allows courts "[t]o address these kinds of [large-scale] policy decisions" and allow plaintiffs to "seek injunctive relief." *Id.* The issue before the Court in *Ziglar* was whether it should recognize an implied cause of action for damages to challenge the FBI's alleged "hold-until-cleared policy" adopted in the wake of the terrorist attacks on September 11, 2001. 137 S. Ct. at 1852. The Court declined to create an implied right of action, leaving the work of crafting a right of action to Congress. *Id.* at 1864. And although the Court indicated plaintiffs could seek injunctive relief, the Court did not suggest that such a challenge could be raised directly under the Constitution, as opposed to through the APA's right of action. Moreover, while the FBI's alleged policy may have been "large-scale" in the sense that it applied to hundreds of individuals, the plaintiffs' challenge in *Ziglar* targeted one specific agency action—the adoption of that policy—not the unconnected "aggregate actions" of a dozen or more agencies taken over five decades that Plaintiffs attempt to challenge here.

Webster v. Doe, *Franklin v. Massachusetts*, and *Hills v. Gautreux* are equally unavailing. Pls.' Resp. 29. In *Webster*, a former CIA employee challenging termination of his employment brought both statutory and constitutional claims under the APA. 486 U.S. 592, 595, 602 (1988). Although the Court found the statutory claims unreviewable under the APA, it expressly refused to extend that holding to the constitutional claims. *Id.* at 603. In *Franklin*, the Court considered a challenge to the apportionment of overseas federal employees among the States for purposes of allocating seats in the House of Representatives. 505 U.S. 788, 790-91 (1992). Although, after finding no viable APA claim, the Court went on to consider the constitutional claims, *id.* at 803, the case is of no assistance here because the Court expressly limited its holding to claims challenging the apportionment of representatives based on past precedent allowing such claims. *Id.* at 801 ("Constitutional challenges to apportionment are justiciable" (citing *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442 (1992)). Finally, in *Hills*, the Supreme Court affirmed a remedy against the Department of Housing and Urban Development spanning the entire Chicago metropolitan area to address racial discrimination in public housing. 425 U.S. 284, 288 (1976). Though Plaintiffs cite *Hills* as an example of a "structural remedy similar to the relief requested here[,]" Pls.' Resp. 29—with no acknowledgement of the differences between a remedy that covers a single federal agency within a single metropolitan area and one that covers the entire federal government nationwide—in fact, the case illustrates that a remedy that violates the government's statutory and constitutional authority—like the remedy requested in this case, *supra* 16-19 & *infra* 23-28—is "impermissible as a matter of law." *Hills*, 425 U.S. at 306.

Lastly, Plaintiffs suggest that two Ninth Circuit decisions allow them to bring constitutional claims against federal agencies without invoking the APA right of action, when in fact those cases do not address this issue. Pls.' Resp. 30 (citing *Presbyterian Church (U.S.A.) v.*

United States, 870 F.2d 518 (9th Cir. 1989), and *Navajo Nation*, 876 F.3d 1144). As explained in prior briefing, those cases instead address the separate issue of when a plaintiff may avail herself of the APA's waiver of sovereign immunity. *See* Defs.' Reply in Supp. of Mot. to Stay Disc. 2-4, ECF No. 231.

Because the APA provides the sole mechanism for Plaintiffs to bring their claims,[4] they must comply with the APA's requirements for judicial review, including the requirement that a plaintiff direct her challenge to "circumscribed, discrete" final agency action, rather than launching a "broad programmatic attack" on agency policies in general. *Norton*, 542 U.S. at 62, 64; *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). As Plaintiffs have chosen to challenge "aggregate actions" and have not identified discrete, final agency actions as required to assert a valid challenge under the APA, their claims must fail.[5]

c) Judicial review under the APA provides sufficient procedural due process.

Plaintiffs make the extraordinary contention that it would violate procedural due process to require them to channel their claims through the statutory procedures that Congress has provided for challenging the constitutionality of agency action or inaction. The APA explicitly provides for judicial review of constitutional claims. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity[.]"). Thus, the Supreme Court's

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

[5] As explained in Defendants' motion for summary judgment, the Court lacks jurisdiction to review the sole discrete agency action identified by Plaintiffs (Department of Energy Order No. 3041). Defs.' Mot. 18 n.7.

concern in *Davis* that a constitutional right may be beyond judicial review is inapplicable here. *See* Pls.' Resp. 33 (citing *Davis*, 442 U.S. at 242). In addition, Plaintiffs' observation, that where Congress intends to preclude judicial review of constitutional claims "its intent to do so must be clear[,]" *id.* at 33 (quoting *Webster*, 486 U.S. at 603), is wholly inapt in the context of the APA. *Cf. Elgin v. Dep't of the Treasury*, 567 U.S. 1, 9 (2012) ("*Webster's* standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court."). As Plaintiffs correctly observe, the APA nowhere evinces an intent to "preclude [judicial] review of constitutional claims." Pls.' Resp. 34 (quoting *Webster*, 486 U.S. at 598). To the contrary, it expressly provides the vehicle for such claims against federal agencies.

Plaintiffs point to no case holding that the APA's judicial review provisions are constitutionally deficient, either as a general matter, or as applied to plaintiffs who bring constitutional claims. And courts that have considered those procedures have concluded that they pass constitutional muster. *See, e.g., Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 50 (1st Cir. 2016) ("The APA sets forth no strict procedural regime for informal agency decisionmaking, and a party's procedural due process rights are respected as long as the party is afforded adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (citation omitted)).

At root, Plaintiffs' are making a facial attack on the APA itself, alleging that the provisions of that statute requiring a plaintiff to challenge final agency actions, 5 U.S.C. §§ 702, 704, violate due process. This is a sweeping claim against a statute that has governed judicial review of agency action for over sixty years. Plaintiffs present nothing to justify a finding that the APA violates their due process rights other than claiming that it would be too hard for them to identify the specific agency actions and inactions that have harmed them. Pls.' Resp. 34-35.

But some additional effort on the part of Plaintiffs to identify the source of their injuries is far outweighed by the prejudice to the government that would result from a court order purporting to evaluate the nation's energy and environmental policies outside of any particular action. The APA's requirement that plaintiffs challenge discrete "agency actions" serves to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. While Plaintiffs may disagree with Congress's determination that litigants should not be able to "seek wholesale improvement" of a program or policy by court decree, *Lujan*, 497 U.S. at 891, that disagreement is far from sufficient to demonstrate that the statute itself is unconstitutional.

Finally, Plaintiffs' suggestion that this lawsuit, as currently presented, provides their only opportunity for relief is demonstrably incorrect. Plaintiffs are free to challenge particular agency actions or inactions before the agencies or the courts, to petition for rulemakings or for the repeal of certain rules (and to subsequently challenge the agencies' response), to challenge agency conduct under other statutes that provide a right of action, or to petition Congress. There is no basis to conclude that bringing one omnibus action making a litany of vague assertions against more than fifty years of unspecified and unconnected actions (or inactions), policies, and practices, by nearly a dozen different agencies, is consistent with the judicial role, much less that it is required by procedural due process.

3. Plaintiffs ask the Court to exercise authority that exceeds the scope of its power under Article III of the Constitution.

As explained in the government's motion for summary judgment, Plaintiffs' suit itself and the relief sought are broader than this Court can entertain under Article III. Defs.' Mot. 20-24. At its most basic level, Plaintiffs' suit is not a Case or Controversy cognizable under Article

III. It is instead an attempt to make energy and environmental policy through the courts rather than through the political branches to whom the Constitution assigns law-making and policy-making authority.

In response, Plaintiffs deny that they are asking the Court to make policy. Pls.' Resp. 41. But their denial is contradicted by their request that this Court create a national "remedial plan" that sets a "minimum safe level of atmospheric CO_2 concentrations" to "decarbonize the U.S. energy system" in order to "substantially reduc[e] GHG emissions." Pls.' Resp. 23, 26; Am. Compl. 94 & Prayer for Relief ¶ 7. While Plaintiffs may not use the word "policy" to describe their remedy, what they are requesting—a national plan to reduce greenhouse gas emissions—is indisputably policy. This Court's decision to set its own emissions levels based on a limited number of adversarial expert reports would trample on the separation of powers. *Id.* at 428.

It is no response to say, as Plaintiffs attempt to do here, that such concerns can be cast aside because Defendants may have some latitude in how they implement Plaintiffs' proposed plan. Pls.' Resp. 40. Requiring the President and the entire Executive Branch to produce to the Court a national "remedial plan" to combat global warming, end the Nation's reliance on fossil fuels, or ensure that atmospheric CO_2 is no more concentrated than a specific parts-per-million, and retaining jurisdiction to ensure the Executive Branch's compliance with that plan, simply cannot be reconciled with the limited judicial power vested by Article III in the federal courts. And it would put the Court on a collision course with Congress' legislative power and the President's supervisory power over federal agencies as the Nation's Chief Executive. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010); *Clinton v. Jones*, 520 U.S. 681, 711-713 (1997) (Breyer, J., concurring in the judgment) (explaining that Article II "makes a single President responsible for the actions of the Executive Branch"). As a unanimous

Supreme Court recognized in *AEP*, federal courts "lack the scientific, economic, and technological resources an agency can utilize in coping with [such] issues . . . ." 564 U.S. at 428 (citation omitted).

Indeed, as noted above, the Northern District of California (Alsup, J.) reached the same conclusion in dismissing a series of public nuisance claims brought by several cities against oil and gas production companies, alleging that their production and sale of fossil fuels caused climate change and sea level rise that injured the cities. *See City of Oakland*, 2018 WL 3109726, at *9; *supra* 12-13.

Plaintiffs' efforts to analogize this case to other cases in which courts issue "systemic" remedies fail. Plaintiffs have not identified a single case in which a court ordered the government to develop and implement a national plan, let alone a national plan to alter the environment or climate. Instead, they rely on school desegregation and prison reform cases, Pls.' Resp. 38, neither of which even approach a remedy on the scale requested by Plaintiffs here. School desegregation and prison reform are limited to local school districts and state prison systems. The courts' remedies in those cases were directed at local and state governments. *See Brown v. Plata*, 563 U.S. at 499 (affirming remedy directed at California prison system); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (remanding to local courts to oversee remedies for local school districts). Thus, those cases did not involve the same separation of powers concerns at issue here where Plaintiffs have asked this Court to order the federal Executive branch to implement judicially-determined emissions standards. *Brown v. Plata* provides a particularly inapt comparison. There, the remedy—the release of prisoners to reduce overpopulation—was provided by statute. 563 U.S. at 511. Thus, *Brown v. Plata* suggests that a court and plaintiffs

should abide by the specific rights of actions and procedures already provided by Congress—such as the APA—when challenging government conduct under the Constitution.

Plaintiffs also argue that the Court need not address the separation of powers problem yet, suggesting that the Court delay until it decides on a remedy. Pls.' Resp. 40. There are two problems with Plaintiffs' argument. First, the issue is ripe for decision now. Plaintiffs' response confirms that they are deliberately seeking exceptionally broad relief: their "unprecedented" claims seek a "wholesale structural remedy" to address infringement "of a profound and systemic nature" that arises from "aggregate, systemic acts." *Id.* at 1, 22, 27, 37, 41. The issue—whether the claims and relief are consistent with Article III—is purely legal and ready to be decided now. Factual development regarding the scope of Defendants' alleged violations or Plaintiffs' injuries is not relevant to a determination of whether this Court's implementation of Plaintiffs' requested remedy violates Article III of the Constitution. *See id.* at 40. That is, even accepting all of Plaintiffs' allegations regarding Defendants' conduct and Plaintiffs' injuries as true, as a matter of law this Court lacks authority to set emissions standards and require Defendants to implement those standards as part of a national "remedial plan" to "decarbonize the U.S. energy system." For this reason, this case is unlike *Baker v. Carr*, where the Court found that it had "no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found." 369 U.S. 186, 198 (1962). Here, in contrast, it is clear from the outset that the claims and relief sought are inconsistent with the separation of powers.

Second, delaying resolution of Defendants' argument exacerbates the constitutional problem. As Defendants have explained elsewhere, ongoing discovery and trial will themselves violate independent legal requirements and the constitutional separation of powers. *See* Defs.'

Mot. for J. on the Pleadings, ECF No. 195; Defs.' Mot. for Protective Order, ECF No. 196. Plaintiffs seek 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. Allowing Plaintiffs to leverage civil litigation to marshal the policy positions of federal agencies would displace the President as the superintendent of the Executive Branch and encroach on his exclusive authority to elicit the views of federal agencies in formulating national policies for addressing important issues of general concern. The Constitution assigns the task of addressing problems like climate change to the Executive and Legislative Branches; the Judicial Branch is assigned the task of resolving cases and controversies. Putting the Executive Branch's "systemic" policy on climate change over the past decades on trial is not consistent with Article III. "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (Thomas, J., concurring); *see also Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945); *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

In response, Plaintiffs offer the platitude that "[j]udicial review of the political branches has been a historic stalwart of separation of powers principles." Pls.' Resp. 41. While this is true, it does nothing to show that the claims and relief sought here are within the authority of the federal courts. They are not, as a judicial injunction or declaration establishing national policy on climate change has no support in the "traditional scope of equity." *Guar. Trust Co.*, 326 U.S. at 105.

Plaintiffs also claim that the limitations on a court's equity jurisdiction set forth in *Guaranty Trust* and *Grupo Mexicano de Desarrollo* "are inapposite to the systemic constitutional

harms alleged here." Pls.' Resp. 41. But those cases do not state that the limits on a federal court's equitable authority go out the window when a claim is constitutional. As the Supreme Court explained in *Grupo Mexicano*, the limitation on equity jurisdiction is based on the type of relief sought—equitable relief—and the limitations are "substantive prerequisites for obtaining an equitable remedy." 527 U.S. at 318 (quoting 11A Wright, Miller, & Kane, Federal Practice and Procedure § 2941, at 31 (2d ed. 1995)); *see also Guaranty Trust*, 326 U.S. at 105 ("Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, a plain, adequate and complete remedy at law must be wanting, explicit Congressional curtailment of equity powers must be respected, [and] the constitutional right to trial by jury cannot be evaded." (citations omitted)).

At bottom, this lawsuit is an effort to use "the judicial process . . . to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408 (citations omitted). The Court should accordingly dismiss the case as not justiciable under separation of powers principles. As the Northern District of California recently recognized in dismissing a far-reaching—but not as far-reaching—effort to use the federal courts to address climate change, the courts "must also respect and defer to the other co-equal branches of government when the problem . . . deserves a solution best addressed by those branches." *City of Oakland*, 2018 WL 3109726, at *9.

B. Plaintiffs' claims fail as a matter of law.

Plaintiffs cannot save their remaining claims—the Fifth Amendment substantive due process claim and the public trust doctrine claim—by advancing the legally unsupported argument that all of their claims require an "empirical scientific and historic" analysis. Pls.' Resp. 42. This Court need not entertain "an empirical scientific and historical analysis" to determine the purely legal questions of whether (1) there is a legally cognizable right under the

Due Process Clause to a climate system capable of sustaining human life; (2) there can be a viable "state-created danger" claim against the federal government under the Due Process Clause; and (3) the Public Trust Doctrine applies to the federal government. Plaintiffs also claim that there are three Fifth Amendment Claims not addressed in Defendants' opening summary judgment brief. But these three claims are not legally distinct from Plaintiffs' claim that there is a right under the Due Process Clause to an environment of a certain quality.

1. A judicially enforceable right to a climate system capable of sustaining human life cannot be found in the Due Process Clause.

Plaintiffs claim that this Court cannot determine whether the Due Process Clause includes a right to a climate system capable of sustaining human life without resolving factual disputes at trial. But whether such a right exists is a purely legal question.

The Supreme Court has cautioned that courts should not readily recognize novel due process claims. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* "We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S 494, 502 (1977)).

To protect against the unbounded expansion of the Due Process Clause, the Court has required that a plaintiff demonstrate that the alleged right is "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 720 721 (quotation and citations omitted). It is not enough that a right is "personal and profound" or that it implicate the concepts of personal dignity and autonomy. *Id.* at 725-28.

Plaintiffs cannot meet this high bar here. There is no mention of the environment or the climate in the Constitution. And no other case has ever found a fundamental right arising from the natural environment or climate system. For good reason. The novel right proposed by Plaintiffs is unlike the fundamental rights recognized in other cases. The right to keep and bear arms is expressly discussed in the Second Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010). The right to be free from cruel and unusual punishment is based in the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 311, 321 (2002); *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The right of adults to engage in private intimate relations grew out of a long line of cases recognizing "the autonomy of the person in making" decisions related to "marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). And although Plaintiffs have tried to stretch the rights of personal autonomy and dignity recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to reach their proposed right to a particular climate system, Pls.' Resp. 44-45, the caselaw is not that malleable. The right of same-sex couples to marry grew out of the well-recognized right to marry; it "was not simply deduced from abstract concepts of personal autonomy." *Glucksberg*, 521 U.S. at 703; *Obergefell*, 135 S. Ct. at 2598. No such well-recognized right—or line of precedent—underlies Plaintiffs' proposed right to a particular climate system.

The D.C. Circuit recently reached a similar conclusion in *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission ("FERC")*, in which the plaintiffs alleged FERC and its funding structure violated their protected due process right "to clean air, pure water, and preservation of the environment." 2018 WL 3352897, at *1, *3 (D.C. Cir. July 10, 2018). The court held "the right to healthy environment" is not a liberty interest protected by the Due Process Clause because it "bears no relationship to the quintessential liberty interest—'freedom

from bodily restraint'" and it does not "protect activities that have been held to constitute federally protected liberty interests." *Id.* at *3 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972)).

Although this Court recognized a "right to a climate system capable of sustaining human life" at the motion to the dismiss stage, that finding was totally unsupported. *Juliana*, 217 F. Supp. 3d at 1250. This Court cited no prior caselaw recognizing any related right, but rather reached its conclusion based solely on its own "reasoned judgment." *Id.* Respectfully, the Court's willingness to recognize a new fundamental right based on no more than its own judgment is precisely what the Supreme Court warned of in cautioning that courts should "'exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into' the policy preferences of the Members of this Court." *Glucksberg*, 521 U.S. at 720 (quoting *Moore*, 431 U.S., at 502). At the summary judgment stage, this Court should find that there is no fundamental right to a particular climate system where there is no legal foundation whatsoever to support that alleged right.

Plaintiffs attempt to make the question of whether there is a fundamental right to a particular climate system a factual matter by relying on the view of their expert, Andrea Wulf. Ms. Wulf's views have no bearing on the purely legal question of whether there is a right to a life-sustaining climate system under the due process clause. The Court does not need an expert to illuminate whether an alleged unenumerated due process right is "deeply rooted" in our Nation's history and tradition. Rights that are deeply rooted are evident in precedent. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2598; *McDonald*, 561 U.S. at 754; *Lawrence*, 539 U.S. at 574; *Atkins*, 536 U.S. at 311; *Roper*, 543 U.S. at 568; *see also Del. Riverkeeper Network*, 2018 WL 3352897,

at *3 (looking to precedent to determine if claimed due process right exists). A judicially enforceable right to a particular climate system is not.

Finally, Plaintiffs attempt to downplay the significance of recognizing a new fundamental right completely divorced from precedent by arguing that such a right would be consistent with the United States' "clear policy of protecting the climate" as illustrated by the its ratification of the UN Framework Convention on Climate Change. Pls.' Resp. 45. Putting aside the oddity of Plaintiffs' acknowledgement of the government's "policy of protecting the climate" in the context of their claims, this argument only underscores that Plaintiffs are asking this Court to render a policy judgment under the mantle of creating a novel "fundamental right." *Id*.

Because the question of whether the Due Process Clause contains a fundamental right to a climate capable of sustaining human life is purely legal question, there is no need for a trial to resolve it. This Court need only look to past precedent to see that there is no support for a finding that such a right is "deeply rooted" in the Nation's history and tradition.

2. Plaintiffs Cannot Establish a State-Created Danger Claim.

Plaintiffs cannot state a due process claim under a state-created danger theory. The Due Process Clause has never been interpreted to allow a challenge to proceed where, as here, Plaintiffs' main complaint centers on an amorphous policy disagreement spanning several decades. The Due Process Clause

> is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989). A state actor is generally not liable under the Due Process Clause "for its omissions." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016) (quotation and citation omitted).

The Ninth Circuit has articulated two circumstances where a due process claim might exist based on an omission: "(1) when a 'special relationship' exists between the plaintiff and the state (the special-relationship exception); and (2) when the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known or obvious danger' (the state-created danger exception)." *Id.* (citing *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971-72 (9th Cir. 2001)). Neither exception plausibly applies here.[6]

First, Plaintiffs do not argue that any special relationship exists between them and the United States. Nor could they. Plaintiffs' contention that the United States' alleged "aggregate actions" foster a fossil-fuel based energy system, Pls.' Resp. at 47, applies to every citizen.

Second, Plaintiffs' general argument that the United States' alleged knowledge of climate change "caused dangers to Plaintiffs" does not rise to the level of "deliberate indifference" under a long line of precedent. *See, e.g.*, *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (refusing to find deliberate indifference based on City's alleged failure to provide a safe work environment in part because Due Process Clause does not include such a right and noting that the Supreme Court has "always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" (citation omitted)); *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997) ("'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal

[6] Plaintiffs contend that there is a three-prong test for assessing the state-created danger exception. *DeShaney* itself does not provide for such a three-prong test. 489 U.S. at 196-200. Nor is the United States aware of any precedent — except for this Court's opinion denying the United States' motion to dismiss — that articulates such a three-prong test for the state-created danger exception. Indeed, the Supreme Court in *DeShaney* emphasized the limited nature of the state-created danger exception, noting that this line of precedent "stand[s] only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being." *Id.* at 199-200 (citation omitted).

actor disregarded a known or obvious consequence of his action."); *Johnson v. City of Seattle*, 474 F.3d 634, 639 (9th Cir. 2007) ("Because the City of Seattle had no constitutional duty to protect the Pioneer Square Plaintiffs against violence from members of the riotous crowd, 'its failure to do so-though calamitous in hindsight-simply does not constitute a violation of the Due Process Clause.'" (quoting *DeShaney*, 489 U.S. at 202)); *Patel*, 648 F.3d at 976 (summarizing case law and requiring stringent proof to find deliberate indifference because "[a]nything less 'is not enough' to constitutionalize a state tort" (quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (1996)).

The narrow circumstances where the Ninth Circuit has recognized a due process claim under the state-created danger theory accords with this precedent. *See, e.g., Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (finding a cause of action for due process violation arose only where officers "took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 9-1-1 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; then they locked the door and left him there alone . . . after they had examined him and found him to be in serious medical need"); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (finding due process cause of action only arose where officer arrested a female driver, impounded the car, and left driver by the side of the road at night in a high-crime area). Moreover, the duty of officers recognized in these cases not to affirmatively place an individual in a position of imminent risk with deliberate indifference to his or her safety can be traced to common law roots. But there is no basis in common law or elsewhere for a duty to protect persons (which would presumably include all members of the general population of the United States) against whatever perils are produced by emissions of CO_2.

Plaintiffs counter that the United States' actions in promoting fossil fuels resulted in greater emissions by third parties, causing psychological[7], and to a lesser extent physical, harm to Plaintiffs, and that the United States knew that its actions "caused dangers to Plaintiffs[,]" evincing deliberate indifference. Pls.' Resp. 47-59. Plaintiffs' proof shows that there is a policy disagreement, not deliberate indifference. *Id.* at 49.[8] Specifically, Plaintiffs quote the declaration of Gus Speth who explains that the United States knew about "alternative energy pathways" that would have minimized greenhouse gases but it elected not to pursue these pathways. *Id*. at 48. Speth and Plaintiffs' other experts may believe that the United States' policies are too encouraging of energy production and give too little consideration to climate change. They may not endorse the manner in which the United States has historically managed the energy system. But such official action that is merely inconsistent with Plaintiffs' policy preferences is not remotely the sort of conduct that rises to the kind of deliberate indifference that can support a due process claim. *See, e.g., Lombardi v. Whitman*, 485 F.3d 73, 84 (2d Cir. 2007) (Federal agencies "often must decide whether to regulate particular conduct by taking into account whether the risk to the potentially affected population will be acceptable. Such

[7] Plaintiffs cite the opinion of Dr. Lise Van Susteren to support their claims about the alleged psychological harms arising from climate change and their impacts on "[t]hese youth, not just these Plaintiffs." But as discussed above, there is not a general duty to protect a large class of persons from the effects of climate change because there is no right to a particular climate system. *Supra* 29-32. The state-created danger exception focuses on particularized harms to an individual; it is not a vehicle to bring a claim to vindicate "despair," "ang[er]" or "hopelessness," Pls.' Resp. 48, of a large number of youth wrought by the United States' alleged inaction.

[8] While Plaintiffs acknowledge that that the state-created danger exception imposes "rigorous proof requirements," Pls.' Resp. 47, they argue that their evidence showing that the United States historically promoted fossil fuels is tantamount to deliberate indifference and to hold otherwise would be to impose "an impossibly high factual threshold." *Id.* at 49. This Court should decline Plaintiffs' invitation to relax the stringent proof requirements necessary to invoke this exception. Plaintiffs cite to no case in which a court found deliberate indifference based on, as Speth opines, policy decisions that allegedly left a class of persons vulnerable to danger. *Id*. at 49.

decisions require an exercise of the conscience, but such decisions cannot be deemed egregious, conscience-shocking, and arbitrary in the constitutional sense, merely because they contemplate some likelihood of bodily harm." (quotation and citation omitted)).

3. The Public Trust Doctrine Applies to the States' Ownership of Submerged Lands, Not to the Federal Government's Regulation of the Atmosphere.

Plaintiffs' response fails to overcome the basic problem with their public trust claim: the claim fails as a matter of law because that doctrine does not apply to the federal government.[9] As the Supreme Court stated in *PPL Montana, LLC v. Montana*, "the public trust doctrine remains a matter of state law," and "the contours of that public trust do not depend upon the Constitution." 565 U.S. 576, 603-04 (2012) (citation omitted); *see also United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012) (explaining that that "the contours" of the public trust doctrine, "are determined by the [S]tates").[10] This presents a purely legal question, not a mixed question of law and fact that could be informed by expert opinion or further factual development at trial.

In keeping with that rule, courts have recently and resoundingly rejected public trust claims against federal agencies. For example, in *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012)—a case this Court called "substantially similar to the instant action," *Juliana*, 217 F.

[9] Plaintiffs' assertion that "[u]nder the clear error standard, the Ninth Circuit upheld this Court's order" denying the government's motion to dismiss, Pls.' Resp. 50, is misleading. As explained above, the Ninth Circuit reviewed the Court's order only to determine whether mandamus relief was warranted; the merits of the order were not squarely before the Ninth Circuit. *Supra* 16; *see also United States v. U.S. Dist. of Or.*, 884 F.3d at 837.

[10] That rule is consistent with the Property Clause of the Constitution, which vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress possesses that power "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

Supp. 3d. at 1258—the District Court for the District of Columbia reiterated that the public trust doctrine does not "impose duties on the federal government." *Alec L.*, 863 F. Supp. 2d at 13. Because the plaintiffs relied solely on the public trust doctrine, the court properly held that they had failed to identify a federal cause of action and dismissed their suit. *Id.* at 15, 17. The D.C. Circuit summarily affirmed. *Alec L. ex rel Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014) (noting that the "plaintiffs point to no case . . . standing for the proposition that the public trust doctrine—or claims based upon violations of that doctrine—arise under the Constitution or laws of the United States, as would be necessary to establish federal question jurisdiction" (citation omitted)). That result was both grounded in the law and undoubtedly correct.

Plaintiffs identify several sources that refer generally to the federal government as a "trustee" or discuss a duty to hold natural resources "in the public trust," but not one transforms the public trust doctrine into a cause of action available for use against the federal government. Pls.' Resp. 51-52. Instead, Plaintiffs' sources stand only for the unremarkable proposition that the federal government has authority to manage particular natural resources for public benefit. *Id.* The fact that the sources call the federal government a "trustee" does not help Plaintiffs; the government may act as a trustee in any number of contexts without implicating the public trust doctrine. *See, e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003) (describing the federal government's duty as trustee to manage land held in trust for Indian tribe).

Even assuming for present purposes that the public trust doctrine could apply to federal actors, the doctrine remains unavailable here because the Clean Air Act has displaced it. As the Supreme Court held in *AEP*, "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired

power plants." 564 U.S. at 424; *see also Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853, 856-57 (9th Cir. 2012) (affirming the dismissal of an Alaskan native village's claims against major carbon dioxide emitters on grounds articulated in *AEP*). The fact that Plaintiffs raise public trust claims and the *AEP* plaintiffs raised public nuisance claims makes no difference because the Supreme Court's logic applies with equal force in this case: when Congress designates an expert agency to "serve as primary regulator of greenhouse gas emissions," federal judges should not be able to set limits on those same emissions. *AEP*, 564 U.S. at 427-29. Plaintiffs make no effort to grapple with that logic in their response.

No discovery or expert opinion is necessary for this Court to resolve this claim in the government's favor. The Court need only decide the purely legal question of whether the public trust doctrine provides a cause of action against the federal government, and the law establishes that it does not. Plaintiffs assert that discovery is necessary to evaluate whether "the atmosphere or climate system is part of the federal trust *res*[,]" Pls.' Resp. 50, but they are mistaken. Because the public trust doctrine does not apply to any such res—whether the "atmosphere or climate system" is part of it or not—further fact development will not aid the Court. To put it another way, fact discovery or expert testimony will do nothing to illuminate what the Supreme Court has already made clear: "the public trust doctrine remains a matter of state law," *PPL Mont.*, 565 U.S. at 603-04, and it simply does not apply here.

4. <u>Plaintiffs have not preserved three additional Fifth Amendment claims and, even if they had, the claims are meritless.</u>

Plaintiffs contend that the Defendants have not sought summary judgment on three of Plaintiffs' Fifth Amendment claims. On the contrary, as explained above, regardless of the constitutional theory Plaintiffs advance, they do not have standing, their claims and relief exceed the bounds of Article III, and there is no right of action but for the APA, which Plaintiffs have

refused to use. All of those rationales fully justify rejecting every one of Plaintiffs' constitutional claims. Plaintiffs also ignore the procedural history of this case, which shows that the relevant claims were not credited at the motion to dismiss stage. The government's initial motion to dismiss asked the Court to dismiss Plaintiffs' Due Process claim based on either unenumerated or enumerated rights. *See* ECF No. 27 at 4, 9-14. This Court denied the motion, identifying a sole Due Process right—the right to a livable climate. *Juliana*, 217 F. Supp. 3d at 1248-50. Plaintiffs' belated effort to raise additional "enumerated" rights should thus be rejected.[11]

Plaintiffs are therefore incorrect that they "have preserved three Fifth Amendment Claims that are not at issue in Defendants' motion." Pls.' Resp. 51 (capitalization altered). Plaintiffs have not preserved the claims and, even if they had, the motion for summary judgment explains why the Court should reject them.

C. If the Court denies Defendants' motion, it should certify its decision for interlocutory appeal under 28 U.S.C. § 1292(b).

At a minimum, the Court should certify for interlocutory appeal any denial of Defendants' motion. *See* 28 U.S.C. § 1292(b); *United States v. U.S. Dist. Court for Dist. of Or.*,

[11] The first claim that Plaintiffs identify is a "Fifth Amendment Substantive Due Process claim for government infringement of Plaintiffs' enumerated rights of life and property and already recognized implicit liberties," including the "rights to move freely, to family, and to personal security." Pls.' Resp. 53. The second claim is "the Fifth Amendment Substantive Due Process and Equal Protection Claim for systemic government discrimination against Plaintiffs with respect to the exercise of their fundamental rights." *Id*. The third claim is a "Fifth Amendment Substantive Due Process Equal Protection Claim for government discrimination against Plaintiffs as a class of children, who should have suspect or quasi-suspect classification and some heightened level of constitutional protection against discrimination." *Id*. The government's motion to dismiss explained that rational basis review applies to any Equal Protection claim based on age, and this Court has already held "that defendants' affirmative actions would survive rational basis review." *Juliana*, 217 F. Supp. 3d at 1249; Mot. at 24 n.8.

884 F.3d at 838 (contemplating future certification). Certification is appropriate when a case "involves [] controlling question[s] of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from" an order denying summary judgment would "materially advance the ultimate termination of the litigation." U.S.C. § 1292(b). "Courts traditionally will find that a substantial ground for difference of opinion exists where . . . 'novel and difficult questions of first impression are presented.'" *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quoting 3 Federal Procedure, Lawyers Edition § 3:212 (2010)). This cases raises numerous purely legal issues that have the potential to affect the outcome of the case such as whether Plaintiffs' constitutional claims must proceed under the APA, whether there is a substantive due process right to a climate system capable of supporting life, and whether the public trust doctrine applies to the government's regulation of the atmosphere. Defendants have also identified a range of cases that have considered similar issues and reached different conclusions. In particular, the Supreme Court's decision in *AEP* and the Northern District of California's decision in *City of Oakland* would both conflict with a decision by this Court allowing claims seeking to change government policy on climate change to proceed. *AEP*, 564 U.S. at 428; *City of Oakland*, 2018 WL 3109726, at *9. Similarly, in *Alec L.*, the District Court for the District of Columbia's decision holding that the public trust doctrine does not apply to the federal government would conflict with a decision by this Court finding that such a claim was legally permissible. *Alec L.*, 863 F. Supp. 2d at 13.

Although Section 1292(b) is only to be used "in extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation," this is such a case. *U. S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). This Court has itself called this case and Plaintiffs' claims "unprecedented," *Juliana*, 217 F. Supp. 3d at 1262, and Ninth Circuit

anticipated that Defendants might need to "ask[] the district court to certify orders for interlocutory appeal" given the breadth of Plaintiffs' claims. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 838. And there can be no doubt that continued litigation of Plaintiffs' claims via a 50-day trial in which Plaintiffs intend to present 18 experts and at least 21 fact witnesses would be "protracted and expensive."

There is no sound basis for subjecting the United States to burdensome discovery and a 50-day trial, which would itself violate fundamental statutory and constitutional limitations, when so many novel and potentially dispositive legal issues remain in doubt. *See* Oral Arg. Recording at 5:49-5:51, *United States v. U.S. Dist. Court for Dist. of Or.*, No. 17-71692 (9th Cir. Dec. 11, 2017), https://www.ca9.uscourts.gov/media/ (Berzon, J., suggesting that "many judges would have" certified for interlocutory appeal the denial of Defendants' motion to dismiss).

III. CONCLUSION

There are no material factual issues in dispute, and Defendants are therefore entitled to summary judgment on all claims. For the foregoing reasons, the Court should enter summary judgment in favor of Defendants on each of Plaintiffs' claims.

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Respectfully submitted,

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