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' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Court Rule

INTRODUCTION

In this action, Plaintiffs — a group of youths, an environmental organization representing them, and an individual who purports to represent "future generations" — ask a single federal district court to require the Executive Branch to stop global climate change. In particular, Plaintiffs demand an order dictating and managing for an indefinite period countless federal policy decisions related to fossil fuels, energy production, alternative energy sources, public lands, and air quality standards.

This action is misguided and fails on numerous independent grounds. First of all, no federal court has jurisdiction over Plaintiffs' claims because Plaintiffs lack standing and their action is not a case or controversy cognizable under Article III. In addition, Plaintiffs have failed to satisfy the requirements of the Administrative Procedure Act (APA), as they must in order to challenge federal agency action or inaction. Even if Plaintiffs could satisfy those threshold requirements, their Fifth Amendment claims fail as a matter of law because there is no fundamental constitutional right to a "stable climate system," and the challenged agency actions and inaction do not infringe any other constitutional rights. Likewise, the public trust doctrine on which Plaintiffs rely has no basis in federal law; and even if the doctrine had some federal grounding, it is displaced by statute and does not create any judicially enforceable obligation to maintain or protect the atmosphere.

For any or all of these independent reasons, this Court should reverse and remand with instructions to dismiss.

JURISDICTIONAL STATEMENT

(a) Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, asserting claims under the United States Constitution. 3 Excerpts of Record (E.R.) 525. But as elaborated in Part I below (pp. 12-27), the district court lacked subject matter jurisdiction.

(b) On December 26, 2018, this Court granted the government's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). 2 E.R. 117-23. The Court has jurisdiction under that provision.

(c) The district court denied the government's motion to dismiss on November 10, 2016. 1 E.R. 63-116. On October 15, 2018, the district court largely denied the government's motions for judgment on the pleadings and for summary judgment. 1 E.R. 1-62. On November 21, 2018, the district court certified those two orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). 2 E.R. 184-89. On November 30, 2018, the government filed a petition for permission to appeal within the ten days prescribed by that provision. 2 E.R. 156-83.

ISSUES PRESENTED FOR REVIEW

1. Whether this action is justiciable under Article III and the equitable authority of the federal courts.

2. Whether Plaintiffs' challenges to federal agency action and inaction must proceed, if at all, under the APA.

3. Whether Plaintiffs have stated a claim under the Constitution upon which relief can be granted.

4. Whether Plaintiffs have stated a claim under a federal public trust doctrine upon which relief can be granted.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Per Ninth Circuit Rule 28-2.7, pertinent constitutional provisions and statutes are included in an addendum attached to the end of this brief.

STATEMENT OF THE CASE

Plaintiffs brought this action in August 2015 against President Obama (for whom President Trump was later substituted), the Executive Office of the President, three sub-components within that office, and eight Cabinet departments and agencies for allegedly violating their rights (under the Constitution and a purported federal public trust doctrine) to particular climate conditions. *See generally* 3 E.R. 516-615 (operative complaint). Among other requests, Plaintiffs asked the district court to order the President and the other Executive Branch officials and agencies named as defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." 3 E.R. 614, ¶ 7.

The Supreme Court has observed that the "breadth of [these] claims is striking" and that their justiciability "presents substantial grounds for difference of opinion." 2 E.R. 193; *see also* 2 E.R. 190-92 (reiterating that "the 'striking' breadth of plaintiffs' claims 'presents substantial grounds for difference of opinion' "). This Court has likewise acknowledged that "some of the plaintiffs' claims . . . are quite broad, and some of the remedies the plaintiffs seek may not be available as redress." *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018). Not surprisingly, therefore, even before these statements, the government moved to dismiss all of Plaintiffs' claims in its first responsive pleading in November 2015.

The government identified several grounds for dismissal, 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 that 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 by alleging that they had been harmed by the effects of global climate change through increased droughts, wildfires, and flooding; 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 determined that it could redress those injuries by ordering

> Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO_2 emissions, as well as take such other action necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, including to develop 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 complaint).

On the merits, the district court held that Plaintiffs had stated a claim under the Fifth Amendment's Due Process Clause. 1 E.R. 90-98. The court found in the Fifth Amendment's protection against the deprivation of "life, liberty, or property, without due process of law" a previously unrecognized fundamental right to a "climate system capable of sustaining human life," and the court determined that Plaintiffs had adequately alleged infringement of that right. 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.

The court further held that Plaintiffs had adequately stated a claim under a federal public trust doctrine, which the court held imposes a judicially enforceable prohibition on the government's "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." 1 E.R. 99 (quoting amicus brief in support of Plaintiffs). Plaintiffs' claims under this public trust rationale, the court concluded, are also "properly categorized as substantive due process claims." 1 E.R. 113.

The government petitioned this Court for a writ of mandamus to halt these proceedings. The Court denied the petition without prejudice. *In re United States*, 884 F.3d at 838. It explained, however, that "[c]laims and remedies often are vastly narrowed as litigation proceeds," and that it had "no reason to assume this case will be any different." *Id*. The Court observed that the government could continue to "raise and litigate any legal objections [it may] have," *id*. at 837, and it added that the government remains free to "seek[] mandamus in the future," *id*. at 838.

Consistent with this Court's opinion, in May 2018, the government filed two new dispositive motions. The government moved for judgment on the pleadings, arguing that Plaintiffs' claims should be dismissed in their entirety. 3 E.R. 385-86. The government separately moved for summary judgment, arguing that the district court should enter judgment in favor of the government on all of Plaintiffs' claims. 3 E.R. 383-84. The court issued an opinion largely denying the government's dispositive motions in October 2018. 1 E.R. 1-62.[1]

[1] While the two dispositive motions were still pending and after the district court had denied the government's motion for a protective order barring discovery, the government sought relief from both this Court and the Supreme Court. This Court denied the petition without prejudice. *In re United States*, 895 F.3d 1101 (9th Cir. 2018). The Supreme Court likewise denied the government's application "without prejudice" on the ground that it was "premature." As quoted above, the Supreme Court observed that the "breadth of [Plaintiffs'] claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion." 2 E.R. 193.

The district court granted two narrow aspects of the motions. First, the court dismissed the President from the action — but only "without prejudice" because the court could "not conclude with certainty that President Trump will never become essential to affording complete relief." 1 E.R. 18. Second, the court granted summary judgment to the government on Plaintiffs' "freestanding claim under the Ninth Amendment," which was "not viable as a matter of law." 1 E.R. 56.

The district court otherwise denied the dispositive motions. It rejected the government's argument that Plaintiffs were required to assert their constitutional challenges to agency actions and inaction through the mechanism of the APA, ruling that the "APA does not govern" claims seeking equitable relief for alleged constitutional violations based on "aggregate action by multiple agencies." 1 E.R. 25 (emphasis omitted). The court also rejected the government's argument that Plaintiffs had failed to establish standing at the summary-judgment stage, largely by 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.

The district court then directly addressed Plaintiffs' equal protection claim for the first time. It rejected Plaintiffs' argument based on the notion of either "posterity" or "minor children" as a "suspect class," because "[a]pplying strict scrutiny to every governmental decision that treats young people differently from

others is unworkable and unsupported by precedent." 1 E.R. 58. But the court permitted Plaintiffs' equal protection claim to proceed because "strict scrutiny is also triggered by alleged infringement of a fundamental right," and the claim "rests on alleged interference with [Plaintiffs' right to] a climate system capable of sustaining human life — a right the Court has already held to be fundamental." *Id.* The court concluded that applying strict scrutiny in the context of Plaintiffs' equal protection and due process claims "would be aided by further development of the factual record." 1 E.R. 58-59. The court again declined to certify its order for interlocutory appeal. 1 E.R. 59-61.

With less than two weeks remaining before a scheduled 10-week trial, the government again sought relief from both this Court and the Supreme Court. The Supreme Court again denied the government's stay application without prejudice, this time on the ground that "adequate relief may be available in the United States Court of Appeals for the Ninth Circuit." 2 E.R. 191.

Shortly thereafter, the government moved the district court to reconsider its denials of the government's requests to certify the court's orders for interlocutory appeal. 3 E.R. 654 (Entry 418). The court granted the 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. 3 E.R. 656 (Entries 445 and 453). The government then

petitioned this Court for permission to appeal, 2 E.R. 156-83, and the Court granted the government's petition in December 2018, 2 E.R. 117-23.

SUMMARY OF ARGUMENT

The district court first erred when it denied the government's motion to dismiss this action. It erred again when it denied the government's motions for judgment on the pleadings and for summary judgment. This Court should reverse for any of the following independent reasons:

1. Plaintiffs cannot establish any of the three requirements for Article III standing. Plaintiffs have only a generalized grievance and not the required particularized injury because global climate change affects everyone in the world. They cannot demonstrate causation because climate change stems from a complex, world-spanning web of actions across all fields of human endeavor, and Plaintiffs cannot plausibly connect their narrow asserted injuries — like flooding or drought in their neighborhoods — to any particular conduct by the government. In addition, Plaintiffs' alleged injuries are not redressable because a single district judge may not (consistent with Article III and the equitable authority of federal courts) seize control of national energy production, energy consumption, and transportation in the ways that would be required to implement Plaintiffs' demanded remedies.

Separate and apart from Plaintiffs' failure to satisfy the three standing requirements, this action is fundamentally not a case or controversy under Article III.

Plaintiffs did not ask the district court to resolve anything resembling the kind of dispute that gave rise to jurisdiction at common law or the adoption of Article III; Plaintiffs instead asked the district court to review all of the representative branches' programs and regulatory decisions relating to climate change over the past several decades and then pass upon their constitutionality in the aggregate. No federal court has the power to perform such a sweeping policy review, and no federal court has ever done anything close to what Plaintiffs seek here.

2. Plaintiffs have failed to pursue any claim under the APA or any other remedial scheme established by Congress for review of federal agency action or inaction. At its core, Plaintiffs' action challenges a vast number of federal agency actions and inactions, yet Plaintiffs have refused to comply with the requirements of the APA. Plaintiffs may not circumvent Congress's considered judgment to channel such challenges through the APA by asserting a right to proceed directly under the Constitution or the courts' equitable authority; the existence of the APA forecloses those potential causes of action.

3. Even if Plaintiffs could satisfy the foregoing threshold requirements, their constitutional claims are baseless and must be dismissed. Plaintiffs' alleged fundamental right to a "livable climate" finds no basis in this Nation's history or tradition and is not even close to any other fundamental right recognized by the Supreme Court. Plaintiffs' reliance on the state-created danger exception is also

misplaced; there is no reason to extend that narrow doctrine to these circumstances. Plaintiffs' equal protection and Ninth Amendment claims are also meritless.

4. Finally, there is no federal public trust doctrine that binds the federal government. Even if such a doctrine did apply to the federal government, any common-law federal public trust doctrine is displaced by statute. In any event, the atmosphere is not within any public trust.

The orders of the district court should be reversed, and this case should be remanded with instructions to dismiss the complaint.

STANDARD OF REVIEW

This Court reviews the district court's orders denying the government's motions to dismiss and for judgment on the pleadings de novo, accepting allegations of material fact in the complaint as true and construing the facts in the light most favorable to Plaintiffs. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 903 (9th Cir. 2009); *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005). The district court's denial of the government's motion for summary judgment is also reviewed de novo. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

ARGUMENT

I. The district court lacked jurisdiction over this action.

A. Plaintiffs lack Article III standing.

To demonstrate the requisite Article III standing, Plaintiffs must establish

- that they "have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical";
- that the injury is "fairly [traceable] to the challenged action of the defendant," and not the result of "the independent action of some third party not before the court"; and
- that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). The purpose of these requirements is "to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty International USA*, 568 U.S. 398, 408 (2013). "In keeping with [that] purpose," a court's inquiry must be "'especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Under that rigorous standard (or any plausible standard), Plaintiffs have failed to establish any of the three requirements of Article III standing.

1. Plaintiffs cannot identify any injury to a concrete and particularized legally protected interest because their grievance is universally shared and generalized.

Plaintiffs fail to satisfy the first standing requirement because they assert "generalized grievance[s]," 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); *accord, e.g.*, *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, 127 n.3 (2014). 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' asserted injuries are archetypal generalized grievances. They arise from a diffuse, global phenomenon that affects every other person in their communities, in the United States, and throughout the world. No one disputes that the issue here is *global* climate change. 1 E.R. 4-5 (summarizing undisputed facts in this matter concerning *global* impacts of climate change). Plaintiffs' declarations are likewise clear on this point: one of their experts explained that the "risks" from

climate change "to some extent, *will affect everybody*, some groups are especially vulnerable, and children comprise one such group." 2 E.R. 300 (emphasis added).

Indeed, the "very concept of global warming seems inconsistent with" the "particularization requirement," because "[g]lobal warming is a phenomenon harmful to humanity at large." *Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (internal quotation marks omitted). The D.C. Circuit has explained that alleged injury based on global climate change is too generalized to establish injury in fact:

> [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.

Center for Biological Diversity v. U.S. Department of Interior, 563 F.3d 466, 478 (D.C. Cir. 2009). Plaintiffs' concerns about global climate change are the exact sort of "generalized grievances" that are "more appropriately addressed in the representative branches." *Lexmark*, 572 U.S. at 126 (internal quotation marks omitted).

Plaintiffs submit that they "exemplify [the] vulnerabilities" resulting from global climate change, 2 E.R. 300 (Plaintiffs' expert), but that does not convert their generalized grievance into a sufficiently particularized one. Though climate change might injure the individual Plaintiffs in different ways, *see, e.g.*, 1 E.R. 30-31, those differences are unresponsive to the generalized grievance problem. Because the

harm from climate change is global and universal, it is beyond the ken of Article III courts. The prohibition against standing based on generalized grievances exists to protect the separation of powers established by the Constitution. *Defenders of Wildlife*, 504 U.S. at 559-60. The constitutional structure cannot be ignored because Plaintiffs have identified individual manifestations of obviously universal impacts.

The district court held the "generalized grievance rule" inapplicable because even if an alleged harm is "widely shared," the rule applies only if the harm is also of an "abstract and indefinite nature." 1 E.R. 82 (citing *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015); *Jewel v. NSA*, 673 F.3d 902, 909 (9th Cir. 2011)), *quoted in* 1 E.R. 32. The court made two errors in so holding. First, although this Court has observed that it is "generally" true that many widely shared harms are also "abstract and indefinite," it has held that courts should look in tandem at both how widely shared and how concrete the harm is. In neither opinion cited by the district court did this Court foreclose the possibility that a global universal harm alone would be deemed a generalized grievance: the "fact that a harm is widely shared *does not necessarily* render it a generalized grievance." *Novak*, 795 F.3d at 1016 (emphasis added) (quoting *Jewel*, 673 F.3d at 909).

Second, the reach of the harm at issue here is significantly broader — essentially as broad as is theoretically possible — than the harms at issue in the cited opinions. Neither case addressed climate change, which is not just a "widely shared"

problem, but rather a *globally and universally shared* problem. In *Novak*, by contrast, the injury was shared merely among purchasers of "domestic ocean cargo shipping services on west coast Hawaii routes." 795 F.3d at 1016. In *Jewel*, the injury was alleged warrantless searches of internet traffic and telecommunications. 673 F.3d at 906; *see also Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) (injury shared by all Americans who found the inscription of "In God We Trust" to cause spiritual harm). None of these cases concerned either climate change or a similar diffuse phenomenon causing *universal* global harm.

The district court also relied on *Massachusetts v. EPA*. 1 E.R. 32, 82. That decision quotes from Justice Kennedy's concurring opinion in *Defenders of Wildlife*: "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way." 549 U.S. at 517 (quoting 504 U.S. at 581). But the Supreme Court provided further explanation in *Massachusetts v. EPA*, which makes plain that the Court's holding depends on three factors that are missing here. First, the Court held that a *state* had standing to protect its particular interests in light of its special place in our federal system. 549 U.S. at 519-20. No state is a plaintiff here. Indeed, this Court has held that the standing analysis set forth in *Massachusetts v. EPA* does not apply where plaintiffs are not states: "Plaintiffs are not sovereign states and thus the [Supreme] Court's standing analysis [there] does not apply." *Washington*

Environmental Council v. Bellon, 732 F.3d 1131, 1147 (9th Cir. 2013). Second, the Supreme Court relied on a "procedural right" afforded by the Clean Air Act. 549 U.S. at 520. Plaintiffs here have not brought a narrow claim based on a particular procedural right afforded by statute; they instead are attempting to challenge decades of aggregate action and inaction by much of the federal government. 3 E.R. 571-86. Third, Massachusetts' claim "turn[ed] on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court." 549 U.S. at 516. Plaintiffs' claims by contrast seek functionally legislative determinations regarding energy, transportation, public lands and pollution control policies, matters well beyond what is "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819 (internal quotation marks omitted).

In sum, Plaintiffs cannot establish a concrete and particularized injury.

2. Plaintiffs have not established that their injuries are caused by the Defendants' actions.

Nor can Plaintiffs establish that their asserted injuries were caused by the broad, undifferentiated aggregation of the largely unspecified government actions that they challenge. *See Defenders of Wildlife*, 504 U.S. at 560. Although a valid causal chain may have "several links" (so long as they are "not hypothetical or tenuous and remain plausible"), "where the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, . . . the causal chain is too weak to support standing." *Bellon*,

732 F.3d at 1142 (quoting *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012)).

Plaintiffs principally complain of the government's regulation (or lack thereof) of private parties not before the district court. Among their widely scattered objections, for example, Plaintiffs claim that the United States subsidizes the fossil fuel industry. 3 E.R. 580-81. 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 Article III, namely, "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); *accord Defenders of Wildlife*, 504 U.S. at 562.

Showing causation is especially difficult given the complex interaction of greenhouse gases in the global atmosphere. As the Supreme Court has explained, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) (*AEP*). Not even Plaintiffs suggest that the government can control "emissions in China." *Id.* The types of regulatory decisions to which Plaintiffs and the district court refer (such as permits for livestock grazing and setting "energy and efficiency standards") are remarkably attenuated from the specific injuries alleged

(such as "the magnitude of rainfall and the extent of flooding" near one Plaintiff's home or "the pattern of drought that led" another Plaintiff to relocate). 1 E.R. 35, 41. In short, Plaintiffs have established no valid "causal nexus" between the amorphously described decisions challenged by Plaintiffs and the specific harms alleged by them.

The fundamental deficiency in Plaintiffs' causal showing is confirmed by this Court's decision in *Bellon*. Although the plaintiffs in *Bellon* (unlike Plaintiffs here) had alleged a specific failure by specific agencies — not setting standards for CO_2 emissions from refineries — that allegation was insufficient to establish causation. 732 F.3d at 1141-46. This Court made clear that where standing rests on alleged climate change injuries, "simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing." *Id*. at 1143 (internal quotation marks omitted). Plaintiffs here rely on a far more attenuated and diffuse chain of causation, one that fails to point to any specific failure to regulate (or even specific regulatory actions) but relies instead on only vague allegations of aggregated actions and inactions by the Executive Branch over many decades. As in *Bellon*, there is "a natural disjunction between [Plaintiffs'] localized injuries and the greenhouse effect." *Id.* The district court failed to meaningfully distinguish *Bellon*. 1 E.R. 36-37, 85-86.

First, the district court relied on *WildEarth Guardians v. U.S. Department of Agriculture*, 795 F.3d 1148, 1158 (9th Cir. 2015), but plaintiffs in that case were not alleging harm from climate change but from the management of "predator damage." And the district court omitted a key consideration in *WildEarth Guardians* — that "*Bellon* did not involve a procedural right." *Id*. As in *Bellon*, Plaintiffs' claims here involve no procedural rights.

Second, the district court purported to distinguish *Bellon* on the ground that the plaintiffs in that case had focused on "specific emissions" that were "minor contributors to greenhouse gas emissions," 1 E.R. 36, while Plaintiffs here challenge essentially all greenhouse gas emissions in the United States, constituting "a substantial share of worldwide greenhouse gas emissions," 1 E.R. 86; *cf.* 1 E.R. 37 (citing government counsel's statement that the "United States' current global contribution to current emissions is around 14 to 15 percent"). But this aggregation weakens — indeed, fatally undermines — Plaintiffs' claim to standing. It attributes to the government the actions of literally millions of third parties, i.e., the producers and consumers of CO_2-emitting goods. Thus, Plaintiffs seek to hold the government responsible for the entire mix of the United States' alleged contribution to global climate change without attempting to trace the connection between particular government actions and the resulting emissions. But Plaintiffs may not avoid their constitutionally based burden to show causation by simply challenging *everything*.

The district court's lengthy description of the supposed "chain of causation" underscores that it is far too tenuous. With respect to the government's affirmative acts, the court found the following chain to be sufficient: "fossil fuel combustion accounts for the lion's share of greenhouse gas emissions produced in the United States; defendants have the power to increase or decrease those emissions; and defendants use that power to engage in a variety of activities that actively cause and promote higher levels of fossil fuel combustion." 1 E.R. 87; *accord* 1 E.R. 38-39. But simply observing that the government "has the power" to take action does not establish that the government — as opposed to the third-party producers and consumers not before the Court (i.e., *all of us*) — has actually *caused* climate change. Under Plaintiffs' boundless theory of causation, the government would be subject to suit for every automobile accident because it "has the power" to ban cars but has not done so.

Neither Plaintiffs nor the district court make any effort to untangle the tremendously complex web of who and what in fact has led to climate change; they summarily attribute the entire problem to the government on the theory that the government should have done more. The court then doubles down on that theory by relying on the federal agencies' "failure to act in areas where they have authority to do so." 1 E.R. 87. Because Plaintiffs allege that "power plants and transportation" in the United States produce 64% of CO_2 emissions in the United States and 14% of

emissions worldwide, the court simply assumes that EPA and the Department of Transportation could have set "demanding standards" and that their ostensible failure to do so caused Plaintiffs' injuries. 1 E.R. 88. But again neither the court nor Plaintiffs untangle the causes of those emissions or consider to what extent third parties are responsible.

In sum, Plaintiffs cannot establish the requisite causation.

3. A favorable order cannot redress Plaintiffs' alleged injuries.

Even if Plaintiffs could somehow establish injury in fact and causation, they cannot 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. Plaintiffs have not even begun to articulate a remedy within a federal court's authority to award that could meaningfully address the complex phenomenon of global climate change, much less likely redress their alleged injuries. *See, e.g.*, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 (1976) (holding that plaintiffs challenging tax subsidies for hospitals lacked standing where they could only speculate whether a change in policy would "result in [the plaintiffs'] receiving the hospital services they desire").

The district court assumed that it had the authority to order the government "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emission[s] and draw down excess atmospheric CO_2." 1 E.R. 43 (quoting 3

E.R. 614, ¶ 7). In its summary judgment order, the district court contemplates some of the "actions" that the government could take to redress Plaintiffs' asserted injuries, including drastic measures like "phas[ing] out" greenhouse gas emissions "within several decades" and converting the Nation's entire electricity generation infrastructure to "100 [percent] clean, renewable wind, water, and sunlight" sources. 1 E.R. 43-44 (internal quotation marks omitted). But neither Plaintiffs nor the district court cited any legal authority that would permit such an unprecedented usurpation of legislative and executive authority by an Article III court, essentially placing a single district court in Oregon — acting at the behest of a few plaintiffs with one particular perspective on the complex issues involved — in charge of directing American energy and environmental policy.

Nor have Plaintiffs or the district court grappled with the fact that the carbon emissions from the United States "may become an increasingly marginal portion of global emissions" as developing countries increase their own emissions, thereby making it all the more speculative and uncertain that even Plaintiffs' unprecedented remedy would actually redress their asserted injuries. *Massachusetts v. EPA*, 549 U.S. at 545 (Roberts, C.J., dissenting). Plaintiffs' own summary-judgment declarations make this point clear: in 2016, the United States emitted 14% of CO_2 from fossil fuels; China emitted 29%. 2 E.R. 272; *see also* 2 E.R. 273 (noting that "China's degree of responsibility will grow in coming years and decades"). The

solution to the problem of the magnitude alleged by Plaintiffs can be only a global solution, *see, e.g.*, 2 E.R. 274, 282, 291 (discussing Plaintiffs' expert's view of the need for an annual 6% reduction in *global* fossil fuel emissions starting in 2013), and the United States' share of this global solution can come only from the decisions of the representative branches of our government.

In sum, Plaintiffs' injuries are not redressable by a district court. For that reason, and because Plaintiffs have established neither injury in fact nor causation, Plaintiffs lack Article III standing to maintain this action.

B. Plaintiffs' action is not otherwise a case or controversy cognizable under Article III.

Quite aside from its fatal flaws with respect to standing, this action simply is not one that a federal court may entertain consistent with the Constitution. The "judicial Power of the United States," U.S. Const. art. III, § 1, is "one to render dispositive judgments" in "cases and controversies" as defined by Article III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (internal quotation marks omitted). That power can "come into play only in matters that were the traditional concern of the courts at Westminster" and only in "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (internal quotation marks omitted). "If a dispute is not a proper case or

controversy, the courts have no business deciding it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

Plaintiffs' suit is not a case or controversy cognizable under Article III. Plaintiffs ask the district court to review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to climate change and then to pass on the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate. *See, e.g.*, 3 E.R. 604-13. No federal court, nor the courts at Westminster, has ever purported to use the "judicial Power" to perform such a sweeping policy review — and for good reason: the Constitution commits to *Congress* the power to enact comprehensive government-wide measures of the sort sought by Plaintiffs. And it commits to the *President* the power to oversee the Executive Branch in its administration of existing law and to draw on its expertise to formulate policy proposals for changing that law. Such functions are not the province of Article III courts: "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. The actions that Plaintiffs' seek to compel are appropriately considered by the legislature and the executive, not by the courts.

Plaintiffs appeal to the district court's "equitable powers" to justify the review sought here. But a federal court's equitable powers are "subject to restrictions: the

suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945). The relief requested by Plaintiffs is plainly not of the sort "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). "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). One of those things is "running Executive Branch agencies." *Id.* at 133. And the same is surely true of running eight of them. At bottom, this dispute over American energy and environmental policy "is not a proper case or controversy," or a proper suit in equity, and so "the courts have no business deciding it." *Cuno*, 547 U.S. at 341.

In response to the government's argument, the district court opined that it is "'emphatically the province and duty of the judicial department to say what the law is,'" and that the courts have a "duty to fulfill their role as a check on any unconstitutional actions of the other branches of government." 1 E.R. 27 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* 1 E.R. 46 (again citing *Marbury*). These points do not save this action: if a dispute — even one alleging a constitutional violation — is not a proper case or controversy, the federal courts may not decide it. Indeed, as noted, a court's inquiry into its own jurisdiction must be "especially rigorous when reaching the merits of the dispute would force

[it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper*, 568 U.S. at 408.

Because this action is categorically not a case or controversy within the meaning of Article III, the district court lacked jurisdiction to entertain it.

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

The district court should have dismissed this action for a separate threshold reason: Plaintiffs were required to proceed under the APA but did not do so.

Congress enacted the APA to provide a "comprehensive remedial scheme" for a "person 'adversely affected . . . ' by agency action" or by an agency's alleged failure to act with respect to regulatory requirements and standards, permitting, and other administrative measures. *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) (citation omitted); *see also Wilkie v. Robbins*, 551 U.S. 537, 551-54 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions"). The APA provides generally that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA authorizes a reviewing court both to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "contrary to constitutional right, power, privilege, or immunity," *id*.

§ 706(2)(A)-(B); and to "compel agency action unlawfully withheld or unreasonably delayed," *id*. § 706(1).

Congress's enactment of the APA channeled challenges to agency actions into a carefully organized framework. Under the APA, a suit challenging an agency's regulatory measures must target specifically identified actions or failures to act, and review must be based on the administrative record for those actions and in accordance with special statutory measures for judicial review. A party aggrieved by agency actions may not mount a "broad programmatic attack" on agency policies but must instead identify "circumscribed, discrete" actions that allegedly harmed the party. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62, 64 (2004) (*SUWA*); *accord Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990).

Here, Plaintiffs challenge a vast array of unidentified agency actions undertaken by numerous defendant agencies that allegedly "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels." 3 E.R. 522, ¶ 5. Although Plaintiffs identify few specific agency actions, the *types* of actions they identify are all subject to review under the APA. Plaintiffs mention, for example, being harmed by oil and gas leases issued by the Department of the Interior, 3 E.R. 579-80, ¶¶ 167-168; the processing of permits to drill on federal lands, 3 E.R. 580, ¶ 169; and decisions allowing interstate and international transport of fossil fuels, 3 E.R. 582-83. The Supreme Court has made clear that

these are the very types of challenges that Congress envisioned proceeding under the APA. *See SUWA*, 542 U.S at 62 (explaining that the APA provides for review of "agency action" as comprehensively defined in the Act, 5 U.S.C. § 551(13), which definition includes an agency's "failure to act").[2]

Plaintiffs contend that they need not rely on the cause of action provided by the APA (and may therefore disregard the APA framework), because the Constitution itself provides them a cause of action. 3 E.R. 525, 604-12; 1 E.R. 20-23. But neither the Supreme Court nor this Court has held that the Constitution itself provides an across-the-board cause of action for all constitutional claims — and especially for the sweeping constitutional claims concerning governmental regulation that Plaintiffs advance or for the sweeping relief they seek. To the contrary, the Supreme Court recently ruled that "the Supremacy Clause does not confer a right of action," a decision that conflicts with the district court's assertion

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[2] Plaintiffs' complaint identified one specific agency action, but the district court lacked jurisdiction to consider it. Although they did not state it as a separate claim, Plaintiffs challenged the constitutionality of an order of the Department of Energy authorizing the international export of liquefied natural gas from a proposed facility in Oregon. 3 E.R. 584-86, 607-08; *cf.* 3 E.R. 460-75 (DOE Order 3041). The particular order was issued under Section 201 of the Energy Policy Act of 1992, 15 U.S.C. § 717b(c), which makes import/export approvals reviewable exclusively in the courts of appeals, *id.* § 717r(b). The district court did not address the order or its merits in its summary judgment opinion — nor could it, given the Energy Policy Act's limits on judicial review. *See id.*; *City of Tacoma v. Taxpayers*, 357 U.S. 320, 336 (1958); *see generally Elgin v. Department of Treasury*, 567 U.S. 1, 12-13 (2012) (holding that a provision vesting review in a court of appeals barred district court from exercising jurisdiction over facial challenge to constitutionality of a statute).

of an inherent cause of action for all constitutional claims. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015).

The *Armstrong* decision recognized that federal courts have equitable authority in some circumstances "to enjoin unlawful executive action." *Id.* at 1385. But the decision did not suggest that a sweeping equitable action like this one would be available, and indeed it emphasized that such authority is "subject to express and implied statutory limitations." *Id.* Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts rightly "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996). Here, even if the equitable authority of an Article III court could otherwise extend to an action remotely resembling the one brought by Plaintiffs, the APA provides "statutory limitations" that "foreclose" Plaintiffs' asserted constitutional claims against the Executive Branch. *Armstrong*, 135 S. Ct. at 1385 (internal quotation marks omitted).

In addition to the APA, other statutes provide causes of action that confirm that the courts' general equitable authority is not available here. For example, Section 307 of the Clean Air Act provides for exclusive review in the courts of appeals of specified "action" or "final action" of the EPA Administrator under the Act. 42 U.S.C. § 7607(b); *cf. Massachusetts v. EPA*, 540 U.S. at 514 n.16 (noting

that it was pursuant to this provision that the state brought its climate change-related challenge to EPA's decision). The Energy Policy and Conservation Act provides for judicial review in the courts of appeals of Department of Transportation actions setting fuel economy standards. 49 U.S.C. § 32909. As noted above (p. 29 n.2), the Energy Policy Act makes Plaintiffs' challenge to natural gas import/export approval reviewable exclusively in the courts of appeals. 15 U.S.C. § 717r(b). This provision also authorizes review of decisions by the Federal Energy Regulatory Commission about natural gas pipelines and other things. *Id.* § 717r(b), (d). Just as with the APA, these provisions channel constitutional challenges to agency action into particular courts and proceedings, and the courts may not supplement those review schemes.

The district court essentially held that Plaintiffs may opt out of proceeding under the APA (or any available statutory cause of action) and may instead proceed directly under the Constitution. It opined that Plaintiffs "may choose which claims to assert and which legal theories to press," and Plaintiffs "have not asserted APA claims; their claims are brought directly under the United States Constitution, which has no 'final agency action' requirement." 1 E.R. 20. The court's analysis is backwards: because Congress provided in the APA a cause of action to challenge unconstitutional agency action, it has impliedly prohibited a plaintiff from bypassing that cause of action and proceeding either directly under the Constitution or under the court's equitable authority.

The district court also reasoned that because the government's APA-based argument would "displace constitutional claims," the government must show "clear legislative intent" in the statute to so displace. 1 E.R. 322 (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)). But the government's argument would not bar Plaintiffs from asserting their constitutional claims; it would require only that they do so within the framework of the APA or one of the other statutes providing a cause of action. For example, the APA would authorize Plaintiffs to bring a constitutional challenge to a lease of federal lands by the Bureau of Land Management for the purpose of extracting fossil fuels. In that challenge, Plaintiffs would be free to argue that the agency had violated the very constitutional provisions cited in Plaintiffs' complaint. *See* 5 U.S.C. § 706(2)(B) (authorizing challenges to agency action alleged to be "contrary to constitutional right, power, privilege, or immunity"). A court undertaking APA review would then be able to assess the merits vel non of any and all of Plaintiffs constitutional claims. *See, e.g.*, *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1451 (D. Wyo. 1998) (considering within APA framework the claim that a National Park Service management plan violated the First Amendment), *aff'd*, 175 F.3d 814 (10th Cir. 1999). This is not an instance of constitutional claims being "displaced" — and triggering the requirement of express displacement language — but rather an instance under *Armstrong* where the APA and other statutes prohibit Plaintiffs from relying on a non-statutory cause of action.

The district court also conflated the required cause of action with the separate issue whether the United States has waived its sovereign immunity. This Court has held that the APA waives sovereign immunity for claims seeking non-monetary relief against the government whether the claims are brought pursuant to the APA or another cause of action, such as the courts' general equitable authority. *See Navajo Nation v. Department of Interior*, 876 F.3d 1144, 1167-73 (9th Cir. 2017); *Presbyterian Church (USA) v. United States*, 870 F.2d 518, 525 & n.9 (9th Cir. 1989). But neither the Supreme Court nor this Court has held that a plaintiff has a *cause of action* outside of the APA simply because the APA's *waiver of sovereign immunity* might apply to such a claim. Plaintiffs must establish both a waiver of sovereign immunity and a cause of action, and establishing one does not automatically establish the other.

The district court also cited *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017), but that case does not even address the APA, let alone establish that Plaintiffs may proceed outside of the framework of that statute. *Ziglar* held that a *Bivens* remedy was not available and in so holding observed that detained illegal aliens "may seek injunctive relief" or "might be able to challenge their confinement conditions via a petition for a writ of habeas corpus." *Id*. at 1862-63. Those conditional observations say nothing about *Armstrong* or the availability of an APA claim here.

In previous filings, Plaintiffs cited a footnote in a recent decision of this Court for the proposition that even if the APA bars judicial review of government actions, that "bar does not affect a plaintiff's ability to bring freestanding constitutional claims." *Regents of University of California v. U.S. Department of Homeland Security*, 908 F.3d 476, 494 n.8 (9th Cir. 2018) (citing *Webster*, 486 U.S. at 601-05). But *Regents* merely restated the well-settled rule that, even in a case where agency action is otherwise "committed to agency discretion by law" within the meaning of 5 U.S.C. § 702(a)(2), "review is still available to determine if the Constitution has been violated." *Id.* (quoting *Padula v. Webster*, 822 F.2d 97, 101 (D.C. Cir. 1987)). That is no surprise: Section 702(a)(2) precludes review only "to the extent" that a decision is committed to agency discretion, but no agency has discretion to violate the Constitution. Review of such constitutional challenges to federal agency action, however, nevertheless must proceed "under the APA." *Webster*, 486 U.S. at 602.

Finally, the district court stated that "Plaintiffs' claims simply do not fall within the scope of the APA" because they "seek *wholesale* improvement of an agency program by court decree." 1 E.R. 24 (brackets omitted). In other words, Plaintiffs' claims are too big for the APA's "case-by-case approach." *Id.* But because Congress prescribed a case-by-case approach in the APA, Plaintiffs cannot choose a wholesale approach instead. In *Armstrong*'s phraseology, Plaintiffs must abide by Congress's "statutory limitations" even if Plaintiffs find them too limiting.

Because Plaintiffs have not brought their constitutional claims challenging agency actions within the framework of the APA, *e.g.*, 1 E.R. 20 (observing that "here, plaintiffs have not asserted APA claims"), those claims must be dismissed.

III. Plaintiffs' constitutional claims fail on the merits.

Even if Plaintiffs could satisfy those threshold requirements, their constitutional claims would fail on the merits.

A. There is no fundamental right to a "stable climate system."

The Supreme Court has repeatedly instructed courts considering novel due process claims to " 'exercise the utmost care whenever . . . asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed" into judicial policy preferences. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting and omitting citation to *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)). More specifically, 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.' " *Id.* at 720-21 (quoting *Moore*, 431 U.S. at 503). The district court's recognition of an "unenumerated fundamental right" to a "climate system capable of sustaining human life," 1 E.R. 93, 114, squarely contradicts that directive, because such a purported right is entirely without basis in this Nation's history or tradition.

Tellingly, the most analogous implied fundamental right that the district court could identify was the right to same-sex marriage recognized by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). There is, to understate the point considerably, no meaningful analogy between a distinctly personal and circumscribed right to same-sex marriage and a purported right to particular climate conditions that apparently would run indiscriminately to every individual in the United States and the judicial recognition of which would affect every person in this country and the world. Moreover, the climate-related right recognized by the district court bears no relationship to any right as "fundamental as a matter of history and tradition" as the right to marry that the Supreme Court recognized in *Obergefell*. *Id.* at 2602. Nor was *Obergefell*'s extension of that right an invitation to lower courts to abandon the cautious approach to recognizing new fundamental rights that is demanded by the Supreme Court's prior decisions.

A right to a "climate system capable of sustaining human life" is simply nothing like any fundamental right ever recognized by the Supreme Court. Such rights 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). Thus, the Supreme Court has "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child

rearing, and education." *Id.* at 851; *see also Glucksberg*, 521 U.S. at 720 (describing "the 'liberty' specially protected by the Due Process Clause" as including the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion). The state of the climate, however, is a public and generalized issue having no connection to personal liberty or personal privacy.

The district court's invocation of a 1993 decision from the Supreme Court of the Philippines, 1 E.R. 93-94, underscores how dramatically far afield the right asserted by Plaintiffs is from any other right ever recognized under the United States Constitution. *See, e.g.*, *Guertin v. Michigan*, 912 F.3d 907, 921-22 (6th Cir. 2019) (The "Constitution does not guarantee a right to live in a contaminant-free, healthy environment."); *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1237-38 (3d Cir. 1980) (finding it "established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment"), *vacated on other grounds sub nom. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (observing that arguments "in support of a constitutional protection for the environment" have not "been accorded judicial sanction"); *cf. Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) ("[W]henever federal courts have faced assertions of fundamental rights to a 'healthful environment' or to

freedom from harmful contaminants, they have invariably rejected those claims."); *id.* n.3 (identifying the district court's opinion here as the only exception).

B. Plaintiffs' state-created danger claims fail.

The Constitution does not impose an affirmative duty to protect individuals, and the district court erred in holding that Plaintiffs had stated a viable claim under the narrow "state-created danger" exception to that rule. 1 E.R. 49-54, 95-98.

As a general matter, 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 two narrow exceptions to the no-duty rule articulated in *DeShaney*: (1) the "special relationship" exception, which applies to individuals involuntarily placed in state custody; and (2) the state-created danger exception. *Patel*, 648 F.3d at 971-72. Under the second exception, "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). The exception has "limited applicability," and this Court does not often approve its application. *Kennedy v. City of Ridgefield*, 440 F.3d 1091, 1095 (9th Cir. 2006) (Tallman, J., dissenting from denial of rehearing en banc).

Plaintiffs contend that the government's "affirmative actions and deliberate indifference to the dangers of climate change" amount to a due process violation under the state-created danger exception. 2 E.R. 372. But applying the exception to the circumstances of this matter would cause the exception to swallow the rule. The district court ignored that this matter is readily distinguishable from all other viable state-created danger cases. "Every instance" in which this Court has "permitted a state-created danger theory to proceed has [also] 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). None of those elements is present here.

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). But here, Plaintiffs allege that general degradation of the global climate has harmed their "dignity, including their capacity to provide for their basic human needs, safely raise families, practice their religious and spiritual beliefs, [and] maintain their bodily integrity" and has prevented them from "lead[ing] lives with access to clean air, water, shelter, and food." 3 E.R. 606, ¶ 283. Those alleged harms "do not remotely resemble" the immediate, direct, physical, and personal harms at issue in the above-cited cases. *Pauluk*, 836 F.3d at 1129 (Murguia, J., concurring in part and dissenting in part). In any event, all of Plaintiffs' harms result from what they allege is the government's failure to protect the environment. But Plaintiffs have no constitutional right to particular climate conditions, *see supra* Section III.A (pp. 35-38), and they may not resort to the state-created danger exception to circumvent that limitation.

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 especially in Part II above (pp. 27-35), Plaintiffs contend that a number of (mostly unspecified) "agency action[s]" and inactions 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: they cancelled the 9-1-1 call to the paramedics; they dragged him 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*, 879 F.2d at 588 (same where officer arrested driver, impounded his car, and left his female passenger by the side of the road at night in a high-crime area).

Third, Plaintiffs do not allege that government actions endangered *Plaintiffs* in particular. *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 officers were not aware that the victim "as distinguished from the public at large, faced any special danger"). As explained in Section I.A.1 above

(pp. 13-17), 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 decisions to "allow[] fossil fuel production, consumption and combustion at [allegedly] dangerous levels," 3 E.R. 606, ¶ 284, did not increase the danger to Plaintiffs in particular.

Therefore, the district court erred as a matter of law in permitting Plaintiffs' claims based on the state-created danger exception to move forward. There is no support in *DeShaney* or in this Circuit's law to apply that exception to the federal government's actions and inactions related to climate change.

C. All of Plaintiffs' constitutional theories are before this Court in this appeal, and none has merit.

In opposing certification of this appeal, Plaintiffs asserted that they have other constitutional claims that are not before the Court because the government never challenged the merits of those claims in its motions to dismiss and for summary judgment. 2 E.R. 135, 141, 148. That assertion is incorrect.

Plaintiffs' argument is based on a misreading of the proceedings and a mischaracterization of the government's motions. First, the government moved to dismiss *all* of Plaintiffs' claims for failure to state a claim, including all of Plaintiffs' constitutional claims alleging infringement of fundamental rights or alleging discrimination. 3 E.R. 514 (moving "for dismissal of *the action* with prejudice" for, among other grounds, "failure to state a claim upon which relief can be granted"

(emphasis added)); 3 E.R. 501 (arguing categorically that "Plaintiffs Fail To State A Claim Under The Constitution").

In resolving this aspect of the government's motion, the district court first addressed the government's arguments concerning Plaintiffs' "Due Process Claims." 1 E.R. 90 (section heading). The court explained that "Plaintiffs' due process claims encompass asserted equal protection violations and violations of unenumerated rights secured by the Ninth Amendment." *Id.* n.6. The court held that it was "clear . . . that defendants' affirmative actions would survive rational basis review," and so the relevant question was whether "plaintiffs have alleged infringement of a fundamental right." 1 E.R. 92. The court then identified *one* such right, namely, "the right to a climate system capable of sustaining human life." 1 E.R. 94. The court chose this right purposefully so as "to provide some protection against the constitutionalization of all environmental claims." *Id.* The court then went on to recognize other due process claims — the " 'Danger Creation' Challenge to Inaction," 1 E.R. 95 (section heading) — and "Public Trust Claims," 1 E.R. 98 (same). Thus, only three claims survived for further proceedings after the district court's resolution of the motion to dismiss: (1) a due process claim based on the right to a climate system capable of sustaining human life; (2) a due process claim based on the "danger creation" challenge to inaction; and (3) a public trust claim.

The government then moved for summary judgment on the merits of "each of the four claims" pleaded in the operative complaint. 2 E.R. 384; *see also* 3 E.R. 604-13, ¶¶ 277-310 (asserting First through Fourth Claims for Relief). Plaintiffs argued that, in addition to the three claims that survived the district court's ruling on the motion to dismiss, the court should consider additional constitutional theories. 2 E.R. 378-79 (arguing, incorrectly, that the government failed to seek summary judgment on three Fifth Amendment claims). The government's reply in support of its motion for summary judgment argued that the motion's "rationales fully justify rejecting *every one* of Plaintiffs' constitutional claims." 2 E.R. 240 (emphasis added). The district court's summary judgment opinion rejected Plaintiffs' Ninth Amendment claim and Plaintiffs' argument that they had identified a suspect class triggering heightened equal protection scrutiny. 1 E.R. 56-59. The court added one claim to the three it recognized in the opinion on the motion to dismiss (an "equal protection" claim), but that claim is based on the same purported fundamental right to "a climate system capable of sustaining human life." 1 E.R. 58; *see also supra* Section III.A (pp. 35-38) (discussing the non-viability of that purported right).

Therefore, the government has consistently argued (and continues to argue in this brief) that each of Plaintiffs' four claims or theories lacks any merit. Of course, Plaintiffs are free to argue in their answering brief that the district court erred in rejecting their Ninth Amendment claim and suspect class argument, or that the court

should have recognized additional due process or equal protection theories that would provide an alternative basis for affirmance. *See Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 481 (1976) ("[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." (internal quotation marks omitted)). But the point for present purposes is that all of Plaintiffs' claims and theories are before this Court now; they are not languishing in district court. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (holding that the court of appeals "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court" (internal quotation marks omitted)).

In any event, Plaintiffs' other claims and theories are meritless. The district court correctly ruled that Plaintiffs' Ninth Amendment claim "is not viable as matter of law" under this Court's controlling precedent. 1 E.R. 56 (citing *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986)). The district court also correctly rejected Plaintiffs' argument that "posterity" is a suspect classification under the Equal Protection Clause, correctly observing that "[b]oth the Supreme Court and the Ninth Circuit have held that age is not a suspect class." 1 E.R. 57 (citing cases).

As to Plaintiffs' other due process theories, the district court did not revisit its decision (in resolving the motion to dismiss) "to provide some protection against the constitutionalization of all environmental claims" by focusing solely on the right to a climate system capable of sustaining human life. 1 E.R. 48-49, 94. Moreover, those other theories are meritless. Plaintiffs submit that the government violated "their substantive due process rights to life and property, their recognized liberty rights to personal security and family autonomy, or rights of equal protection even where no suspect class exists." 2 E.R. 135 n.4. But Plaintiffs are shuffling their arguments to no end: they are simply swapping out a climate-related right for other rights that they assert have been violated by the government's actions (and inactions) related to climate change.

In response to the government's motions, Plaintiffs identified no legal support for their claim that the government's policy actions concerning energy and the environment can themselves violate substantive due process rights concerning life, liberty, property, personal security, or family autonomy. We are not aware of any authority that the government's actions or inactions relating to climate change or any other environmental phenomenon could conceivably violate due process or equal protection rights. *See supra* Section III.A (pp. 35-38). Here, for example, Plaintiffs seek to constitutionalize review of agency decisions to lease federal land for coal mining. *See* 3 E.R. 579-80. The district court rightly rejected that idea. 1 E.R. 94.

To be sure, statutes enacted by Congress (like the Clean Air Act) and agency actions implementing those statutes (like a rule promulgated or an enforcement action taken pursuant to that Act) may have effects on life, liberty, and property in a general sense, as do congressional and agency inaction. But no court has ever held that such effects are due process violations (or equal protection violations based on infringement of a substantive right). *See, e.g.*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) ("This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin."). Indeed, even where an *express* constitutional guarantee is involved, such as the First Amendment, the Supreme Court has instructed that Congress's choices in economic policymaking must be respected. *See, e.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997) ("Doubts concerning the policy judgments [of Congress] do not, however, justify reliance on the First Amendment as a basis for reviewing economic regulations.").

Therefore, Plaintiffs have stated no viable claims under the Constitution.

IV. No federal public trust doctrine creates a right to particular climate conditions.

The district court should have dismissed Plaintiffs' public trust claim for three independent reasons. First, any public trust doctrine is a creature of *state* law only, and it applies narrowly to only 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. Second, even if the doctrine had a federal basis, it has been displaced by statute, primarily the Clean Air Act. Finally, even if any such doctrine had not been displaced, the "climate system" or atmosphere is not within any conceivable federal public trust.

A. There is no federal public trust doctrine that binds the federal government.

Plaintiffs rely on an asserted public trust doctrine for the proposition that the federal government must "take affirmative steps to protect" "our country's life-sustaining climate system," which they assert the government holds in trust for their benefit. 3 E.R. 612-13. But because any public trust doctrine is a matter of *state* law only, public trust claims may not be asserted against the federal government under federal law.

The concept of a public trust is derived from English common law. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1081-82 (D.C. Cir. 1984). Where the concept has been invoked, it generally declares that "the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." *National Audubon Society v. Superior Cour*t, 658 P.2d 709, 718 (Cal. 1983) (internal quotation marks omitted). The Supreme Court has without exception treated public trust doctrine as a matter of state law with no basis in the United States Constitution. *See, e.g.*, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283-85

(1997); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926); *Long Sault Development Co. v. Call*, 242 U.S. 272, 278-79 (1916); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-53 (1892).

The Court recently confirmed in *PPL Montana* that "the public trust doctrine remains a matter of state law," and that its "contours . . . do not depend upon the Constitution." 565 U.S. at 603-04. The Court explained that the public trust doctrine, as a creature of state law, was "subject . . . to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power." *Id.* at 604. The district court attempted to distinguish *PPL Montana* because it did not address "the viability of federal public trust claims with respect to federally owned trust assets." 1 E.R. 106. But *PPL Montana* made clear that a public trust doctrine would never apply to the federal government, 565 U.S. at 603-04, and different facts would not change that result.

The Supreme Court's statements in *PPL Montana* cannot be dismissed as dicta. The statement that the doctrine does "not depend on the Constitution" was central to its holding that the federal "equal footing doctrine" — and not the state public trust doctrine — controlled the resolution of the case before it. *Id.* at 603-04. In any event, courts may not "blandly shrug . . . off" any statements from the Supreme Court, including dicta. *United States v. Montero-Camargo*, 208 F.3d 1122,

1132 n.17 (9th Cir. 2000) (en banc); *see also Overby v. National Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (explaining that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative").

Nor should the district court have discounted the numerous cases from the federal courts of appeals — including this Court — acknowledging that any public trust doctrine is a matter of state law. *See, e.g.*, *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012) ("While the equal-footing doctrine is grounded in the Constitution, the public trust doctrine remains a matter of state law, the contours of which are determined by the states, not by the United States Constitution." (internal quotation marks omitted)); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 537 n.3 (4th Cir. 2013) (same); *West Indian Co. v. Government of Virgin Islands*, 844 F.2d 1007, 1019 (3d Cir. 1988) (observing that the public trust doctrine varies by state); *Air Florida*, 750 F.2d at 1082, 1085-86 n.43 (explaining that the doctrine "has developed almost exclusively as a matter of state law" and suggesting that a federal public trust doctrine could be displaced by statute).

Indeed, in *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir. 2014) — a purported public trust action brought on behalf of a different group of children — the D.C. Circuit rejected the very same theory advanced by Plaintiffs here. There, the plaintiffs asserted that the federal government had abdicated a

public trust duty to protect the atmosphere from irreparable harm. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 12 (D.D.C. 2012). In a detailed opinion, the district court dismissed the case, holding that "the central premise upon which Plaintiffs rely to invoke the Court's jurisdiction is misplaced," because public trust claims do not present a federal question. *Id.* at 15 (citing *PPL Montana*, 565 U.S. at 603-04). The D.C. Circuit affirmed in an unpublished, per curiam opinion. That court explained that *PPL Montana* "repeatedly referred to 'the' public trust doctrine" — that is, "the *state* public trust doctrine" — and "directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." 561 Fed. Appx. at 8. The court below failed to grapple with *Alec L.*, stating that because the opinions in that case relied on *PPL Montana*, the court was simply "not persuaded." 1 E.R. 108.

The district court further erred in holding that the Fifth Amendment separately protects Plaintiffs' "public trust rights" and grants Plaintiffs a federal "right . . . to enforce the government's obligations as trustee." 1 E.R. 113. First, Plaintiffs' operative complaint never alleged that their "public trust rights" were grounded in the Fifth Amendment; it cited instead the Ninth and Tenth Amendments and the "Vesting, Nobility, and Posterity Clauses of the Constitution." 3 E.R. 612, ¶ 308. But the Ninth Amendment "has never been recognized as independently securing any constitutional right." *Strandberg*, 791 F.2d at 748; *accord* 1 E.R. 56 (district

court's rejection of Plaintiffs' Ninth Amendment claim). Neither has the Tenth Amendment, which only reserves to the states those powers not expressly granted to Congress. *New York v. United States*, 505 U.S. 144, 156-57 (1992). In any event, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (discussing the well-pleaded complaint rule).

Second, even apart the Court's holding in *PPL Montana*, it is inconceivable that the Founders would have recognized any fundamental "public trust rights," 1 E.R. 113, to require the federal government to "manage the atmosphere" for the public's benefit, 3 E.R. 613, ¶ 310. The district court's recognition that some individual Founders were "influenced" by the Social Contract Theory and nebulous "intergenerational considerations," 1 E.R. 112 & n.13, does not establish that the right to such management is "deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21. The district court could not "fashion a new due process right out of thin air." *Carlisle v. United States*, 517 U.S. 416, 429 (1996).

Plaintiffs' public trust claim should have been dismissed because there is no federal public trust doctrine.

B. Any federal public trust doctrine is displaced by statute, primarily the Clean Air Act.

Even if a public trust doctrine had some basis in federal law, and even if the federal government at one time had a common-law duty to maintain "our country's life-sustaining climate system" for public benefit, 3 E.R. 612, ¶ 308, that duty is displaced by numerous federal statutes and regulations, principally including the Clean Air Act.

When Congress enacts a federal statute that "speak[s] directly" to the question previously addressed by a non-statutory cause of action, the previous cause of action is displaced and consequently no longer recognized. *AEP*, 564 U.S. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); *see also Native Village of Kivalina*, 696 F.3d at 856-57 (applying and extending *AEP*'s displacement rule). In *AEP*, the Supreme Court considered whether a public nuisance claim against greenhouse gas emitters could be maintained under federal common law after enactment of the Clean Air Act. 564 U.S. at 415. The Court held unambiguously that "the Clean Air Act and the EPA actions it authorizes displace" any such common-law claim. *Id.* at 424. The Court found it "altogether fitting that Congress designated an expert agency . . . as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal

judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 428.

The district court's holding that Plaintiffs may challenge government action or inaction on climate change based on a freestanding public trust theory, 1 E.R. 54-55, 98-110, would recast the regulatory system developed by Congress and federal agencies and would fly in the face of the Supreme Court's holding in *AEP*. The district court reasoned that *AEP*'s displacement rule "simply does not apply" to Plaintiffs' public trust claims because the Supreme Court "did not have public trust claims before it and so it had no cause to consider the differences between public trust claims and other types of claims." 1 E.R. 111. But *AEP* was not limited to nuisance claims: the Court held broadly that Congress's vesting in EPA the "decision whether and how to regulate carbon-dioxide emissions" "displaces *any* federal common law right to seek abatement of" those emissions. 564 U.S. at 424, 426 (emphasis added). Moreover, as discussed in more detail in Section I.B above (pp. 24-27), the district court altogether ignored the Supreme Court's warning that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize" to engage in this type of policymaking. *Id*. at 428.

C. Any public trust doctrine would not apply to the "climate system" or the atmosphere.

Finally and independently, an asserted public trust doctrine does not help Plaintiffs here. Public trust cases have historically involved state ownership of

specific types of natural resources, usually limited to submerged and submersible lands, tidelands, and waterways. *See, e.g.*, *PPL Montana*, 565 U.S. 576, 603-04 (riverbeds); *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 707-08 (2010) (submerged lands); *Phillips Petroleum Co.*, 484 U.S. at 476-77 (tidelands); *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 205-06 (1984) (tidelands); *United States v. Mission Rock Co.*, 189 U.S. 391, 406-07 (1903) (tidelands); *Illinois Central Railroad*, 146 U.S. at 453-60 (submerged lands).

Plaintiffs' version of the public trust doctrine rips the doctrine from those historical tethers. Plaintiffs seek to hold the government responsible for maintaining the whole of "the climate system, which encompasses our atmosphere, waters, oceans, and biosphere." 3 E.R. 612-13, ¶ 308. Specifically, they contend that the federal government has "alienated substantial portions of the atmosphere" and that agencies have "failed in their duty of care as trustees to manage the atmosphere." 3 E.R. 613, ¶ 309. Although state courts have sometimes expanded the state-law doctrine to protect additional uses of waters within a state's jurisdiction — e.g., for recreation, aesthetic enjoyment, and preservation of flora and fauna, *see Air Florida*, 750 F.2d at 1083 (collecting cases) — the climate system or atmosphere is unlike any resource previously deemed subject to a public trust. It cannot be owned and, due to its ephemeral nature, cannot remain within the jurisdiction of any single

government. No court has held that the climate system or atmosphere is protected by a public trust doctrine. Indeed, the concept has been widely rejected.[3]

Although their operative complaint confirms that Plaintiffs seek to hold the federal government responsible for alleged mismanagement of the entire "climate system" — and not any particular tidelands, waters, or oceans — the district court sidestepped this fact, holding that Plaintiffs had stated a viable claim because they "alleged violations of the public trust doctrine in connection with the territorial sea." 1 E.R. 102. The court misstates Plaintiffs' complaint: Plaintiffs might allege that

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[3] *See, e.g.*, *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) ("Plaintiffs have cited no cases — and we have found none — where another jurisdiction's appellate court has concluded that common law public trust principles independently apply to management of the atmosphere."); *Filippone v. Iowa Department of Natural Resources*, No. 12-0444, 2013 WL 988627, at *3 (Iowa Ct. App. Mar. 13, 2013) (holding that the defendant "does not have a duty under the public trust doctrine to restrict greenhouse gases to protect the atmosphere"); *Aronow v. Minnesota*, No. A12-0585, 2012 WL 4476642, at *3 (Minn. Ct. App. Oct. 1, 2012) (explaining that "no Minnesota appellate court has held that the public-trust doctrine applies to the atmosphere"); *cf. Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229, at *7 (Or. Cir. Ct. May 11, 2015) ("This Court, based on its understanding of the history of the public trust doctrine in Oregon, cannot conclude that the atmosphere is a 'resource' to which the public trust doctrine is applicable."), *aff'd in relevant part*, 295 Or. App. 584, 598 (2019) (holding that even if the atmosphere were protected by a public trust, "the Oregon public trust doctrine is rooted in the idea that the state is *restrained* from disposing" or impairing public trust resources and affords no basis "for imposing fiduciary duties on the state to affirmatively act to protect public-trust resources"); *Kanuk ex rel. Kanuk v. Alaska Department of Natural Resources*, 335 P.3d 1088, 1102 (Alaska 2014) (holding that even if the atmosphere were protected by a public trust, the "past application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources").

the territorial seas were *harmed* by the government's alleged failure to protect the climate system, but they contend that that the atmosphere is *burdened* by a federal trust. 3 E.R. 612-13. That the federal agency action and inaction challenged by Plaintiffs might indirectly affect the territorial seas does not mean that Plaintiffs have identified a protected trust.

In sum, the district court should have dismissed Plaintiffs' public trust claim.

CONCLUSION

For the foregoing reasons, the orders of the district court should be reversed, and this case should be remanded with instructions to dismiss the complaint.

Dated: February 1, 2019.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are four related cases within the meaning of Circuit Rule 28-2.6, namely, the government's four petitions for writs of mandamus: *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692); *In re United States*, 895 F.3d 1102 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776 (denied as moot Nov. 2, 2018); and *In re United States*, No. 18-73014 (denied as moot Dec. 26, 2018).

The government's petition for permission to appeal in the instant case was docketed as No. 18-80176 on November 30, 2018.

ADDENDUM

Fifth Amendment to the United States Constitution

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Administrative Procedure Act
5 U.S.C. § 551(13)

§ 551. Definitions

For the purpose of this subchapter—

. . . .

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

. . . .

Administrative Procedure Act
5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Administrative Procedure Act
5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Energy Policy Act of 1992
15 U.S.C. § 717r

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection

shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

Clean Air Act
42 U.S.C. § 4607(b)

§ 7607. Administrative proceedings and judicial review

. . . .

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for

reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

. . . .

Energy Policy and Conservation Act
49 U.S.C. § 32909

§ 32909. Judicial review of regulations

(a) Filing and Venue.—(1) A person that may be adversely affected by a regulation prescribed in carrying out any of sections 32901-32904 or 32908 of this title may apply for review of the regulation by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

(2) A person adversely affected by a regulation prescribed under section 32912(c)(1) of this title may apply for review of the regulation by filing a petition for review in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

(b) Time for Filing and Judicial Procedures.—The petition must be filed not later than 59 days after the regulation is prescribed, except that a petition for review of a regulation prescribing an amendment of a standard submitted to Congress under section 32902(c)(2) of this title must be filed not later than 59 days after the end of the 60-day period referred to in section 32902(c)(2). The clerk of the court shall send immediately a copy of the petition to the Secretary of Transportation or the Administrator of the Environmental Protection Agency, whoever prescribed the regulation. The Secretary or the Administrator shall file with the court a record of the proceeding in which the regulation was prescribed.

(c) Additional Proceedings.—(1) When reviewing a regulation under subsection (a)(1) of this section, the court, on request of the petitioner, may order the Secretary or the Administrator to receive additional submissions if the court is satisfied the additional submissions are material and there were reasonable grounds for not presenting the submissions in the proceeding before the Secretary or Administrator.

(2) The Secretary or the Administrator may amend or set aside the regulation, or prescribe a new regulation because of the additional submissions presented. The Secretary or Administrator shall file an amended or new regulation and the additional submissions with the court. The court shall review a changed or new regulation.

(d) Supreme Court Review and Additional Remedies.—A judgment of a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28. A remedy under subsections (a)(1) and (c) of this section is in addition to any other remedies provided by law.