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' REPLY BRIEF

JEFFREY BOSSERT CLARK
Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

ANDREW C. MERGEN
SOMMER H. ENGELS
ROBERT J. LUNDMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0943
eric.grant@usdoj.gov

Counsel for Defendants-Appellants

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INTRODUCTION

As explained in our opening brief, Plaintiffs have not satisfied the three prerequisites for Article III standing, nor have they brought a cognizable case or controversy. And Plaintiffs have failed to bring their claims challenging agency action and inaction pursuant to the Administrative Procedure Act and other statutes by which Congress has authorized — and channeled — judicial review. If anything, Plaintiffs' answering brief makes the threshold defects of this action clearer. No federal court has ever permitted an action that seeks to review decades of agency action (and alleged inaction) by a dozen federal agencies and executive offices — all in pursuit of a policy goal ("decarbonization") currently under debate by the representative branches. Indeed, the proposed remedial scope of this action dwarfs the prior high-water mark for judicial reach in institutional reform cases, making the judicial administration of entire school districts and prison systems appear modest by comparison.

Finally, none of Plaintiffs' claims succeeds on the merits. Plaintiffs identify no historical basis for a fundamental right to a stable climate system or any other constitutional right related to the environment. They invite this Court to expand the narrow state-created danger doctrine far beyond any previous application. Plaintiffs' public trust theory also fails on multiple grounds: the doctrine has no basis in federal law, is displaced by statute, and does not apply to management of the atmosphere.

The orders of the district court should be reversed.

APPELLATE JURISDICTION

Plaintiffs argue that the Court should reconsider its decision to permit this appeal pursuant to 28 U.S.C. § 1292(b), but there is no reason to do so. The Court correctly granted the government's petition for permission to appeal because the appeal involves "controlling question[s] of law as to which there is substantial ground for difference of opinion," and it "may materially advance the ultimate termination of the litigation." *Id*.

First, this appeal involves several controlling questions of law: (1) whether Plaintiffs' claims are justiciable under Article III; (2) whether the types of agency actions challenged by Plaintiffs may be reviewed only within the framework of the Administrative Procedure Act (and other statutes authorizing judicial review); and (3) whether Plaintiffs have stated claims on which relief can be granted. The government's arguments on all of these questions are purely legal, and no factual development is necessary. Both this Court and the Supreme Court have already acknowledged that these questions present a "substantial ground for difference of opinion." 2 E.R. 173-74.

Second, resolution of this appeal doubtless "may materially advance the ultimate termination of the litigation." If the Court rules in the government's favor on any of the threshold issues, then the litigation will end. That fact alone meets the

standard. As to the merits, a resolution in the government's favor will also terminate the litigation because the merits of all of Plaintiffs' claims are now before the Court. Opening Brief 42-47. The government moved to dismiss Plaintiffs' entire "action," *id.* at 42-43, and then moved for summary judgment on "each of the four claims" in the operative complaint, *id.* at 44. Plaintiffs argue that the government confuses "counts" and "claims," Answering Brief 5-6, but the government's phrasing tracked the operative complaint, which does not mention "counts" and which asserts four — and only four — "Claim[s] for Relief," 3 E.R. 452, 453, 454, 455. In any event, Plaintiffs incorrectly contend that some claims remain unexamined. Answering Brief 7. In fact, the district court addressed each one and decided to move forward on only some of them. Opening Brief 42-46.

Third and finally, even if this Court had accepted certification on only one controlling question decided by the district court, it may "address any issue fairly included within the certified order[s]." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (internal quotation marks omitted). Thus, Plaintiffs could have argued the merits of any remaining claims in their answering brief. Opening Brief 45. Because they failed to do so, any potential arguments about those claims are now forfeited.

ARGUMENT

I. The district court lacked jurisdiction over this action.

A. Plaintiffs lack Article III standing.

Before turning to the three prongs of standing, we address Plaintiffs' argument that "[e]very issue of Plaintiffs' standing raised by Defendants requires an evidentiary analysis." Answering Brief 10. Plaintiffs are wrong: the government's standing arguments are entirely legal and do not turn on disputed issues of material fact. Neither Plaintiffs nor the district court have identified any such issues that are relevant to the government's arguments. Our brief accepts the relevant facts as alleged by Plaintiffs and then argues from that baseline as a matter of law.

Plaintiffs assert that a "district court's determination that the evidence presented by the parties raises genuine factual disputes is not reviewable on interlocutory appeal." Answering Brief 10 (quoting *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1291 (9th Cir. 1999)). But *Mendocino* addresses the interlocutory appeal of the denial of a motion for qualified immunity, which balances interests particular to that context, and not a Section 1292(b) appeal. In the Section 1292(b) context, courts routinely review the propriety of the denial of a motion for summary judgment. *See, e.g.*, *Hill v. Xerox Business Services, LLC*, 868 F.3d 758, 760 (9th Cir. 2017).

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

As explained in our opening brief, Plaintiffs' claimed interests are universally shared and generalized and thus insufficient to establish standing. Opening Brief 13-17. That is, Plaintiffs cannot make the required showing of injury to a concrete and particularized legally protected interest that is distinct from the rest of the public.

Plaintiffs assert that the government's "generalized grievance theory . . . is unsupported by precedent." Answering Brief 12. But the cases cited in our opening brief are clear that generalized grievances cannot be used to establish standing. Opening Brief 13 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992); *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, 127 n.3 (2014)). Even the district court here recognized the "generalized grievance rule," 1 E.R. 82, but it seriously erred in applying it, Opening Brief 15-16.

Plaintiffs also argue that their injuries and interests are not generalized because they have identified "a broad range of personal injuries caused by human induced climate change." Answering Brief 10 (quoting E.R. 30). But alleging "personal injuries" does not solve Plaintiffs' standing problem. Climate change, as Plaintiffs conceive it, is a *universal* problem, and addressing it is a *universal* interest. From this standpoint, almost any individual on the planet could identify a climate-change related harm that he or she allegedly will suffer. Article III standing serves

to ensure that universal problems concerning "the public interest" are addressed to and by the representative branches, not by Article III courts.

Moreover, the difference between climate change and the "widely shared" problems cited by Plaintiffs, Answering Brief 12-13, is plain. Alleged injuries from climate change are not like the injury shared by purchasers of "domestic ocean cargo shipping services on west coast Hawaii routes," *Novak v. United States*, 795 F.3d 1012, 1016 (9th Cir. 2015), or by those caught up in alleged warrantless searches of internet traffic and telecommunications, *Jewel v. NSA*, 673 F.3d 902, 909 (9th Cir. 2011), or by those alleging spiritual harm from the inscription "In God We Trust," *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010). Plaintiffs' alleged harms are the rare truly universal harm, making them the archetype of a generalized grievance that only the representative branches can legitimately address.

Plaintiffs attempt to avoid the universality problem by asserting that their "claims do not rest on 'global universal harm' " but rather on the harms described in their declarations. Answering Brief 13 (quoting Opening Brief 15). But those harms are simply examples of harms that could be alleged by anyone in the country or the world. Plaintiffs cannot simply disavow the universality of the problems they identify and the public interest in addressing them through the representative branches. When an interest is generalized and public, it implicates the separation-of-powers concerns that motivate Article III standing requirements, regardless of

what a plaintiff says. *See Defenders of Wildlife*, 504 U.S. at 559-60. In any event, Plaintiffs do not (and cannot) claim that their action is actually challenging anything that is narrower than *global* climate change.

Plaintiffs assert that the government "*conceded*" injury-in-fact below both at a hearing and in its pretrial memorandum. Answering Brief 12. But a party cannot concede the jurisdictional requirement of standing. In any event, Plaintiffs misstate the record. At the hearing, the government attorney first acknowledged the district court's opinion concluding that Plaintiffs had alleged sufficient injuries at the pleading stage and then noted that Plaintiffs had submitted declarations in support of those allegations. 1 S.E.R. 6-7. The attorney never conceded that the alleged injuries were sufficient to establish Article III standing. Nor does the government's pretrial memo make such a concession. It dismisses some claimed injuries as not cognizable at all because Plaintiffs did not directly experience them or because they are based on speculative fears. The memo recognizes that other claimed injuries are potentially cognizable under Article III — that is, they could *theoretically* be used to establish standing — but it argues Plaintiffs had not met their burden here. 5 S.E.R. 925.

Plaintiffs are also wrong that merely alleging a constitutional violation is enough to demonstrate the required injury for standing. Answering Brief 14. The case cited by Plaintiffs stands only for the proposition that actual "[i]mpairments"

(i.e., injuries) "to a constitutional right" are enough for standing. *Council of Insurance Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008). There, the Court plainly identified an actual injury — "discriminatory administrative burdens placed on [the plaintiff] because of her nonresident status" — and did not rely on the allegation of a constitutional violation alone. *Id*. And the Supreme Court has repeatedly held that a court's standing inquiry is in no way lessened by a plaintiff's assertion that government action is unconstitutional. Rather, a court 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 v. Amnesty International USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)).

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

According to Plaintiffs, the "chain of causation is simple." Answering Brief 15. And that chain is simple because Plaintiffs just state their conclusion without any attempt to parse responsibility: "Defendants have substantially caused and contributed to climate change." *Id*.

But as we have explained, Plaintiffs cannot show causation by simply asserting that the U.S. government caused climate change. *See* Opening Brief 17-19 (discussing the private and international dimensions of the issue). Here, neither Plaintiffs nor the district court have attempted to determine the respective

responsibilities of producers of greenhouse-gas emitting fuels; the direct consumers of those fuels (such as the power plants that burn some of them); and the consumers who use the gasoline, the electricity, and the products that result (i.e., all of us).

Moreover, this Court has rejected a plaintiff's attempt to bypass the requirement to show that the government caused alleged climate change injuries simply by asserting that the government could have curbed emissions. *E.g.*, Answering Brief 16 (complaining of "federally authorized emissions"); *id*. (asserting that the government has "control over the fossil-fuel based energy system"). 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." *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013) (internal quotation marks omitted). Plaintiffs attempt to distinguish *Bellon* on the ground that the level of greenhouse gas emissions there was small. Answering Brief 21. But Plaintiffs actually weaken their causation argument by "aggregating" decades of federal action and inaction. *See* Opening Brief 20-21. Such aggregation makes it impossible to trace an actual connection between any identifiable agency action and Plaintiffs' claimed harm; hence their resort to the assertion that all United States greenhouse gas emissions must be the government's fault.

Plaintiffs cite a constitutional provision and a variety of statutory provisions in support of their claim that the government "controls" or "authorizes" greenhouse gas emissions. Answering Brief 18 n.11. But these provisions do not connect the dots. As for the Constitution, Plaintiffs cite Article I, Section 3, Clause 2, which addresses the election of Senators and seems wholly irrelevant. They cite hundreds of sections of the U.S. Code, relating to a wide range of topics (e.g., federal lands, deepwater ports, permits to fill waters of the United States, and energy conservation). They cite the Clean Air Act as well, but they never pause to explain how the Act regulates air pollution. Aggregating a large portion of the U.S. Code, as well as a handful of regulations, does not demonstrate the required causation.

Nor is it sufficient to claim that the government "promot[ed] a fossil fuel based energy system." Answering Brief 16. That claim does not do the work required by *Bellon*. First, even if the government does in fact "promote" the use of fossil fuels, Plaintiffs err in jumping to the conclusion that the government is therefore responsible for all emissions resulting from such use, i.e., all "CO_2 emissions during 1850-2012 from the United States," Answering Brief 16, rather than the millions of third parties not before the Court who actually use and consume fossil fuels and thereby produce those emissions.

Second, while Plaintiffs cite hundreds of record pages purportedly "detailing nine components of Defendants' national fossil fuel-based energy system,"

Answering Brief 17, 19, nowhere in those pages is there an actual causation analysis. Instead, there is a collection of various federal policies and actions relating to energy use and development. The components describe massive segments of the U.S. economy and various federal actions relating to them, e.g., "[e]nergy planning and policies," "power plants and refineries," and "road, rail, freight, and air transportation." *Id.* at 18 n.10. Plaintiffs need not trace the molecules of CO_2 to have standing. *Id.* at 22. But they cannot simply point to large swaths of the economy and assert, based on a string-cite of hundreds of sections of the U.S. Code, that the government should have controlled the emissions therefrom. Moreover, they cannot show that the contributions of all U.S. sources of emissions, separated out from the contributions of all other nations on the globe, cause any identifiable harm to any given Plaintiff here.

Plaintiffs also assert that the actions of third parties are "produced by 'determinative or coercive effect' of Defendants as part of their creation and control of the national energy system." Answering Brief 18 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). But they do not then identify any (allegedly) determinative or coercive actions by Defendants. In *Bennett*, the determinative and coercive effect was the result of a specific government opinion that functioned as a permit for another government agency; the agency receiving the opinion either had to follow it or to disregard it and potentially face civil and criminal penalties. 520 U.S. at 170.

Plaintiffs identify nothing like this in the government's actions "promoting a fossil fuel based energy system." Answering Brief 16.

Plaintiffs also fault the government for not addressing the evidence linking climate change to their alleged injuries. *Id.* at 19-20. But the government has not contested this part of the causal chain at any stage in this proceeding. Plaintiffs are responding to an argument the government has not made.

Finally, a district court recently rejected a similar causation argument in a lawsuit brought by other young plaintiffs who likewise claim that the government's climate change-related action and inaction violated due process and a federal public trust doctrine. The court held that these plaintiffs had not satisfied the causation requirement of Article III standing, explaining that they "simply ignore that Defendant agencies and officers *do not produce* greenhouse gases, but act to regulate those third parties that do: innumerable businesses and private industries." *Clean Air Council v. United States*, No. 2:17-cv-04977-PD, 2019 WL 687873, at *7 (E.D. Pa. Feb. 19, 2019).

3. The district court cannot redress Plaintiffs' alleged injuries.

Plaintiffs argue that our brief engages in "hyperbolic speculation" about the relief they seek in order to claim that it is beyond the authority of the federal courts to award. Answering Brief 4. But our brief simply walks through both the relief sought in Plaintiffs' complaint and the relief proposed by the district court. Opening

Brief 3-5, 22-23 (discussing, inter alia, 1 E.R. 88-90). This is not speculation: it is what Plaintiffs are seeking and what the district court offered in response to the government's redressability argument.

Moreover, Plaintiffs' brief confirms that Plaintiffs seek an order requiring the *wholesale decarbonization of the United States economy*. Although Plaintiffs are willing to let the government propose "a remedial plan" of the government's "own devising," Answering Brief 26, that plan must "undo that [fossil fuel energy] system and create a clean, decarbonized system," and the district court can command the government's "existing authorities" to achieve that system, *id.* at 26 & n.17. Thus, the complaint asks for decarbonization, the district court has relied on Plaintiffs' demand for decarbonization as a remedy, and Plaintiffs' brief reiterates that decarbonization is required. But ordering decarbonization of the United States economy — which is shorthand for totally reordering (and upending) the economic life of the Nation, all without voting under our democratic system — is beyond the authority of a district court, and so it is not a remedy available to Plaintiffs and thus fails to demonstrate redressability. Opening Brief 23.

Relying in large part on *Brown v. Board of Education*, 347 U.S. 483 (1954), Plaintiffs argue that at least their "psychological and emotional injuries" could be redressed "if the courts affirm their fundamental rights" and give them, apart from any other relief, "a judicial declaration of the unlawfulness of governmental climate

destruction." Answering Brief 24. Plaintiffs' attempt to equate their circumstances with those of the schoolchildren challenging overt racial segregation as a violation of the express terms of the Equal Protection Clause in *Brown* is deeply misguided. Although *Brown* recognized the severe psychological and emotional harms inflicted by unconstitutional racial segregation, it did not suggest that the mere prospect that asserted "psychological and emotional injuries will lessen," Answering Brief 24, could create Article III standing.

Plaintiffs also suggest that enjoining Defendants "from discriminatorily discounting the economic value of young people's lives" would redress their equal protection claim. *Id.* at 25. Because Plaintiffs did not advance this argument in response to the government's motion for summary judgment, 2 E.R. 315-82, it is forfeited, *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). In any event, the argument for standing lacks merit; it is just an assertion that the universal effects on which the claims rest will continue into the future.

Plaintiffs cite desegregation and institutional reform cases to argue that their requested decarbonization "relief is firmly within the competence of the judiciary." Answering Brief 26. The high-water mark for the federal courts' traditional equitable authority has come in these cases, where the Supreme Court found such authority sufficiently broad to address the discrete constitutional claims at issue there. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1,

16 (1971). But even the systemic relief there paled in comparison to Plaintiffs' requested relief. The plaintiffs in those cases sought injunctions against particular school districts for particular constitutional violations distinctly experienced by particular individuals. Or the plaintiffs sought injunctions to address the conditions in a particular prison system at a particular time. The courts then directed injunctions at the institutions and required particular actions to remedy the violations. Plaintiffs here challenge decades of climate change-related policies, allegedly affecting the population at large. They ask the district court to take control of that entire range of government policy-making in order to achieve U.S. decarbonization. This relief is irreconcilable with Article III. Plaintiffs have failed to demonstrate redressability.

* * *

In sum, Plaintiffs have not established that they suffered injury-in-fact, that Defendants caused the injury, or that the injury can be redressed. They lack Article III standing.

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

As we have explained, *see* Opening Brief 24-27, Plaintiffs' action is not a case or controversy "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). 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 over decades, and then to pass on the comprehensive constitutionality of all of those policies, programs, and alleged inaction in the aggregate. *See* Answering Brief 17, 22; 3 E.R. 571-86. No federal court has ever purported to use the "judicial Power" to perform such a sweeping policy review.

In response to this argument, Plaintiffs claim that "Defendants' theory that the judiciary is without power to assess the constitutionality of large and pervasive government policies and systems would have been the downfall of cases addressing desegregation, prison reform, interracial and same-sex marriage, and the rights of women to serve on juries and have access to contraception, among other rights." Answering Brief 30. But all of these cases addressed particular places and times, as discussed in the previous section. None sought review of decades of actions by multiple agencies made pursuant to a host of unspecified statutes, and none sought a remedy remotely approaching the scale of nationwide decarbonization.

A quick look at the climate change issues and actions pending before Congress and the Executive Branch confirms that Plaintiffs have petitioned the wrong branch. Some in Congress seek a "Green New Deal." H.R. J. Res. 109, 116th Cong., 1st Sess. (2019). Others prefer a carbon tax. H.R. 7173, 115th Cong., 2d Sess. (2018). Still others support neither. In the meantime, EPA is considering actions under the Clean Air Act, including a potential replacement for the Clean Power Plan. *See* 83

Fed. Reg. 44,746 (Aug. 31, 2018). On the international front, the President has indicated that the United States will withdraw from the 2015 Paris Climate Accord. In derogation of these normal workings of democracy, Plaintiffs seek to put a single district court, at the behest of a handful of litigants, in charge of directing American energy and environmental policy.

Plaintiffs also claim that holding that their action is not cognizable under Article III would "upend the judiciary's core role as a check and balance in our Nation's system of separated powers, particularly in enforcing constitutional rights." Answering Brief 29. It would not, for "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. "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). As the district court in *Clean Air Council* explained, there "is a difference . . . between determining the constitutionality of particular Executive action and regulating all statutory, regulatory, budgetary, personnel, and administrative Executive actions that relate to the environment. The former is certainly within the province of the Judiciary. The latter would make the Executive a subsidiary of the Judiciary." 2019 WL 687873, at *11. This action is categorically not an Article III case or controversy, and so the district court lacked jurisdiction to entertain it.

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

As explained in our opening brief, 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. The *types* of agency actions targeted by Plaintiffs are all subject to review under the APA, including through special statutory review provisions, and Plaintiffs have not argued otherwise.

Plaintiffs first create a straw man, claiming that we are arguing that the federal courts never have equitable authority to address constitutional claims. Answering Brief 33. Not so. We have been clear that federal courts "have equitable authority in some circumstances 'to enjoin unlawful executive action.' " Opening Brief 30 (quoting *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015)). The question here is whether an equitable cause of action is available for claims that Plaintiffs could have brought pursuant to either the APA or other statutory causes of action, where Plaintiffs have chosen not to do so.

Armstrong answers *no*. It makes clear that an equitable cause of action, even if (unlike here) one might otherwise potentially lie, is "subject to express and implied statutory limitations." 135 S. Ct. at 1385. "Where 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,

the APA (together with similar statutes authorizing judicial review of agency action) provides the statutory limitation: under the APA, one cannot directly challenge decades of agency action aggregated by Plaintiffs but instead may only challenge "circumscribed, discrete agency actions." *Norton v. SUWA*, 542 U.S. 55, 62 (2004).

Plaintiffs' motion for a preliminary injunction pending appeal provides a concrete example of the pitfalls of letting Plaintiffs proceed outside the metes and bounds of either the APA or similar statutes. That motion asked the Court for, among other relief, an injunction by March 19, 2019 to block a particular lease sale by the Bureau of Ocean Energy Management (part of the Department of the Interior) in the Gulf of Mexico. DktEntry 21-1, at 5. That lease sale, however, is only the first part of a "four-stage process" that was established by the Outer Continental Shelf Lands Act (OCSLA) and that the agency must undertake "before allowing development of an offshore well, with each stage more specific than the last and more attentive to the potential benefits and costs of a particular drilling project." *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015). Instead of bringing their constitutional claims pursuant to the channelized judicial review mechanism established by OCSLA, *see* 43 U.S.C. § 1349(b)(1), Plaintiffs plow ahead as if that provision did not exist. This problem goes far beyond this particular sale, because Plaintiffs are seeking review of an untold number of unspecified agency actions aggregated over decades.

Plaintiffs argue that *Armstrong* is inapplicable because it concerned statutory rights rather constitutional claims. Answering Brief 34 n.21. That misses the point: *Armstrong* addressed the "power of federal courts to enjoin unlawful action," and its holding — that this authority can be limited by statute — was not limited to statutory claims. 135 S. Ct. at 1385. Indeed, *Armstrong* addressed whether one could sue to bar state action preempted by federal law *under the Supremacy Clause*. *Id*. at 1382-83. That is why the Court discussed the "ability to sue to enjoin *unconstitutional* actions by state and federal officials." *Id*. at 1384 (emphasis added).

Plaintiffs also argue that the Due Process Clause itself provides the required cause of action. Answering Brief 34-35. No authority supports the notion that a sweeping cause of action against the Executive Branch writ large could be implied by a court under that Clause. But in addition, that argument misses the point: even if that were so, Congress in the APA and other statutes providing for review of agency action has channeled those claims into a particular framework that Plaintiffs may not choose to ignore.

The cases cited by Plaintiffs do not stand for the proposition that constitutional challenges to agency action may be brought without regard to the APA or similar statutes. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Supreme Court considered the viability of the plaintiffs' constitutional claims outside of the APA *only after* the Court determined that the APA review was unavailable because of a

lack of final agency action and because presidential action was unreviewable under the statute. *Id*. at 801. As for *Webster v. Doe*, 486 U.S. 592 (1988), the plaintiff in that case asserted that he was "entitled, *under the APA*, to judicial consideration" of his constitutional claims. *Id*. at 602 (emphasis added). And, after rejecting the government's argument that those claims were "unreviewable under the APA," the Court permitted those claims to proceed. *Id*. at 603. The decision thus endorses review of constitutional challenges under the APA. Neither *Franklin* nor *Webster* held that a plaintiff may unilaterally ignore the APA (or similar statutes like OCSLA) for claims of the sort at issue here.[1]

Plaintiffs also err in equating the APA's waiver of sovereign immunity with whether a cause of action is available. As we have acknowledged, this Court has held that the APA waives sovereign immunity for claims seeking non-monetary relief against the government regardless of whether the claims are brought pursuant to the APA or an alternative mechanism like the courts' general equitable authority. *See* Opening Brief 33 (discussing *Navajo Nation v. Department of Interior*, 876 F.3d 1144, 1167-73 (9th Cir. 2017), and *Presbyterian Church (USA) v. United States*, 870 F.2d 518, 525 & n.9 (9th Cir. 1989)). But this Court has never held that a plaintiff possesses a cause of action outside of the APA simply because the APA's waiver of

[1] Plaintiffs also cite *Hills v. Gautreaux*, 425 U.S. 284 (1976), Answering Brief 33, but that case addressed the scope of the lower courts' remedial order; it did not rule on what cause of action supported the claim in the first place.

sovereign immunity might apply to such a cause of action. And Plaintiffs are wrong that the two issues must be equated. Answering Brief 34.

Finally, Plaintiffs argue that requiring them to bring their constitutional claims pursuant to the APA would violate their rights to procedural due process. Answering Brief 37-40. As an initial matter, Plaintiffs are wrong that proceeding pursuant to the APA would bar judicial review entirely. The language they quote from *Davis v. Passman*, 442 U.S. 228, 242 (1979), addresses whether a statute may bar judicial review of a claim of a constitutional violation entirely, not whether a statute may channel that review. Moreover, Plaintiffs point to no decision holding that the APA's judicial review provisions are constitutionally deficient, either as a general matter, or as applied to plaintiffs who bring constitutional claims.

Plaintiffs are free to challenge particular agency actions or inactions before the agencies and the courts, to petition the agencies for rulemakings or for the repeal of certain rules (and to later seek judicial review of the agencies' responses vel non), or to pursue any of a number of various options provided by Congress in the APA and similar statutes to vindicate their alleged constitutional rights in the context of discrete agency actions and in a concrete factual setting. In such a setting, Plaintiffs could argue that the particular action they are challenging is unconstitutional because it is part of an (allegedly) unconstitutional "fossil fuel energy system."

Consequently, to vindicate their aggregation/systemic constitutional theory, Plaintiffs would not need to challenge "thousands of agency actions." Answering Brief 38. Plaintiffs instead could target particular actions and argue their theory in those cases. There is simply no basis to conclude that Plaintiffs have a procedural due process right to bring *one omnibus action* making a litany of vague assertions against more than fifty years of unspecified and unconnected actions (or inactions), policies, and practices, by a dozen executives agencies and offices.

Finally, even if the Court were to resort to the factors set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which for the reasons stated above is not appropriate, those factors only underscore that no due process violation has occurred here. There is no fundamental right at stake, *see infra* pp. 23-25, and Plaintiffs can make their constitutional arguments if they were to seek review of a particular agency action.

III. Plaintiffs' constitutional claims fail on the merits.

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

Plaintiffs' purported right to a "climate system capable of sustaining human life" has no basis whatsoever in this Nation's history or tradition and is therefore not a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The right to climate conditions that Plaintiffs deem "capable of sustaining human life" is wholly unrelated to any of the fundamental rights that the Supreme Court has previously recognized, which protect quintessentially "personal decisions," i.e.,

"intimate and personal choices . . . central to personal dignity and autonomy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). Nor is it possible to derive a right to particular climate conditions from any of those fundamental rights. No federal court, other than the district court here, has ever recognized any fundamental right that relates to the climate or the environment. *See* Opening Brief 37-38.

Moreover, Plaintiffs do not come close to identifying "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition," as is necessary to support recognition of a new fundamental right. *Glucksberg*, 521 U.S. at 722. The snippets that Plaintiffs quote from John Locke ("laws human must be made according to the general laws of Nature," Answering Brief 46); Thomas Jefferson (the earth belongs "in usufruct to the living," *id.*); James Madison ("[d]eprived of [the atmosphere], they all equally perish," *id.* at 48); and the 1893 Fur Seal Arbitration, *id.* at 48, are neither examples nor concrete. Indeed, the selected statements are so devoid of context that they barely have meaning. Likewise, the notion that individual Framers derived a "transcendent feeling of nationhood" from the country's "nature, soil and plants," *id.* at 47, indicates only that they appreciated the natural world; it provides no basis for Plaintiffs' "climate right." The Framers appreciated many things; their appreciation does not convert those things into fundamental rights protected by the Due Process Clause of the Fifth

Amendment. Moreover, the unremarkable precept that the government cannot privatize "light, air, and water," *id.* at 45, does no work here, as Plaintiffs have not alleged that the government's alleged mismanagement of the atmosphere constitutes privatization.

Plaintiffs may be frustrated by what they perceive as the government's "mismanagement" of fossil fuels, but they have not identified a violation of a constitutional right: "the Constitution does not provide judicial remedies for every social and economic ill." *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Indeed, numerous federal courts have already rejected arguments similar to the ones Plaintiffs raise here. *See* Opening Brief 37-38 (collecting cases). Most recently, a district court rejected a similar due process argument brought by other youth plaintiffs and explained that the "*Juliana* Court certainly contravened or ignored longstanding authority" when it recognized a fundamental right to a livable climate. *Clean Air Council*, 2019 WL 687873, at *8. This Court should do the same.

B. Plaintiffs' state-created danger claims fail.

The state-created danger doctrine is a narrow exception to the rule that the Constitution does not impose on the government an affirmative duty to protect individuals from harm. Applying the doctrine to these circumstances would allow that exception to swallow the rule, and Plaintiffs have failed to identify any case that applied the doctrine on even remotely similar facts.

This matter is readily distinguishable from all other state-created danger cases that this Court has found viable, which generally include (1) immediate harms to an individual's personal security or bodily integrity; (2) specific government actions or actors that put an individual at immediate and obvious risk; and (3) government actions that endangered particular individuals, as distinguished from the public at large. Opening Brief 39-42; *see also Pauluk v. Savage*, 836 F.3d 1117, 1129 (9th Cir. 2016) (Murguia, J., concurring in part and dissenting in part) (collecting cases).

Plaintiffs' interpretation of the state-created danger exception would extend it far beyond all reasonable bounds. Plaintiffs assert that they "need only establish 'the state engaged in affirmative conduct'" that "creates, exposes, or increases a risk of harm Plaintiffs would not have faced to the same degree" had the government not acted. Answering Brief 51. But if that were enough, the government would violate the Fifth Amendment every time it took a regulatory action — ranging from increasing the speed limit to decreasing food safety standards — as long as it knew that the action could increase the risk of harm to some segment of the population. This approach is completely unprecedented.

The majority opinion in *Pauluk v. Savage* does not help Plaintiffs. There, a state employee died after continued exposure to toxic mold in his workplace. 836 F.3d at 1119-20. The employee's supervisors had transferred him to the mold-infested building over his objection, and they later refused to transfer him to another

building even after he presented proof that the mold was affecting his health. *Id.* at 1125. This Court held that Pauluk's family had stated a claim under the state-created danger doctrine because a reasonable jury could find that his supervisors "acted with deliberate indifference toward the danger posed by toxic mold . . . to [his] health" when they decided to transfer him to a building that they knew was infested. *Id.*

Plaintiffs rely on *Pauluk* for the proposition that they need not identify "immediate, direct, physical, and personal" harms to state a viable due process claim under the exception, Answering Brief 51-52, but they are mistaken. *Pauluk* includes the same essential features as earlier cases: (1) Pauluk suffered direct harm to his "life, liberty, or property"; (2) specific government actors (his supervisors) put him at immediate physical risk when they sent him to the mold-infested building; (3) and the supervisors knew that Pauluk in particular was harmed by the exposure because he presented proof that it was damaging his health. 836 F.3d at 1119-20, 1124-25. Plaintiffs' claims of harm from decades of government action and inaction regarding, for example, "nine components of Defendants' national fossil fuel-based energy system," Answering Brief 17, have none of those features. Opening Brief 39-42.

Plaintiffs' also rely on *Farmer v. Brennan*, 511 U.S. 825, 843 (1994), *cited in* Answering Brief 53. There, a prisoner asserted that the government had acted with deliberate indifference when it failed to protect her from an attack by a fellow prisoner. 511 U.S. at 830. The prisoner relied not on the Due Process Clause but

rather on the Eighth Amendment, which requires the government to "take reasonable measures to guarantee the safety of the inmates." *Id.* at 832. The Court rejected her claim, but it clarified that a prison official may not evade liability for deliberate indifference by showing that "he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 843.

Farmer is readily distinguishable because Plaintiffs are not incarcerated and do not rely on the Eighth Amendment. It is well-established, moreover, that particularization is required. *See, e.g.*, *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006) (holding that the affirmative act must have exposed the plaintiff to "an actual, particularized danger"); *Ketchum v. Alameda County*, 811 F.2d 1243, 1247 (9th Cir. 1987) (requiring evidence that the government "has affirmatively placed the plaintiff" in danger). Such particularization is altogether lacking here, where Plaintiffs have identified only generalized harms resulting from a global phenomenon allegedly caused by decades of agency actions and inaction. *See* Opening Brief 41-42.[2]

[2] All of the state-created danger cases cited by Plaintiffs are distinguishable on yet another ground: the generalized harms alleged by Plaintiffs here affect members of the representative branches no less than Plaintiffs themselves. That is not true of the defendants in the cases on which Plaintiffs rely.

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

Plaintiffs insist that not all of their constitutional claims are before the Court in this appeal. Answering Brief 7. But because the government moved to dismiss and for summary judgment on all of Plaintiffs' claims, Plaintiffs are wrong. Opening Brief 42-45; *supra* pp. 2-3. Because Plaintiffs offer no argument on why their other claims provide an alternative ground for affirmance, we do not address them again here. *See* Opening Brief 45-47 (explaining why the claims are meritless).

* * *

Therefore, all of Plaintiffs' constitutional claims fail on the merits.

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

The government's opening brief identified three independent reasons why Plaintiffs' public trust theory fails, Opening Brief 47-57, and Plaintiffs' answering brief rebuts none of those reasons.

A. No federal public trust doctrine binds the federal government.

Plaintiffs identify no case holding that the federal government is subject to some sort of judicially enforceable public trust doctrine, and their claim that "courts have routinely found public trust obligations to attach to federal property," Answering Brief 55, misstates the legal landscape. The Supreme Court and numerous federal appellate courts have treated public trust doctrine as a matter of

state law with no federal basis. The Court's clear statements in *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012) that the contours of any public trust doctrine "do not depend upon the Constitution" and that any such doctrine "remains a matter of state law" are definitive and are consistent with other precedents. *See Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014) (collecting cases); Opening Brief 48-51. That should be the end of the matter.

Likewise, the fact that the government has previously called itself a "trustee," Answering Brief 55-56, does not mean that it is bound by any extra-constitutional and extra-statutory public trust doctrine. The federal government holds "resources . . . in trust for its citizens in one sense," because Congress tasks it with "utiliz[ing] the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation." *Alabama v. Texas*, 347 U.S. 272, 277 (1954) (Reed, J. concurring). The federal government does not, however, manage those assets "in the sense that a private trustee holds for a *cestui que* trust" — i.e., for a trust beneficiary. *Id.*

B. Any federal public trust doctrine is displaced by statute.

Even if a public trust doctrine at one time had some basis in federal law, it has since been displaced by the Clean Air Act and other statutes that grant federal agencies authority to manage fossil fuel development, such as the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a. Plaintiffs contend that their public

trust claims cannot be displaced for two reasons, Answering Brief 57-58, but neither has merit.

First, Plaintiffs assert that because the district court held that their public trust claims rest "directly on the Due Process Clause of the Fifth Amendment," *id.* at 57, the claims cannot be displaced by statute. As we have explained, however, Plaintiffs never argued that their public trust claims rested on the Fifth Amendment, and the district court erred when it rewrote their complaint to say that they had. Opening Brief 51-52. The court's efforts fall flat in any event: just as there is no support for a right to a "livable climate," there is no support for the Fifth Amendment-based federal public trust right envisioned by Plaintiffs. *See id.* at 35-38, 52. Plaintiffs also acknowledge that the public trust right they envision would impose affirmative "fiduciary obligations." Answering Brief 54. But Plaintiffs and the district court ignore that the Due Process Clause imposes a *negative limit* on the federal government's ability to act and "cannot fairly be extended to impose an *affirmative obligation* on the [government]." *DeShaney*, 489 U.S. at 195 (emphasis added).

Second, Plaintiffs' assertion that *American Electric Power Co. v. Connecticut (AEP)*, 564 U.S. 410 (2011), cannot apply to their claims because they do not seek abatement of emissions from specific power plants, Answering Brief 57-58, misreads that case. *AEP*'s displacement holding was not, as Plaintiffs contend, limited to "cause[s] of action directly against private party emissions." *Id.* at 58.

Instead, *AEP* held that it remains for federal agencies — not federal courts — to decide whether and to what extent to reduce carbon dioxide emissions, no matter their source. 564 U.S. at 428. Here, Plaintiffs urge the judiciary to make that policy determination in the first instance and thereby ignore Congress's intent to make expert federal agencies the "primary regulator[s] of greenhouse gas emissions." *Id.*; *see also Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16 (D.D.C. 2012) (applying same logic), *aff'd*, 561 Fed. Appx. 7. That path is patently inconsistent with *AEP*.

Finally, the fact that Plaintiffs seek a remedy different from the one sought in *AEP*, Answering Brief 58, makes no difference: "The Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (collecting cases). That is, "if a cause of action is displaced, displacement is extended to all remedies." *Id.*

C. The "climate system" is not part of a public trust.

Plaintiffs have consistently argued that the government has a trust duty to "manage the atmosphere," 3 E.R. 613, ¶ 309, because the harms that they identify result from "increased atmospheric concentrations of greenhouse gas," Answering Brief 15. As we have explained, the atmosphere is not within a protected trust, and Plaintiffs have identified no support for the notion that it is. Opening Brief 55-56. The fact that the government manages "airspace" for example, Answering Brief 60,

means only that it controls air *traffic*, not the composition of the air itself. *See* 49 U.S.C. § 40103 (discussing "navigable airspace").

Plaintiffs have also changed the trust *res* that the government assertedly must protect from not only the atmosphere, but also to the "hydrosphere," "lithosphere," "cryosphere," and "biosphere." Answering Brief 41 n.27. The refocusing does not help Plaintiffs; indeed, it renders their assertion even more implausible. If the atmosphere is not within a protected trust, then the rest of the climate system is not either. Plaintiffs' effort to argue otherwise, by linking the climate system to the resources historically discussed in public trust cases, merely underscores the absurdity of their theory. Plaintiffs argue that the system is within a protected trust because it includes the hydrosphere; which includes the "territorial sea"; which is an aquatic asset; which renders it similar to the tidelands, submerged lands, and waterways traditionally held to be within a state's trust. *Id.* at 59. That territorial waters are affected by atmospheric changes does not mean that the entire system is within a federally protected trust. Plaintiffs' flimsy chain of reasoning provides no grounding for their theory.

CONCLUSION

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

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Respectfully submitted,

s/ Eric Grant

JEFFREY BOSSERT CLARK
Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

ANDREW C. MERGEN
SOMMER H. ENGELS
ROBERT J. LUNDMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Counsel for Defendants-Appellants

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