IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLEAN AIR COUNCIL, et al., Plaintiffs, v. **UNITED STATES OF AMERICA, et al.,** Defendants.	Case No. 2:17-cv-04977-PD

DEFENDANTS' MOTION TO DISMISS

Federal Defendants hereby file this response to Plaintiffs' Amended Complaint and move the Court to dismiss the Amended Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

The bases for this motion are more fully set forth in the accompanying Memorandum of Law.

Respectfully submitted this 29th day of March, 2018.

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MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, two minors and an environmental organization, seek the extraordinary – and wholly improper – remedy of a judicial declaration controlling current and future environmental policy decisions of the President, the Department of Energy ("DOE"), the Environmental Protection Agency ("EPA") and the Department of the Interior ("DOI"). The scope and breadth of Plaintiffs' proposed remedy is without precedent: they ask this Court not only to declare invalid policies and regulations that revise environmental policies in place before 2017 but also to declare invalid and prevent future policy changes. Plaintiffs ask this Court to fashion a new substantive due process right to a stable climate out of whole cloth — a right that the Third Circuit has already rejected. *See Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1237-38 (3d Cir. 1980), *vacated in non-relevant part by Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

This Court should dismiss this case on several independent dispositive grounds. *First*, Plaintiffs lack standing. Article III does not give Plaintiffs standing to bring an action such as this; nor does it vest a federal court with the power to transform its limited jurisdiction to decide "cases" and "controversies" into a national writ to make environmental policy. Plaintiffs' alleged injuries are widely shared by every member of society, cannot plausibly be traced to particular

actions of Defendants, and cannot be redressed by an order within the authority of a federal court. Plaintiffs lack standing and dismissing this case on this ground avoids entangling the Court in the separation-of-powers concerns implicated by second-guessing and controlling the elected branches' policy decisions.

Second, Plaintiffs invite the Court to arrogate to itself the power to issue sweeping declarations regarding environmental policy and government operations, and any other social or economic activity that contributes to carbon dioxide ("CO_2") emissions. To do so, they seek to transform reducing CO_2 emissions and combatting global climate change into a personal constitutional right vindicable in a federal court. In the process Plaintiffs offer an interpretation of the Due Process Clause that has never been adopted in a final court order as providing a "fundamental right" to a global atmosphere capable of sustaining human life.

Third, Plaintiffs seek to proceed on a theory that the President and federal agencies have violated the "public trust" doctrine. But the Supreme Court has found that such doctrine is purely a creature of state law and the Court of Appeals for the District of Columbia Circuit has affirmed the dismissal of nearly-identical claims.

Fourth, to the extent Plaintiffs can assert any challenges to government action in this Court, they must proceed under the Administrative Procedure Act ("APA") or other statute-specific review provisions. The current Amended

Complaint, however, runs afoul of established limitations on such challenges because it represents an improper programmatic challenge to a broad swath of environmental policies and programs. And to the extent the Amended Complaint seeks to reverse non-final actions or prevent future policies, Plaintiffs' claims are not ripe for adjudication.

Finally, this Court must resist Plaintiffs' improper attempt to have the judiciary decide important questions of energy and environmental policy to the exclusion of the elected branches of government. For all of these reasons, this case must be dismissed.

BACKGROUND

Two minors, by and through their guardians, and Clean Air Council filed an Amended Complaint March 15, 2018, naming the President, DOE, EPA, DOI and these agencies' leaders as Defendants. ECF No. 16. Plaintiffs allege that these Defendants have since 2017 embarked on a program to scale back or eliminate measures designed to minimize the United States' contribution to *global* climate change. Am. Compl. ¶¶ 1-2. The Amended Complaint characterizes any measure or statement that appears to reverse, suspend or merely review previous government regulations tangentially related to greenhouse gas emissions as a "rollback." ¶ 31. According to Plaintiffs, the government's "rollbacks" recklessly and knowingly place the "*nation's population* in harm's way." ¶ 36.

The Amended Complaint characterizes climate change as a global problem and the harms as international in scope, ¶¶ 67, 69, 75-76, 81. According to Plaintiffs, climate change threatens human life due to the "totality of attributes that define climate" including changes in air temperature and "changes to precipitation patterns, winds, ocean currents, and other measures of Earth's climate." ¶ 38. The Amended Complaint describes extreme weather events and wildfires, both within and outside the United States, ¶¶ 64-65, 67, 69, declining artic sea ice, ¶ 52, rising sea levels that will affect "[m]illions of Americans," ¶ 75, and global ocean acidification, ¶¶ 81-83. The Amended Complaint alleges that all of Pennsylvania will be affected because climate change will lead to "extreme precipitation," increased risk of flooding and wetland loss. ¶¶ 66, 77.

In large measure, Plaintiffs do not identify or challenge specific final agency actions, such as agency orders, permits, or rulemakings. Instead, they challenge Executive Orders, postponements or review of existing regulations, statements by the White House or agency heads, personnel attrition, budgetary statements and proposed rescission of rules and regulations by Congress or the relevant agency. ¶¶ 141-160. Plaintiffs further broadly oppose what they term the federal government's "affirmative aggregate acts," ¶ 177, which they assert result in "dangerous interference with a stable climate system" that injures their prospects for long and healthy lives. ¶ 187.

Plaintiffs assert two causes of action. First, Plaintiffs allege that Defendants' aggregate actions violate their rights under the Due Process Clause of the Fifth Amendment and their rights reserved by the Ninth Amendment. ¶¶ 172-191. Second, Plaintiffs allege that Defendants have violated the public trust doctrine. ¶¶ 192-197. For relief, Plaintiffs seek a declaration that "Defendants cannot effectuate or promulgate any rollbacks that increase the frequency and/or intensity of the life-threatening effects of climate change. . . ." Am. Compl. at 64.

STANDARD OF REVIEW

A court reviews a motion to dismiss a complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). Judicial review focuses on whether the allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction, accepting all material allegations in the complaint as true and construing them in favor of the party asserting jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). A court may also dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion, the court must accept all of the claimant's material factual allegations as true and view all facts in the light most favorable to the claimant. *See Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 268 (3d Cir. 2016). However, a court need not accept as true any legal conclusion set forth in a pleading. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must set

forth facts supporting a *plausible*, not merely *possible*, claim for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. This Case Must Be Dismissed Because the Court Lacks Jurisdiction

A. Plaintiffs Lack Article III Standing

A federal court, being one of limited jurisdiction, may act only where it is granted power to do so by the Constitution and applicable statutes and regulations. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Article III restricts the jurisdiction of the federal courts to the resolution of "cases" and "controversies." U.S. Const. art. III § 2, cl.1; *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986).

The Article III standing requirement ensures that "federal courts exercise power "only when adjudication is consistent with a system of separated powers. . . ." *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated in non-relevant part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (inner citations and quote marks omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (Standing preserves the separation of powers by "prevent[ing] the judicial process from being used to usurp the powers of the political branches."). This suit is plainly not "consistent with a system of separated powers," *Allen*, 468 U.S. at 752, as it seeks to have a federal court decide broad

matters of national energy and environmental policy that are reserved to the elected branches of government. Article III does not permit suits that seek "broad-scale investigation" into government functions, because "this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action." *Laird v. Tatum*, 408 U.S. 1, 14–15 (1972).

The Supreme Court in *Lujan v. Defenders of Wildlife* reiterated the "irreducible minimum," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982), required by a plaintiff to demonstrate standing. 504 U.S. 555, 560-61 (1992). Plaintiffs must show (1) "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) that their injury is fairly traceable to the defendant's action, and not the result of the "independent action of some third party not before the court"; and (3) that it is "'likely' as opposed to merely 'speculative' that their injury will be redressed by a favorable decision." *Id.* at 561. Because Plaintiffs' alleged injuries are not particularized to them but are shared by every person in the Nation and because the impacts that Plaintiffs allege are not traceable to the Defendants' acts and would not be redressed by a favorable decision, Plaintiffs lack standing.

1. Plaintiffs Lack Standing Because They Allege Generalized Grievances, Not Particularized Harm

Federal courts are not "a forum in which to air . . . generalized grievances about the conduct of government . . . ." *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

Each plaintiff must press a personal stake in the outcome of litigation sufficient "to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on *his* behalf." *Warth*, 422 U.S. at 499 (emphases added). "[S]tanding 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 Comm. to Stop the War*, 418 U.S. 208, 220 (1974). Unless a plaintiff asserts "an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens,'" he lacks standing. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) .

The injuries alleged in the Amended Complaint fall far short of this Article III requirement. Plaintiffs' allegations involve generalized phenomena on a national or global scale such as drought, floods, rising sea levels, reduced agricultural productivity, and fire-prone forests. While these may affect Plaintiffs, they do so in the same way and to the same extent as they may affect everyone else in the world. Am. Compl. ¶¶ 26, 64, 69-83. These generalized harms are allegedly caused or exacerbated by a "global" increase in atmospheric CO_2 that Plaintiffs allege has resulted or will result, in part, from the aggregate of the federal government's alleged efforts to "dismantle" policies and programs that were intended to decrease CO_2 emissions. *Id.* ¶ 31; *see also* ¶177 (Defendants'

"affirmative aggregate acts" increasing national CO_2 emissions). These allegations – which are global in scope – do not plausibly allege a cognizable injury that is "concrete."

Whatever injuries climate change may have caused or may cause, those injuries are "not focused any more on these petitioners than [they are] on the remainder of the world's population," *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466, 475-79 (D.C. Cir. 2009),[1] and hence cannot establish a particularized injury for standing for these Plaintiffs.

2. Plaintiffs Lack Standing Because Their Alleged Injuries Can Be Traced Only to Broad Government Policy, Not Particularized Government Actions

The Supreme Court observed in *Allen* that allowing standing where the alleged injury could not fairly be traced to a particular government action

> would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

468 U.S. at 759-60. And yet Plaintiffs here complain broadly of generalized "rollbacks" of prior environmental policies and regulations — some of which have

[1] *See also WildEarth Guardians v. Salazar*, 88 F. Supp. 2d 77 (D.D.C. 2012); *Amigos Bravos v U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118 (D.N.M. 2011); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01:11-cv-41, 2011 WL 3321296 (E.D. Va. July 29, 2011).

yet to be promulgated. Am. Compl. ¶¶ 141, 143. It is impossible to determine from the Amended Complaint what role particular actions of each Defendant agency supposedly played or will play in the creation of the alleged injuries by any specific alleged violation of law.

Plaintiffs similarly fail to tie their alleged injuries to Defendants' actions, as opposed to the actions of third parties not before this Court. Fundamentally, the United States is by no means the only — or even the predominant — source of global gas emissions. Rather, greenhouse gases from global sources "quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime," meaning that "there are numerous independent sources of GHG emissions, both within and outside the United States, which together contribute to the greenhouse effect." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013). This fundamental fact breaks the requisite chain of causation for standing purposes: "Because a multitude of independent third parties are also responsible for the changes contributing to Plaintiffs' injuries, the causal chain is too tenuous to support standing." *Id.* at 1144.

A central part of the Article III standing inquiry is the requirement that a plaintiff identify with particularity a government failure that is a meaningful cause of the plaintiff's injury. That requirement cannot be avoided by the aggregation of vaguely-defined categories of government actions and inactions relating to vast

sectors of the American economy. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Plaintiffs here rely on just such an attenuated and diffuse chain of causation, one that fails to point to a specific alleged failure to regulate and instead relies on alleged policies that, in many cases, have yet to be implemented.

3. Plaintiffs Lack Standing Because Their Alleged Injuries Cannot be Redressed by This Court

Redressability is a matter of the "fit" between an act or omission and the injury that results from it: Plaintiffs must trace their injury to a *particular* government action that is prohibited, the reversal of which will concretely address their injury. Plaintiffs fail to establish standing where "the injury [is] too abstract," or "the line of causation between the illegal conduct and injury [is] too attenuated," such that "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative." *Allen*, 468 U.S. at 752.

The Amended Complaint here presents a generalized attack on government action and inaction regarding climate change, rather than a challenge to specifically identifiable action whose alleged effects could be concretely rectified by a favorable decision. Plaintiffs cannot establish redressability by alleging that the Court can declare that the federal government has improperly rolled back environmental regulations and policies. Nor, under the Constitution's framework of separation of powers, could the Court compel Congress to enact the additional authority that would be needed to provide relief from the environmental harms

alleged by Plaintiffs. And a court cannot, consistent with Article III, take over the debate about national climate change policy. These limitations on judicial power prevent, as could happen here given the *Juliana* litigation, *see infra*, competing and conflicting decisions on how to best implement Plaintiffs' preferred policies.

Equally problematic is the Amended Complaint's erroneous assumption that this relief could be obtained against the President. *See, e.g., Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties"). "There is longstanding legal authority that the judiciary lacks the power to issue an injunction or a declaratory judgment against the co-equal branches of government. . . ." *Newdow v. Bush*, 355 F. Supp. 2d 265, 280-82 (D.D.C. 2005) (declining to carve an exception to Presidential immunity "where [the President] is claimed to have violated the Constitution"); *see also Clinton v. Jones*, 520 U.S. 681, 718-19 (1997) (Breyer, J. concurring) (acknowledging "the apparently unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (Scalia, J. concurring)).

Dismissal is appropriate because the Amended Complaint fails to identify specific agency actions or inactions redressable by a federal court, and fails to identify any statutory authority for an order prohibiting Defendants from

implementing or issuing any revised regulations that purportedly contribute to climate change.

II. Plaintiffs Fail To State a Claim for a Protected Constitutional Right

Plaintiffs' constitutional claims are premised on the existence of a due process right to a stable climate system. Because the right to a life-sustaining climate system is not a fundamental right, the Fifth and Ninth Amendment claim in the First Cause of Action should be dismissed for failure to state a claim.

A. Plaintiffs Fail To Identify a Fundamental Right Under the Due Process Clause

Assuming, *arguendo*, that Plaintiffs have standing to maintain this action, the First Cause of Action must be dismissed for failure to state a claim. Plaintiffs' due process claim against the federal government based on a global phenomenon like climate change is not legally cognizable. The "touchstone of [Fifth Amendment] due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). No federal court has ever recognized – in a final judgment[2] — a right to be protected from a general

[2] The district court in *Juliana v. United States* allowed plaintiffs' novel and unprecedented claim of an "unenumerated fundamental right" to a global atmosphere capable of sustaining human life to survive a motion to dismiss. *See Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). This decision constitutes clear error; so profound was this error that the United States sought a writ of mandamus, which the Ninth Circuit denied without endorsing Plaintiffs' legal theories. 17-71692 (9th Cir. March 7, 2018), ECF No. 68-1.

environmental phenomenon like climate change. And many courts, including the Third Circuit, have dismissed similar arguments asserting constitutionally-protected rights to various aspects of the environment. *See Nat'l Sea Clammers*, 616 F.2d at 1237-38 ("[i]t is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment").[3]

The consistent and long-standing refusal of courts to accept a due process right to environmental quality is required by the Supreme Court's cautious approach to considering novel due process claims and its "insistence that the asserted liberty interest be rooted in history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). In *Washington v. Glucksberg*, the Court emphasized that federal courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into" judicial policy preferences, and lest important issues be

[3] *See also S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-04936 CRB, 2008 WL 859985, at *6-7 (N.D. Cal. Mar. 28, 2008) ("Plaintiffs also allege deprivation of the right to be free of climate change pollution, but that right is not protected by the Fourteenth Amendment [Due Process Clause] either."); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court has not found a guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution."); *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 720-21 (E.D. La. 1976) ("[T]he courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments.").

placed "outside the arena of public debate and legislative action." 521 U.S. 702, 720 (1997) (citations omitted); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'") (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

The interest in a stable climate system is unlike any of the fundamental liberties the Supreme Court has accepted. The Amended Complaint alleges that "customary international law and international human rights law" should instead guide this Court and that there is a "consensus of nations" that there is a right to a "life-sustaining climate system." Am. Compl. ¶ 124. But neither "international law" nor a consensus of nations provide a basis for a due process right. *See Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 943–44 (D.C. Cir. 1988) (finding that violation of international legal norms did not result in a due process violation). There is no basis in common law or the Constitution for a duty to protect persons (including all citizens of the United States) against the impacts of CO_2 emissions.

B. The Ninth Amendment Guarantees No Substantive Rights

Plaintiffs also allege that Defendants have infringed on their unenumerated right to be sustained by our climate system in violation of the Ninth Amendment.

Am. Compl. ¶ 191. But "[t]he ninth amendment has never been recognized as independently securing any constitutional right." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986). Rather, it is a "rule of construction" that does not give rise to individual rights. *See United States v. Bifield*, 702 F.2d 342, 349 (2d Cir. 1983); *see also Clynch v. Chapman*, 285 F. Supp. 2d 213, 219 (D. Conn. 2003) (dismissing Ninth Amendment cause of action for failure to state a claim). So while the Ninth Amendment may provide the basis for the recognition of unenumerated rights, which themselves may be enforceable under the Fifth or Fourteenth Amendments, the Ninth Amendment itself provides no substantive right. *See Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991) (dismissing the plaintiff's Ninth Amendment claim on the ground that "the ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law"). Because Plaintiffs have failed to state any claim under the Fifth or Ninth Amendments, their First Cause of Action must be dismissed.

III. Plaintiffs Do Not State an Actionable "Public Trust" Claim

The Amended Complaint's allegations based on the "public trust" doctrine also fail because no precedent authorizes suit against the federal government writ large to require it to protect the global atmosphere or other alleged public trust resources. This very claim was roundly rejected in a similar suit brought in the District of Columbia. In *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012),

aff'd, *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x 7 (D.C. Cir. 2014), the plaintiffs alleged that several Executive Branch agencies had violated their alleged fiduciary duties to preserve and protect the atmosphere as a commonly-shared public resource. They invoked the federal question statute, 28 U.S.C. §1331, as the basis for subject matter jurisdiction over this "public trust" claim. The district court in *Alec L.* found no support for the assertion that the public trust doctrine arises under the Constitution or laws of the United States. The court cited the Supreme Court's conclusion in *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012), that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution."

The district court in *Alec L.* also ruled that even assuming the public trust doctrine provided a claim under federal law, that claim was displaced by federal regulation, specifically the Clean Air Act. The district court relied for this alternative ruling on *American Electric Power Company v. Connecticut*, 564 U.S. 410, 423-24 (2011), where the Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."

The D.C. Circuit affirmed in an unpublished memorandum decision, concluding that the district court correctly dismissed the suit for lack of subject matter jurisdiction because the public trust doctrine is a matter of state, not federal,

law. *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x at 8, (citing *PPL Montana*, 566 U.S. at 603-04). The Third Circuit has also characterized the public trust doctrine as a creature of state law. *See W. Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007, 1019 (3d Cir. 1988) (noting that the public trust doctrine, a state law construct, varies by state). The sole court to find otherwise, the district court in *Juliana*, recognized that "*Alec L.* was substantially similar." The *Juliana* Court nonetheless was "not persuaded by the reasoning of the *Alec L.* courts," because, in its view "a close reading of *PPL Montana* reveals that it says nothing about the viability of federal public trust claims." 217 F. Supp. 3d at 1258. While *PPL Montana* did not involve a federal public trust claim, its holding that "the public trust doctrine remains a matter of state law," 556 U.S. at 603-04, clearly precludes the application of the public trust doctrine to the federal government. As stated, the law of this Circuit is in accord with this principle.

IV. Claims Are Improperly Broad and Not Yet Ripe

A. The APA and Statute-Specific Review Provisions Provide the Sole Avenue for Any Potential Relief

Plaintiffs' claims must also be dismissed because relief is only available, if at all, under the APA or statute-specific judicial review provisions.[4] The scope of judicial review of federal agency actions is generally governed by Section 706 of

[4] *See, e.g.*, 42 U.S.C. 7607(b)(1) (providing court of appeals with exclusive jurisdiction to review challenges to EPA actions under the Clean Air Act).

the APA. 5 U.S.C. § 706. Where no statute-specific judicial review provision is available, Congress was clear in stating that agency actions are to be reviewed pursuant to the APA:

> [T]he 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 . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to constitutional right, power, privilege, or immunity.

Id. The APA thus expressly states that constitutional claims are reviewed pursuant to the APA. *See Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (noting in connection with Fifth Amendment due process claim, "the APA contemplates, in the absence of a clear expression of contrary congressional intent, that judicial review will be available for colorable constitutional claims. . . ."); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237-38 (D.N.M. 2014).

Plaintiffs' constitutional claims present a sweeping challenge to the Defendants' policy pronouncements and decisions related to environmental regulations. To the extent that Plaintiffs' claims are justiciable, they are challenges to federal agency action, which squarely brings this case under the purview of the APA and Section 706. Because Congress has established Section 706 as the vehicle for review of Plaintiffs' constitutional claims, they can only bring their constitutional claims pursuant to the APA. This follows from the recognized principle that "the existence of an effective and substantial federal statutory

remedy for the plaintiffs obviates the need to imply a constitutional remedy on the plaintiffs' behalf." *Mahone v. Waddle*, 564 F.2d 1018, 1024-25 (3rd Cir. 1977).

The rule that a specific statutory remedy precludes a constitutional remedy is a familiar one and can be found across numerous statutory schemes. *See, e.g.*, *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002) (Freedom of Information Act represents a comprehensive scheme, which precludes constitutional *Bivens*-type remedy); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (First Amendment claim barred "by comprehensive procedural and substantive provisions giving meaningful remedies against the United States"); *see also Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003) ("[T]he existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a *Bivens* action."). Because Plaintiffs have an available remedy under the APA, or under specific statutory judicial review provisions, for any constitutional claim, Plaintiffs' alternative and novel due process claim should be dismissed.

B. The Complaint Asserts an Improper Programmatic Challenge

Plaintiffs' Amended Complaint must be dismissed for lack of jurisdiction or failure to state a claim because Plaintiffs bring an improperly broad programmatic claim purporting to challenge wholesale an alleged broad set of programs or policies reversing "regulations, practices and research" related to climate change. Am. Compl. ¶ 31. The claim is facially improper because it challenges a nebulous

set of programs and policy directives, which is prohibited by the Supreme Court's decisions in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 892 (1990) and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004).

"The limitation to discrete agency action precludes . . . broad programmatic attack[s]" seeking wholesale review of an agency program; such review can only be sought "in the offices of the Department [of the Interior] or in the halls of Congress, where programmatic improvements are normally made." *Id.* at 64 (quoting *Lujan*, 497 U.S. at 891); *accord Knoble v. Fitzgerald*, No. 09-5071, 2011 WL 1584495, at *2 (E.D. Pa. Apr. 25, 2011). A plaintiff must instead "direct its attack against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891. The Court has explained that these limitations are intended to (a) protect agencies from undue judicial interference and (b) prevent courts from entering "general orders compelling compliance with broad statutory mandates" that would "inject[] the judge into day-to-day agency management." *S. Utah Wilderness Alliance*, 542 U.S. at 66-67.

Plaintiffs have brought precisely the kind of sweeping programmatic challenge prohibited by *Lujan* and *Southern Utah Wilderness Alliance*. Count I complains of the "affirmative aggregate acts of Defendants" in issuing the alleged "rollbacks" and Count II challenges "Defendants' affirmative acts" that interfere with a "stable climate system." Am. Compl. ¶¶ 177, 187. But as discussed above

Plaintiffs fail to identify a single final agency action that "causes [them] harm." *Lujan*, 497 U.S. at 891. The Amended Complaint is clear that Plaintiffs do not seek to redress a discrete instance — or even a series of discrete instances — of final agency actions. Rather, Plaintiffs seek a sweeping declaration prohibiting ongoing policy initiatives of the current Administration. *See* Am. Compl. ¶¶ 31, 141-160. And Plaintiffs' challenge does not stop at extant policies but extends to a broad set of actions that Defendants have not even taken: asking the Court to issue a prospective declaration prohibiting the issuance of any programs or policies that would increase the "effects of climate change." Am. Compl. at 64. Review of Plaintiffs' far-reaching and nebulous claims, would require the Court to engage in a wholesale review of environmental policy and programs since 2017, not of a discrete agency action. *See Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010) (ongoing review of importing inspections and sampling of foodstuffs were improper because "[s]uch broad review of agency operations is just the sort of 'entanglement' in daily management of the agency's business that the Supreme Court has instructed is inappropriate."); *Knoble* 2011 WL 1584495, at *2 (dismissing challenge to policy as improper programmatic attack seeking "wholesale improvement of [a] program"); *The Wilderness Soc. v. Norton*, No. Civ.A.03-64 RMC, 2005 WL 3294006, at *22 (D.D.C. Jan. 10, 2005). Plaintiffs' request for sweeping relief would improperly "inject[] the [Court] into

day-to-day" setting of national environmental policy thus causing the very "entanglement" the APA was designed to prevent. *See S. Utah Wilderness Alliance*, 542 U.S. at 66-67; *Del Monte*, 706 F. Supp. 2d at 119. The Amended Complaint must therefore be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1) or, alternatively, under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

C. Claims Challenging Future Actions Are Unripe

This Court also lacks jurisdiction to the extent that Plaintiffs ask the court to prohibit the issuance of future policies or programs that revise environmental protections. Am. Compl. at 64. The APA grants a right to judicial review solely of "final agency action." 5 U.S.C. § 704. It does not authorize review of actions that have yet to occur. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (holding agency action is not final and reviewable unless it marks the consummation of the agency's decision making process and one by which rights and obligations have been determined).

Nor do these principles of ripeness authorize premature judicial review. As the Supreme Court held in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), "[t]he injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Id.*

at 148, *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, Plaintiffs' challenge to policies that have not yet even been implemented is an "abstract disagreement[] over administrative policies" that would result in "judicial interference [before] an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-149.

In assessing whether a claim is ripe for judicial review, courts examine: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Each of these factors demonstrates that Plaintiffs' challenge is not ripe.

First, postponing review until Plaintiffs challenge a particular project or rule that threatens immediate injury does not harm them. They will be able to raise any climate-change related concerns during the notice and comment period for any rule or project and, to the extent necessary, in a suit challenging such a rule or project (if they can satisfy the requirements of Article III).

Second, as was true of the claim in *Ohio Forestry*, allowing a challenge to policies that have not yet been crystallized would "hinder agency efforts to refine its policies" through future revisions or review of site-specific proposals. 523 U.S. at 735. Plaintiffs seek to have this Court stop policies that have not yet been

implemented from being issued in the first place. Am. Compl. at 64. For example, Plaintiffs repeatedly cite the proposed "rollback" of the Clean Power Plan. *Id.* ¶¶ 102, 142-143. But they cannot challenge any such "rollback" until the EPA has actually taken the action they want to challenge. As the Supreme Court has explained, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998).

Third, the Court would benefit by deferring consideration of programmatic challenges to the Administration's environmental policies until they are applied in a particular regulation or to a specific project in a concrete way. Plaintiffs' vague allegations about future "rollbacks" standing alone are too abstract and premature. *See National Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 812 (2003) (concluding that a facial challenge to regulations "should await a concrete dispute about a particular" application); *Texas*, 523 U.S. at 301 (challenged "statute is better grasped when viewed in light of a particular application.").

In short, Plaintiffs' demand that this Court police the "promulgation" of Defendants' environmental policies is not ripe for adjudication.

CONCLUSION

This Court should dismiss the Amended Complaint for a lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Respectfully submitted this 29th day of March, 2018.

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CERTIFICATE OF SERVICE

I, Marissa Piropato, hereby certify that, on March 29, 2018, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: March 29, 2018 /s/*Marissa Piropato*
Marissa Piropato