No. 18-36082

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon (No. 6:15-cv-01517-AA)

APPELLANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

This action was filed more than three-and-a-half years ago. In all that time, Plaintiffs never once moved the district court for preliminary relief on the ground that a lack of immediate relief would cause them irreparable harm. Only now on appeal have Plaintiffs moved for such relief — expressly styled as a request for a "*preliminary* injunction" — and only after this Court (at Plaintiffs' request) has already expedited the appeal. *See* DktEntry 21-1 (filed Feb. 7, 2019) (Motion). This multi-year voluntary delay alone should defeat Plaintiffs' late-breaking plea for an "urgent" injunction pending appeal.

Worse yet, Plaintiffs nowhere endeavor to explain their long delay, though their litigation strategy is obvious: had Plaintiffs secured such relief from the district court, that would have resulted in an immediate interlocutory appeal under 28 U.S.C. § 1292(a)(1). But Plaintiffs have vehemently sought to avoid appellate review, repeatedly emphasizing the district court's supposed "ability to fashion reasonable remedies based on the evidence and findings *after trial*." *E.g.*, ECF No. 428, at 4 (emphasis added) (quoting ECF No. 146, at 9); *accord* ECF No. 241 at 2-4, 9, 19-24; ECF No. 255 at 41. Indeed, Plaintiffs by their present motion are essentially making a bid in this Court for a substitute mini-trial or "trial lite" — which is premature until the pure issues of law now being briefed in this interlocutory appeal are appropriately resolved as a threshold matter.

Although Plaintiffs' motion could be denied for these procedural infirmities alone, this opposition instead focuses on the many substantive legal defects in the relief sought by Plaintiffs. That relief is remarkable and sweeping, asking the Court to block agency action under an untold number of unspecified statutes. Specifically, Plaintiffs ask the Court to bar the government "from authorizing through leases, permits, or other federal approvals: (1) mining or extraction of coal on Federal Public Lands; (2) offshore oil and gas exploration, development, or extraction on the Outer Continental Shelf; and (3) development of new fossil fuel infrastructure, in the absence of a national plan that ensures the above-denoted authorizations are consistent with preventing further danger to these young Plaintiffs." Motion 1-2 (multiple footnotes, which underscore the reach of this request, omitted). Beyond the unprecedented nature of this ambitious attempt to throttle important government functions superintending broad swaths of the national economy, Plaintiffs have not satisfied any of the four factors necessary for preliminary injunctive relief, much less the heightened standard necessary for mandatory injunctive relief, especially of the broad type sought here.

As to those factors, none of Plaintiffs' claims is likely to succeed on appeal because Plaintiffs lack standing to sue, and they have brought no case or controversy over which any federal court has jurisdiction. Nor have Plaintiffs proceeded under the Administrative Procedure Act (APA) or other statutes establishing judicial

review for particular agency actions — even though they now identify a particular agency action that they would like enjoined. Plaintiffs are also unlikely to succeed on the merits of their "state-created danger" claim, which is the only claim actually addressed in the moving papers.

Plaintiffs have also failed to establish that an injunction is necessary to prevent irreparable harm, or that the balance of equities and public interest support the drastic injunctive relief sought. Although the injunction would certainly be disruptive, there is no indication that it would have any material impact on climate change during the pendency of this expedited appeal.

Plaintiffs' motion should be denied.

BACKGROUND

The government has already filed an opening brief, which sets forth the relevant background of this action. DktEntry 16, at 3-9 (filed Feb. 1, 2019) (Opening Brief). In short, Plaintiffs — including a group of youths and an individual who purports to represent "future generations" — brought this action in August 2015 against the President, Presidential offices, and eight Cabinet departments and agencies for allegedly violating their rights under the Constitution and a purported federal public trust doctrine. *See generally* 3 E.R. 516-615 (operative complaint).

In November 2015, the government moved to dismiss all of Plaintiffs' claims on several grounds, including lack of standing, failure to state a cognizable

constitutional claim, and failure to state a claim on a public trust theory. 3 E.R. 476-514. In November 2016, the district court denied the motion, 1 E.R. 63-116, and the court later declined to certify its denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), 3 E.R. 631 (Entry 172). The court ruled that Plaintiffs had established Article III standing at that stage by alleging that they had been harmed by the effects of global climate change; and that the government's regulation of (and failure to further regulate) fossil fuels had caused Plaintiffs' injuries. 1 E.R. 80-90. The court held that it could redress those injuries by ordering the defendant agencies to "cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions"; and by ordering other actions, including "develop[ing] a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system." 1 E.R. 90 (quoting 3 E.R. 524-25, ¶ 12).

On the merits, the district court held that Plaintiffs had stated a claim under the Fifth Amendment's Due Process Clause based on a previously unrecognized fundamental right to a "climate system capable of sustaining human life." 1 E.R. 94. The court also concluded that Plaintiffs had stated a viable "danger-creation due process claim" based on the government's alleged "failure to adequately regulate CO_2 emissions." 1 E.R. 98. Finally, the court held that Plaintiffs had adequately stated a claim under a federal public trust doctrine. 1 E.R. 99.

The government petitioned this Court for a writ of mandamus to halt these proceedings. The Court stayed proceedings while it considered the petition, and then denied the petition without prejudice. *In re United States*, 884 F.3d 830, 838 (9th Cir. 2018). In May 2018, the government filed a motion for judgment on the pleadings and a motion for summary judgment. 3 E.R. 383-86. Contrary to Plaintiffs' claim, *see, e.g.*, Motion 14, both motions sought a judgment dismissing all of Plaintiffs' claims, *see* Opening Brief 6, 44.

The district court issued an opinion largely denying the government's dispositive motions in October 2018. 1 E.R. 1-62. It rejected the government's argument that Plaintiffs were required to assert their constitutional claims through the mechanism of the APA by challenging specifically identified agency actions. 1 E.R. 25. The court also rejected the government's argument that Plaintiffs had failed to establish standing at the summary-judgment stage, largely reiterating its analysis from the motion-to-dismiss stage. 1 E.R. 29-45. The court likewise reiterated its earlier holdings on the government's arguments on the merits. 1 E.R. 25-29, 45-59. Finally, the district court rejected Plaintiffs' equal protection argument based on the notion of either "posterity" or "minor children" as a "suspect class," but it accepted an equal protection claim based on the same fundamental right it identified in its opinion denying the motion to dismiss. 1 E.R. 58. The court again declined to certify its order for interlocutory appeal. 1 E.R. 59-61.

Following additional proceedings in this Court and the Supreme Court, *see* Opening Brief 8-9, the district court granted a motion for reconsideration in November 2018 and certified its orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). 2 E.R. 184-89. The district court stayed proceedings pending a decision by this Court and stated that "[a]ny further motions should be directed to the Ninth Circuit Court of Appeal." 3 E.R. 656 (Entries 445 and 453). The government then petitioned this Court for permission to appeal, 2 E.R. 156-83, which petition the Court granted, 2 E.R. 117-23.

ARGUMENT

An injunction pending appeal is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). The equities inquiry merges with the public interest analysis when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014); *see also Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (allowing the movant to meet the standard by

establishing "serious questions" on the merits, but only when it satisfies the other *Winter* factors and shows that the balance of hardships "tips sharply" in its favor).[1]

Crucially, because Plaintiffs seek relief that "goes well beyond simply maintaining the status quo," they seek a *mandatory* injunction — a form of relief that is "particularly disfavored." *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). A mandatory injunction "should not be issued unless the facts and law clearly favor the moving party." *Anderson*, 612 F.2d at 1114 (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)); *see also Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers) (opining that a mandatory injunction is an "extraordinary remedy [to] be employed only in the most unusual case" where "the applicants' right to relief [is] indisputably clear"); *Heckler v. Lopez*, 463 U.S. 1328, 1333-34 (1983) (Rehnquist, J., in chambers). "In plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

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[1] The government hereby preserves for review by the en banc Court or the Supreme Court the conclusion that "the 'serious questions' version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*." *Alliance for Wild Rockies*, 632 F.3d at 1134. That Court "made clear that a likelihood of success is an independent, free-standing requirement for a preliminary injunction," meaning that "a strong showing of irreparable harm . . . cannot make up for a failure to demonstrate a likelihood of success on the merits." *Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (citing *Munaf v. Geren*, 553 U.S. 674 (2008)).

I. Plaintiffs' claims are not likely to succeed on the merits.

A. Plaintiffs lack Article III standing, and this action is not a cognizable case or controversy.

To demonstrate Article III standing, Plaintiffs must establish (1) that they have suffered an "injury in fact" that is concrete and particularized; (2) that the injury is fairly traceable to the actions that they challenge; and (3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs satisfy no element of this test. *See* Opening Brief 12-17.

To start, Plaintiffs have not identified an injury in fact because they assert "generalized grievance[s]," and not the invasion of a legally protected interest that is concrete and particularized. *Defenders of Wildlife*, 504 U.S. at 575 (internal quotation marks omitted). The injuries identified by Plaintiffs arise from a diffuse, global phenomenon that affects every other person in their communities, in the United States, and throughout the world. The Supreme Court has made clear that "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974). "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive," not private plaintiffs. *Defenders of Wildlife*, 504 U.S. at 576. Plaintiffs make no effort to address generalization in their motion.

Plaintiffs also ignore the causation and redressability requirements, Motion 26, which they cannot satisfy in any event. Plaintiffs claim that their injuries were caused by any number of unidentified government actions, and they ignore the "numerous third parties whose independent decisions collectively have a significant effect on [their] injuries." *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013) (quoting *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012)). As a district court explained earlier today in holding that similar plaintiffs asserting similar claims had not satisfied Article III's causation requirement, Plaintiffs "simply ignore that Defendant agencies and officers *do not produce* greenhouse gases, but act to regulate those third parties that do: innumerable businesses and private industries." *Clean Air Council v. United States*, No. 2:17-cv-04977-PD, 2019 U.S. Dist. Lexis 25801, at *18 (E.D. Pa. Feb. 19, 2019).

Nor can Plaintiffs establish that their asserted injuries likely could be redressed by an order of a federal court. *See Defenders of Wildlife*, 504 U.S. at 560-61. Indeed, Plaintiffs have not even begun to articulate a remedy within a federal court's authority to award that could meaningfully address global climate change as the claimed cause of their injuries.

Plaintiffs' assertion that the government has "conceded" that Plaintiffs "made a prima facie case of injury-in-fact," Motion 26, misstates the record and ignores

that jurisdictional barriers like standing cannot be conceded away.[2] Plaintiffs also incorrectly assert that because they have identified an injury in fact, they have also identified a cognizable "case or controversy." Motion 26. Injury alone is not enough, both because a generalized injury fails to satisfy standing requirements and because Plaintiffs fail to meet causation and redressability requirements as well. This alone defeats Plaintiffs' attempt to show a likelihood of success on the merits.

Moreover, Plaintiffs' action is fundamentally not a cognizable case or controversy. *See* Opening Brief 24-27. The "Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Defenders of Wildlife*, 504 U.S. at 559-60. Plaintiffs ask the district court to review and assess the entirety of the representative branches' decisions relating to climate change and then to pass on the comprehensive constitutionality of those policies, programs, and inaction in the aggregate and then enter and enforce a sweeping decree against the government writ large. Because this review and relief plainly exceeds the "judicial Power" under Article III and is appropriately addressed to the representative branches, this action is not one that a federal court may entertain consistent with the Constitution.

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[2] At the hearing cited by Plaintiffs, the government attorney first acknowledged the district court's opinion concluding that Plaintiffs had alleged sufficient injuries at the pleading stage and then noted that Plaintiffs had submitted declarations in support of those allegations. ECF No. 329, at 25:5-13. The attorney never conceded that the injuries were sufficient to establish Article III standing.

The unparalleled nature of this case and the relief it seeks renders it manifestly not the sort of case that could ever remotely have been entertained by the "courts at Westminster." *FEC v. Akins*, 524 U.S. 11, 24 (1998) (internal quotation marks omitted). As the district court in *Clean Air Council* explained, there "is a difference . . . between determining the constitutionality of particular Executive action and regulating all statutory, regulatory, budgetary, personnel, and administrative Executive actions that relate to the environment. The former is certainly within the province of the Judiciary. The latter would make the Executive a subsidiary of the Judiciary." 2019 U.S. Dist. Lexis 25801, at *31. This action is categorically not an Article III case or controversy.

B. Plaintiffs were required to proceed under the APA but concededly did not.

Plaintiffs are also unlikely to succeed on the merits for a separate threshold reason that they do not address in their motion: Plaintiffs were required to proceed under the APA, which channels judicial review into categories of action and inaction, or under various applicable specialized statutory review provisions. *See* Opening Brief 27-35. Because Plaintiffs did not do so, their claims should have been dismissed, and they are unlikely to succeed on appeal.

Plaintiffs' motion crystallizes this basic defect. They ask the Court to enter an injunction by March 19 to block a particular lease sale by the Bureau of Ocean Energy Management (part of the Department of the Interior) in the Gulf of Mexico

that is scheduled for March 20. Motion 5. But an injunction against (or stay of) a particular government action is a perfectly appropriate remedy under the APA and other statutes authorizing judicial review of agency action — so long as statutory requirements (and Article III) are satisfied. *See* 5 U.S.C. §§ 704-706.

In fact, the lease sale targeted by Plaintiffs is one part of a "four-stage process" established by the Outer Continental Shelf Lands Act (OCSLA) that the agency must undertake "before allowing development of an offshore well, with each stage more specific than the last and more attentive to the potential benefits and costs of a particular drilling project." *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015). "Rigorous substantive requirements accompany each procedural stage. Congress calls on Interior to strike an appropriate balance at each stage between local and national environmental, economic, and social needs." *Id.*

To block the March 20 lease sale, Plaintiffs must proceed in compliance with both the substantive and the procedural requirements for judicial review established by Congress in OCSLA, not through an amorphous and ill-defined motion that circumvents those requirements. The problem goes far beyond this particular sale, because Plaintiffs ask the Court to block an untold number of unspecified agency actions during the pendency of this appeal. Plaintiffs instead must seek review of *specified actions*, such as this lease sale, either pursuant to a statute specifically authorizing review — here, OCSLA, *see* 43 U.S.C. § 1349(b)(1) — or pursuant to

the APA, as appropriate. But what Plaintiffs manifestly may not do is bypass these congressionally prescribed avenues for judicial review.

C. Plaintiffs' "state-created danger" claim is unlikely to succeed on the merits.

Plaintiffs make a single argument on the merits in their motion — that the government has violated the Due Process Clause by acting with deliberate indifference to Plaintiffs' lives and security. Motion 28-34. But this argument is meritless because it is completely untethered from the cases addressing this sort of due process claim, as explained below. *See also* Opening Brief 38-42.

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 County Department of Social Services*, 489 U.S. 189, 194-95 (1989). Thus, the Due Process Clause imposes no duty on the government to protect persons from harm inflicted by third parties that would violate due process if inflicted by the government. *Id.*; *accord Patel v. Kent School District*, 648 F.3d 965, 971 (9th Cir. 2011).

This Court recognizes a narrow "state-created danger" exception to that rule, *Patel*, 648 F.3d at 971-72, but the exception does not remotely apply to Plaintiffs'

allegations. Under the exception, if certain other strict requirements are met, "a state actor can be held liable for failing to protect a person's interest in his personal security or bodily integrity when the state actor affirmatively and with deliberate indifference placed that person in danger." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

Plaintiffs ignore that the present case is readily distinguishable from all other viable state-created danger cases. *See* Motion 28-33. "Every instance" in which this Court has "permitted a state-created danger theory to proceed has involved an act by a government official that created an obvious, immediate, and particularized danger to a specific person known to that official." *Pauluk*, 836 F.3d at 1129-30 (Murguia, J., concurring in part and dissenting in part) (internal quotation marks omitted); *see also id.* at 1130 (collecting cases). Those features are not present here. Here, Plaintiffs seek to remedy carbon emissions, myopically attributing them to the U.S. government and ignoring that the global mix of carbon levels is (even on their own theory) predominantly the product of the actions of foreign actors the world over. As the court in *Clean Air Council* phrased the point, "it is worth noting (again) that climate change is the creation of those that pollute the air, not the Government, which seeks to regulate that pollution (evidently, to Plaintiffs' dissatisfaction). The state-created danger doctrine is thus inapplicable here." 2019 U.S. Dist. Lexis 25801, at *27.

First, Plaintiffs have identified no harms to their "personal security or bodily integrity" of the kind and immediacy that qualify for the state-created danger exception. Under this Court's precedent, viable harms include rape, *e.g., L.W. v. Grubbs*, 974 F.2d 119, 120 (9th Cir. 1992); *Wood v. Ostrander*, 879 F.2d 583, 586, 590 (9th Cir. 1989); other physical assault, *e.g., Hernandez v. City of San Jose*, 897 F.3d 1125, 1129-30 (9th Cir. 2018); *Bracken v. Okura*, 869 F.3d 771, 779-80 (9th Cir. 2017); and death directly caused by a government action, *e.g., Maxwell v. County of San Diego*, 708 F.3d 1075, 1082-83 (9th Cir. 2013); *Munger v. City of Glasgow Police Department*, 227 F.3d 1082, 1084-85 (9th Cir. 2000). The harms identified by Plaintiffs, however, "do not remotely resemble" the immediate, direct, physical, and personal harms directed to specific individuals at issue in the above-cited cases. *Pauluk*, 836 F.3d at 1129 (Murguia, J., concurring in part and dissenting in part). All of Plaintiffs' claimed harms result from what they allege is the government's general failure to protect the environment. Yet Plaintiffs have no constitutional right to particular climate conditions, and they may not resort to the state-created danger exception to circumvent that limitation. *See* Opening Brief 35-38.

Second, Plaintiffs identify no specific government actions — much less government *actors* — that put them in "obvious, immediate, and particularized danger." *Pauluk*, 836 F.3d at 1129 (internal quotation marks omitted). Instead, as discussed above (p. 8), Plaintiffs allege that an aggregation of (mostly unspecified)

"agency action[s]" and inaction spanning the last several decades have exposed them to harm. This allegation of slowly-recognized, long-incubating, and generalized harm by itself distinguishes their claim from all other state-created danger cases on which they and the district court relied. *See, e.g.*, *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (recognizing a due process violation where officers "took affirmative actions that significantly increased the risk facing the victim"); *Wood*, 879 F.2d at 588 (same where officer arrested driver, impounded his car, and left his female passenger by the roadside at night in a high-crime area); *cf. Clean Air Council*, 2019 U.S. Dist. Lexis 25801, at *25-27. Plaintiffs have not established the necessary correspondence between increased emissions by specific government actors and specific adverse impacts on individual Plaintiffs.

Third, Plaintiffs do not allege that government actions endangered *Plaintiffs* in particular. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1067 (9th Cir. 2006). The "duty to protect arises where a police officer takes affirmative steps that increase the risk of danger *to an individual*." *Munger*, 227 F.3d at 1089 (emphasis added); *see also Martinez v. California*, 444 U.S. 277, 284-85 (1980) (refusing to find state officers liable where they were not aware that the victim "as distinguished from the public at large, faced any special danger"). As explained above (p. 8), Plaintiffs' asserted injuries arise from a diffuse, global phenomenon that affects every other person in their communities, in the United States, and throughout the world. The

federal government's "conduct with respect to fossil fuels," Motion 30, does not increase the danger to these Plaintiffs in particular. *See Clean Air Council*, 2019 U.S. Dist. Lexis 25801, at *25-26.

For these reasons, Plaintiffs are not likely to succeed on the merits of their state-created danger claim. There is simply no support in *DeShaney* or this Court's cases to apply that exception to the federal government's actions and alleged inaction related to climate change.

D. Plaintiffs are unlikely to succeed on the other issues at stake in this appeal.

Plaintiffs' motion does not address their other claims, other than to reference district court orders. Motion 28 n.16. This passing reference is insufficient to carry their burden of showing a likelihood of success on the merits. Nevertheless, we next address Plaintiffs' remaining merits arguments. *See also* Opening Brief 35-57.

First, there is no fundamental right to a "climate system capable of sustaining human life." 1 E.R. 94. The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). A right to a stable climate is unlike any fundamental right ever recognized by the Supreme Court, and the district court's recognition of such a right "certainly contravened or ignored longstanding authority."

Clean Air Council, 2019 U.S. Dist. Lexis 25801, at *22. The fundamental rights recognized by the Supreme Court have generally involved "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). The state of the climate, however, is a generalized issue lacking a close nexus to personal liberty or privacy.

Second, Plaintiffs are unlikely to succeed on the merits of their "public trust" claim. *See* Opening Brief 38-42. Any public trust doctrine is a creature of state law only, and it applies narrowly to particular types of state-owned property not at issue here. Consequently, there is no basis for Plaintiffs' public trust claim against the federal government under federal law. Moreover, even if the doctrine had a federal basis, it has been displaced by statute, primarily the Clean Air Act. The Supreme Court definitively rejected an attempt to use the federal common law of nuisance to centralize the management of carbon dioxide emissions in a single district court, operating outside the purview of the comprehensive Clean Air Act. *See American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011). Plaintiffs' public trust theory is defective for similar reasons, and it is unthinkable that the Supreme Court or Congress would opt to house such immense common-law power in the District of Oregon alone. Finally, even if any such doctrine had not been displaced, the "climate system" is not within any conceivable trust.

* * *

In sum, Plaintiffs have not demonstrated that they are likely to succeed on the merits of their appeal, and their motion may be denied on this ground alone.

II. Plaintiffs have not established that they will suffer irreparable harm in the absence of an injunction pending appeal.

The activities that Plaintiffs seek to enjoin will not irreparably harm them while this Court considers the merits. The Court has expedited the appeal, indicating that argument will be held in early June. Thus, the Court will be in position to issue its judgment in the near future. Consequently, Plaintiffs have the burden to show that, in the absence of an injunction, they will be irreparably harmed over that relatively brief period. *See, e.g.*, *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001) ("A preliminary injunction is . . . a device for preserving the status quo and preventing the irreparable loss of rights before judgment.").

Plaintiffs have not met this burden. As one of Plaintiffs' own experts avers, climate change "is not something that can be stopped in the near term." ECF No. 275, at 8 (Declaration of Harold R. Wanless); *see also* DktEntry 21-13, Page 16 of 96 (Expert Report of Eric Rignot) ("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 altogether fail to explain why urgent injunctive relief is necessary to preserve "the district court's ability to render a meaningful remedy." Motion 18-19. Nor do they explain how failing to enjoin oil and gas permitting over the coming

months will "lock-in" the harms that they claim already to be suffering. Motion 38. Plaintiffs' conclusory assertions are not enough to justify granting the extraordinary relief that they seek. *See Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (holding that irreparable harm showing must be grounded in evidence, not speculation).

Plaintiffs acknowledge that the actions allegedly harming them have been occurring "for decades." Motion 3; *see also* DktEntry 21-14, Page 15 of 209 (Declaration of Dr. Joseph E. Stiglitz) (referring to the "already-dangerous status quo"); DktEntry 21-19, Pages 11-13 of 217 (Expert Report of Dr. James E. Hansen) (explaining that Plaintiffs' alleged injuries stem from the cumulative effects of hundreds of years of CO_2 emissions). Any additional emissions that that might result between now and resolution of this appeal from the activities that Plaintiffs seek to enjoin are plainly de minimis in this context.

Plaintiffs do not even assert that the one specific action that they seek to enjoin — the March 20 oil and gas lease sale in the Gulf of Mexico, Motion 5 n.8 — will contribute to greenhouse gas emissions *at all* (much less meaningfully so) before this appeal is resolved on the merits. In fact, information available on the Bureau of Ocean Energy Management's website shows that the lease sale is only the first step in a lengthy process that could eventually culminate in future oil and gas production. *See* OCS Oil and Gas Leasing, Exploration, and Development Process, https://www.

boem.gov/BOEM-OCS-Oil-Gas-Leasing-Process/ (showing that development of an exploration plan, completion of National Environmental Policy Act reviews, and government-to-government consultations follow any sale); *North Slope Borough v. Andrus*, 642 F.2d 589, 593 (D.C. Cir. 1980). Just as Plaintiffs may not bypass the procedures set forth in the APA and other statutes to challenge agency action, *see supra* pp. 11-13, they are not entitled to enjoin a broad, self-amalgamated collection of unidentified agency actions simply because those actions *might* someday result in the release of greenhouse gases. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy." *Winter*, 555 U.S. at 22.

Plaintiffs may not rely on their assertion that they have shown "infringement of their rights under the Due Process Clause," Motion 17, to carry their burden to show irreparable harm. Rather, Plaintiffs must demonstrate both that they are likely to succeed on the merits *and* that they will be irreparably harmed without injunctive relief. *Winter*, 555 U.S. at 20. But they have not established that they are likely to succeed on the merits, and even if they had, a "preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). The fact that Plaintiffs assert that their *constitutional* rights have been violated does not change the applicable framework. *See id.* (holding that even if the plaintiffs were likely to

succeed on the merits of their unconstitutional gerrymandering claim, injunctive relief remained inappropriate because the balance of equities and public interest "tilted against their request"). Plaintiffs must establish irreparable harm separately, and they have not carried that burden.

Plaintiffs' reliance on their self-described "deep anger, frustration, depression, and feeling of betrayal," Motion 23-25, is likewise insufficient to establish irreparable harm. First, if this Court were to recognize *feelings* as irreparable injury, then every plaintiff who passionately disagrees with government action — i.e., most if not all plaintiffs — would satisfy the injury requirement. Converting the injury requirement to a test of plaintiffs' mental state is not a workable legal approach. Second, we are not aware of any authority that anger and frustration are enough to establish cognizable injury in an Article III court, much less irreparable injury, and Plaintiffs cite nothing. However sympathetic the courts may regard the aims of these Plaintiffs and their claimed harms, that cannot excuse strict compliance with the dictates of Article III. Plaintiffs' anger, frustration, and passion concerning climate change are properly addressed to, and by, the representative branches of our government.

Finally, Plaintiffs' own delays "impl[y] a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Plaintiffs assert that future oil and gas production must be enjoined "immediately" and that the requested injunction is "urgently needed," Motion 1-2,

but they do not explain why they waited three-and-a-half years to seek injunctive relief. Plaintiffs also ignore the fact that they anticipate months of trial before the district court can even begin to consider fashioning their desired "national remedial plan." 3 E.R. 614, ¶ 7. Plaintiffs cannot credibly claim that, after waiting *years* to seek relief for alleged violations of the Due Process Clause, and after waiting three-and-half more years after filing this action, having to wait for this Court to decide the merits of this expedited appeal will cause them irreparable harm justifying the extraordinary relief that they now seek.

III. The balance of equities and the public interest both favor denying Plaintiffs' motion.

Even if Plaintiffs could show that they are likely to succeed on the merits and that an injunction is necessary to prevent irreparable harm, an injunction may not issue because the balance of harms and public interest both weigh against granting that relief. *Winter*, 555 U.S. at 20.

First, Plaintiffs' unexplained delay in moving for injunctive relief counsels against granting their motion. A party seeking injunctive relief "must generally show reasonable diligence." *Benisek*, 138 S. Ct. at 1944; *see also Menendez v. Holt*, 128 U.S. 514, 524 (1888) (noting that "those who seek equity must do it"). Indeed, "in considering the balance of equities among the parties," the Supreme Court has held that the moving parties' "years-long delay in asking for preliminary relief weigh[s] against their request." *Benisek*, 138 S. Ct. at 1944. The notion that

Plaintiffs' delay should be attributed to the government, Motion 3, 14, is baseless. Plaintiffs identify no reason why the government's efforts to resolve this case without trial prevented them from moving for preliminary injunctive relief years ago, either in the district court or in this Court when district court proceedings were stayed for seven months pending mandamus review in 2017 and 2018.

Second, Plaintiffs' blithe assertion that an injunction "will pose no real harm to employment, the economy, energy security, or the national treasury," Motion 35, is risible. In the first quarter of 2016, the traditional energy and energy efficiency sectors employed more than *six million workers*. Department of Energy, *U.S. Energy and Employment Report* 8 (Jan. 2017), https://www.energy.gov/sites/prod/files/2017/01/f34/2017%20US%20Energy%20and%20Jobs%20Report_0.pdf. The mining, extraction, and utility-generation sectors in particular employed nearly half a million workers in that same period. *Id.* at 25. Enjoining pending appeal all future federal leases, permits, and other approvals for mining and extraction of coal and for offshore oil and gas exploration on federal land, as well as enjoining development of new fossil fuel infrastructure (including "onshore and offshore drilling equipment, pipelines, port facilities, terminals, storage facilities, refineries, and electric generation facilities, used for fossil fuels of any kind"), Motion 1, would undoubtedly cost the jobs of some significant portion of those hundreds of thousands of people and undoubtedly have broader impacts on many more whose interests are

not accounted for in this litigation by a handful of individuals. Because Plaintiffs cannot demonstrate that their requested relief pending appeal would concretely impact climate change, the balance of equities tips heavily in favor of denying Plaintiffs' motion.[3]

Indeed, where Congress has already "decided the order of priorities in a given area," a court sitting in equity must follow the "balance that Congress has struck" and lacks discretion to strike a different balance. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497 (2001). Congress has already struck a balance between limiting greenhouse gas emissions and federal development of a sustainable domestic energy supply in a number of statutes. When it enacted the Mining and Minerals Policy Act of 1970, for example, Congress declared it "in the national interest to foster and encourage . . . the development of economically sound and stable domestic mining [and] reclamation industries" and to foster "the orderly and economic development of domestic mineral resources . . . to help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a. When Congress passed the Federal Land Policy and Management Act of 1976, it declared it the "policy of the United States" that "the public lands be managed in a

[3] Assertions by Plaintiffs that national security interests mandate the relief that they seek, Motion 37-38, similarly fail because they do not account for the precept that Congress and the Commander in Chief — not the courts — are authorized by the Constitution to strike such balances.

manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands." 43 U.S.C. § 1701(a)(12).

Plaintiffs ask this Court to enjoin activities that are regulated and authorized by these statutes (and many others), without any pause to actually analyze the statutes. Granting Plaintiffs' motion would ignore the various balances that Congress has struck and would therefore be inconsistent with *Oakland Cannabis*. The balance of equities and the public interest preclude Plaintiffs' requested relief.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

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Respectfully submitted,

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