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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

ANIMAL LEGAL DEFENSE FUND, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 6:18-cv-01860-MC **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF OR, IN THE ALTERNATIVE, FOR A STAY PENDING THE NINTH CIRCUIT'S DECISION IN *JULIANA V. UNITED STATES***

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants hereby move to dismiss this action with prejudice on the grounds that the Court lacks jurisdiction over the matter and that Plaintiffs have failed to state a claim upon which relief can be granted. In the alternative, Defendants move for a stay of this case pending the Ninth Circuit's resolution of the pending appeal in *Juliana v. United States*, No. 6:15-cv-1517-AA, 2018 WL 6303774 (D. Or. Nov. 21, 2018), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018). The grounds for this

motion are set forth in more detail in the memorandum submitted herewith. Pursuant to Local Rule 7-1(a), Defendants have conferred with counsel for Plaintiffs regarding this motion, and Plaintiffs oppose the motion.

Respectfully submitted this 16th day of May, 2019.

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DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF OR, IN THE ALTERNATIVE, FOR A STAY PENDING THE NINTH CIRCUIT'S DECISION IN *JULIANA V. UNITED STATES*

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INTRODUCTION

Climate change regulation inherently embodies a controversy of global proportions. Like any complex international policy matter, it defies simple-minded nostrums. A variety of approaches among nations, the federal government, state and local governments, and other entities have proliferated. Some legislation and regulations have been adopted. Other legislation or regulatory efforts have failed.

Unsurprisingly, some are unhappy with the status quo and the policy outcomes that our messy democratic processes have so far produced. This includes Plaintiffs. Their proposed solution is elegant in its simplicity: just have this Court impose *their* policy preferences on the United States government and its citizens. But to do this would require the Court to invent wholly new rights under the U.S. Constitution. It would also require the Court to subvert the requirements of standing in multiple ways—setting record low bars in the doctrinal areas of generalized grievances, causation, and redressability. Indeed, Plaintiffs' lawsuit is a misguided attempt to litigate their disagreements with over 50 years of federal environmental, agricultural, energy, and economic policy in a single court, brushing past those disagreements in an order supplanting the federal policy preferences of Congress and the Executive with those of that solitary district court. Significantly, the Eastern District of Pennsylvania recently rejected a similar attempt to use novel constitutional rights to justify the rewriting of federal environmental, energy, and economic policy by a single district court. *Clean Air Council v. United States*, 362 F. Supp. 3d 237 (E.D. Pa. 2019).

Plaintiffs' efforts should likewise be turned aside for several reasons. First, this Court lacks jurisdiction over Plaintiffs' claims. Plaintiffs lack standing. Their alleged injuries arise from global climate change—the paradigmatic example of a generalized grievance shared by all

humans, not just in this country but on the planet. Plaintiffs' contention that they can directly connect their asserted harms to specific government actions or inactions overlooks myriad intervening independent actors (including private companies and, worse yet, other countries) woven together in a very tenuous causal chain. And even if the Court could definitively trace Plaintiffs' harms to specific actions of United States government actors, this Court's ability to redress those harms is entirely speculative. Even if one takes the alleged facts in the complaint to be entirely true and beyond challenge, climate change is a complicated global phenomenon that cannot be solved by a single country, let alone a single trial court. Even if this Court were to completely restructure our nation's economy and energy infrastructure in accord with Plaintiffs' wishes, *nobody* knows whether that would actually address Plaintiffs' alleged harms in *any* measurable way. Plaintiffs' claims are simply not cognizable under Article III of the Constitution. This Court's jurisdiction is limited to cases and controversies; it cannot pass judgment on over 50 years' worth of Executive and Congressional policymaking in the posture of an uber-legislature or quasi-judicial administrative agency of ultimate resort.

Second, Plaintiffs' claims fail as a matter of law. Plaintiffs' claims could only be brought, if at all, under the Administrative Procedure Act ("APA"), but, as drafted, their complaint fails to comply with the APA's requirements. In addition, Plaintiffs' asserted Fifth Amendment right to wilderness is, at bottom, a right to a particular type of environment. Numerous courts across the country have rejected that right, and dressing it up in the philosophical trappings of John Locke will not save it. Likewise, there is no First Amendment right not to associate with the rest of humanity, and the Ninth Amendment does not provide an independent cause of action. In short, this lawsuit is fatally flawed and should be dismissed.

In the alternative, the Court may opt to stay this case pending the Ninth Circuit's

resolution of closely-related claims in *Juliana v. United States*, No. 6:15-cv-1517-AA, 2018 WL 6303774 (D. Or. Nov. 21, 2018), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018). In *Juliana*, as here, the plaintiffs allege that decades of government actions and inactions have contributed to climate change and thereby violated a similarly novel substantive due process right—the right to a life-sustaining climate system. Oral argument in *Juliana* is set for June 4, 2019 and will address many of the issues raised here, including similar standing, Article III, APA, and substantive due process arguments. Any order from the Ninth Circuit will be binding on this Court and, if the Court does not dismiss Plaintiffs' claims at this time, the interests of efficiency and judicial economy strongly favor staying this case pending the Ninth Circuit's resolution of the *Juliana* appeal.

BACKGROUND

Two nonprofit organizations, Animal Legal Defense Fund and Seeding Sovereignty, as well as six individuals, filed an Amended Complaint on February 14, 2019 against the United States; the U.S. Departments of the Interior, Agriculture, and Defense; the Environmental Protection Agency; and the heads of these agencies. Am. Compl., ECF No. 28. Plaintiffs allege that the "Government's promotion, development, and subsidization of fossil fuel extraction, animal agriculture, and large-scale commercial logging, its contribution to and facilitation of overpopulation and overcrowding of wilderness, as well as its failure to act to reduce or eliminate the disastrous impacts of excess greenhouse gases in the atmosphere" has violated Plaintiffs' alleged constitutional right to wilderness. *Id.* at 6.[1]

The Amended Complaint alleges that human actions over the past 150 years have "driven

[1] The first six pages of the Amended Complaint consist of unnumbered paragraphs. Defendants cite to those paragraphs by page number and to the remaining numbered paragraphs by paragraph number.

up quantities of greenhouse gases in the atmosphere," thereby causing global temperatures to rise. *Id.* ¶¶ 49-51. Plaintiffs contend that the resulting climate change threatens wilderness and Plaintiffs' experience of wilderness by reducing available freshwater, *id.* ¶¶ 68-74; increasing natural hazards for people seeking to enjoy wilderness such as rockslides, avalanches, and dead trees that are susceptible to falling, *id.* ¶¶ 76-80, 90-92; aggravating drought, *id.* ¶¶ 81-82; increasing the frequency and intensity of wildfires, *id.* ¶¶ 83-85; contributing to the spread of insects and disease that prey on plants, *id.* ¶¶ 88-89; and reducing biodiversity, *id.* ¶¶ 102-109. Plaintiffs also allege that climate change threatens national security. *Id.* ¶¶ 110-19.

Plaintiffs claim that the United States government has known since approximately 1965 that "fossil fuel combustion, deforestation, animal agriculture and overpopulation contribute to climate change," *id.* at 26, ¶ 62, and yet has "created and magnified the dangers of climate change by permitting, subsidizing, and deregulating fossil fuel extraction and consumption, animal agriculture, large-scale commercial logging, and population growth," *id.* at 39. In large measure, Plaintiffs do not challenge any specific final agency actions such as specific rulemakings, leases, permits, authorizations, or orders. Instead, they challenge the government's "aggregate actions and omissions" over an unspecified period of time but potentially dating back to 1965. *Id.* ¶¶ 279, 287. Plaintiffs also contend that government agencies have failed to recommend wilderness study areas, which "are protected from development" and provide "natural carbon sequestration," for designation as wilderness by Congress under the Wilderness Act. *Id.* ¶¶ 206, 213, 215, 218.

Plaintiffs assert three causes of action. First, they allege that Defendants' authorizations and subsidies of fossil fuels, commercial logging, and animal agriculture, as well as the government's failure "to correct or mitigate" climate harms, have violated Plaintiffs' Fifth

Amendment substantive due process "right to wilderness" by "causing and exacerbating anthropogenic climate change" and thereby "endangering Plaintiffs, and destroying wilderness."[2] *Id.*¶¶ 265-67. Plaintiffs allege that this right to wilderness is a necessary precondition of their fundamental right to be let alone. *Id.* ¶ 265. They locate the alleged right in John Locke's social contract theory: "People who have consented to government must be able to revoke consent by exiting civil society and returning to the 'state of nature.'" *Id.* ¶ 241.

Second, Plaintiffs allege that Defendants' "aggregate actions and omissions" have violated Plaintiffs' Ninth Amendment right to self-determination. This alleged right of self-determination flows from the same Lockean social contract principles: in accordance with their purported right to wilderness, Plaintiffs claim they have a right to return to a state of nature. *Id.* ¶¶ 275-79.

Third, Plaintiffs allege that Defendants' "aggregate acts and omissions" have violated their First Amendment right to freedom of association. *Id.* ¶ 287. They claim that the freedom of association includes a freedom not to associate, and "[o]nly by having the right to wilderness can citizens meaningfully exercise this right not to associate." *Id.* ¶ 285. By "exacerbat[ing] climate change and degrad[ing] wilderness," Defendants have allegedly "subjected Plaintiffs to the influence of others without their consent" and "infring[ed] upon Plaintiffs' right to be let alone free from human influence in wilderness." *Id.* ¶¶ 286-87.

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[2] Plaintiffs define wilderness as "an environment as near as possible to that which existed at the time of the Nation's founding, akin to John Locke's 'state of nature.'" Am. Compl. 4 n.2, ¶ 50 n.4, ¶ 219. The Amended Complaint does not identify specific lands that Plaintiffs consider "wilderness" for purposes of their asserted right. However, it is clear that Plaintiffs' "wilderness" does not only include federal lands within the United States. *See id.* ¶ 10 (ALDF member Will Gadd "guides researchers into wilderness" in the "the Arctic regions of the world."); *id.* ¶ 15 (Plaintiff Sarah Bexell fears that "wilderness" may continue "to disappear globally."); *id.* ¶ 18 (alleging Plaintiff Willow Phelps experiences wilderness in Ringwood State Park in New Jersey).

For relief, Plaintiffs ask the Court to "[d]irect the Government to phase out fossil fuel extraction, animal agriculture, and commercial logging of old-growth forests on federal lands"; "[d]irect the Government to consider the impacts to wilderness areas in its decision-making related to family planning policies"; "[d]eclare Executive Order 13783 to be unconstitutional on its face"; "[a]ppoint a special master to facilitate the immediate review of potential Wilderness Areas for designation as a means to reduce the impacts of climate change on wilderness"; and "[r]etain jurisdiction over this action to monitor and enforce the Government's compliance with the orders of this Court." *Id.* at 72. Although not in their Prayer for Relief, Plaintiffs also ask this Court to order the government "to prepare and implement an enforceable national remedial plan to mitigate climate change impacts caused by fossil fuel extraction, animal agriculture, overpopulation, and large-scale commercial logging on federal lands." *Id.* at 6.

STANDARD OF REVIEW

A party may move to dismiss a complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In a facial attack on jurisdiction, 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. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Once a party has moved to dismiss for lack of jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the Court's jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010).

A court may also dismiss a complaint for failure to state a claim upon which relief can be granted under 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. *Barnett v. Marquis*, 16 F. Supp. 3d 1218, 1221 (D. Or. 2014) (citation omitted), *aff'd*, 662 F. App'x 537 (9th Cir. 2016). But a court need not accept as true any legal conclusion set forth in a pleading. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A motion under Rule 12(b)(6) should be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004) (citation omitted). The complaint must set forth facts supporting a plausible, not merely possible, claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiffs' Claims.

A court may not reach the merits of a plaintiff's claims before resolving whether it has jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998). This Court lacks jurisdiction over this action for two reasons: (1) Plaintiffs lack standing and (2) Plaintiffs' claims are not a case or controversy cognizable under Article III of the U.S. Constitution.

A. Plaintiffs Lack Standing.

Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III" of the Constitution. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992). To demonstrate standing, Plaintiffs must prove three elements:

> (1) they "have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical,"'";
>
> (2) there is a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"; and

(3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Id. at 560–61.

The purpose of these standing requirements is "to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citations omitted). "In keeping with [that] purpose," a court's inquiry must be "'especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Because Plaintiffs' claims in this case challenge over 50 years of federal environmental, agricultural, economic, energy, and family planning policy, they raise separation of powers concerns that require an "especially rigorous" examination of standing. *Id.*

1. Plaintiff Seeding Sovereignty Lacks Associational Standing.

"An organization can assert standing under two theories: (1) in a representative capacity, where there has been an injury to one or more of its members, or (2) on its own behalf, where there has been an injury to the organization itself." *Animal Legal Def. Fund v. USDA*, 223 F. Supp. 3d 1008, 1016 (C.D. Cal. 2016) (citations omitted). Because the Amended Complaint identifies no injuries suffered by Seeding Sovereignty as an organization, *see* Am. Compl. ¶¶ 11-13, Plaintiff Seeding Sovereignty lacks standing on its own behalf.

Seeding Sovereignty also lacks standing on behalf of its members. An organization has standing to sue on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citation omitted). The Amended Complaint includes no allegations regarding the individual members of Seeding Sovereignty or their injuries. None of the individual named Plaintiffs identifies as a member of Seeding Sovereignty, and the allegations regarding the organization's members are limited to two generic statements, neither of which allege harm: Seeding Sovereignty's "members and supporters focus on creating grassroots support for environmental protection" and its "members and activists protested the Government's failure to mitigate impacts of climate change at the Standing Rock Sioux Reservation." Am. Compl. ¶¶ 11, 13. Absent any allegations demonstrating harm to its individual members, Seeding Sovereignty fails to meet the requirements for associational standing. *See Clean Air Council*, 362 F. Supp. 3d at 245 (holding organization asserting climate harms lacked associational standing where complaint included no allegations regarding the organization's members); *see also Physicians Comm. for Responsible Med. v. EPA*, 292 F. App'x 543, 545 (9th Cir. 2008); *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1212-13 (N.D. Cal. 2009), *aff'd*, 646 F.3d 1240 (9th Cir. 2011).

2. Plaintiffs Cannot Allege a Concrete and Particularized Injury Because Their Grievance Is Generalized and Universally Shared.

The remaining Plaintiffs fail to satisfy the first element of standing because they assert "generalized grievance[s]," rather than the invasion of a "legally protected" interest that is "concrete and particularized." *Lujan*, 504 U.S. at 560, 575 (citation omitted). The Supreme Court has made clear that "standing to sue may not be predicated upon an interest" that 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); *see also Flast v. Cohen*, 392 U.S. 83, 106 (1968) (Federal courts are not "a forum in which to

air . . . generalized grievances about the conduct of government."); *Warth*, 422 U.S. at 499 ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."). A grievance is too generalized to support standing where a plaintiff is not affected by the alleged harm in a "personal and individual way" and the relief sought does not benefit him or her any more than it does "the public at large." *Lujan*, 504 U.S. at 560 n.1, 573-74. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.* at 576.

Plaintiffs' asserted injuries are quintessential generalized grievances. All of their alleged injuries purportedly result from climate change. *See, e.g.*, Am. Compl. ¶ 5 (alleging ALDF's members have suffered "aesthetic and recreational harm because climate change has made it increasingly difficult to observe threatened species in wilderness" and they "are often prevented from seeking the communion with nature they desire because members reasonably fear for their safety in wilderness due to climate-related extreme weather events"); *id.* ¶ 11 (alleging "climate change threatens" indigenous "culture and tradition like no previous threat"); *id.* ¶ 15 ("Dr. Bexell has an educational, aesthetic, and economic interest in ensuring that the climate system remains stable enough to secure her constitutional right to find solitude in wilderness."); *id.* ¶ 23 ("[T]he increased frequency and severity of wildfires due to climate change has interfered with Christy's sacred time in wilderness . . . ."). And, per Plaintiffs' own allegations, climate change is a diffuse, global phenomenon that affects every single person in Plaintiffs' communities, the United States, and the world. Am. Compl. at 6 (alleging climate change "threatens to destroy the global environment"); *id.* ¶ 15 (alleging wilderness is disappearing "globally" due to climate change, and children in China face same lack of access to natural places); *id.* ¶ 54 (alleging that

if climate change continues, "Earth will suffer permanent ecosystem loss"). Indeed, according to Plaintiffs, people across the world are facing the same threats to wilderness and to their "innate human need to understand and associate with nature" that Plaintiffs face. *Id.* at 6, ¶ 15.

The "very concept of global warming seems inconsistent with" Article III standing's "particularization requirement," because "[g]lobal warming is a phenomenon 'harmful to humanity at large.'" *Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (citation omitted). The District of Columbia Circuit has explained that alleged injury based on global climate change is too generalized to establish standing:

> climate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore Petitioners' alleged injury is too generalized to establish standing.

Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 478 (D.C. Cir. 2009) (also holding that petitioners had failed to show actual or imminent injury).

Plaintiffs' concerns about global climate change are the exact sort of "generalized grievances" that are "more appropriately addressed in the representative branches." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). The Constitution vests the "legislative Power[]" in Congress, U.S. Const. art. I, § 1, the "executive Power . . . in a President of the United States," *id.* art. II, § 1, cl. 1, and the power "to make Treaties" in the President "provided two thirds of the Senators present concur," *id.* art. II, § 2, cl. 2. All of these representative branch powers are necessary to effectively address climate change. This Court cannot "assume a position of authority over the governmental acts of another and co-equal department" in order to vindicate the world's interest in addressing climate change. *Lujan*, 504 U.S. at 577 (citation omitted).

That Plaintiffs have provided some specific allegations of how climate change affects them individually does not render their injuries sufficiently particularized. Every person on the planet could point to some way in which climate change may be harming them. Indeed, Plaintiffs themselves allege that wilderness is disappearing globally, meaning that people worldwide are suffering the same injury as Plaintiffs regarding their ability to access nature and thus have the same basis for seeking standing before this Court. *Id.* ¶ 15. The prohibition on generalized-grievance standing exists to protect the separation of powers established by the Constitution in precisely this scenario where the relief sought will "no more directly and tangibly benefit[]" the plaintiff than it will the public at large. *Lujan*, 504 U.S. at 574. Because Plaintiffs have not asserted a particularized injury different from the injuries allegedly suffered by all humanity, they lack standing.

3. Plaintiffs' Alleged Injuries Are Not Traceable to Government Conduct.

Nor can Plaintiffs establish that their asserted injuries are "fairly traceable" to the largely unspecified and undifferentiated aggregate government actions and omissions that they challenge. Although a valid causal chain may have "several links" (so long as they are "not hypothetical or tenuous and remain plausible"), "where the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, . . . the causal chain is too weak to support standing." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013) (quoting *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012)).

The causal chain set forth in the Amended Complaint is remarkably attenuated. Although Plaintiffs are suing the United States and its agencies, they have not alleged that the federal government is itself emitting greenhouse gases ("GHGs") that are contributing to climate

change. Rather, Plaintiffs claim that the government's regulation (or lack thereof) of private parties not before this Court has encouraged those private parties to engage in activities, such as mineral development, agriculture, logging, and procreation, that ultimately lead to either the release of GHGs into the atmosphere or the sequestration of less carbon, both of which contribute to global climate change. Am. Compl. ¶¶ 121-201. They then claim that global climate change is causing their specific individual injuries such as wildfires in the Shoshone National Forest in Wyoming, *id.* ¶ 6, and blue-green algae blooms in Ringwood State Park in New Jersey, *id.* ¶ 18. Both halves of this causal chain fail.

When a plaintiff's alleged harms may have been caused directly by the conduct of parties other than the defendants (or only indirectly by the defendants), it is "substantially more difficult to meet the minimum requirement" of Article III, namely, "to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth*, 422 U.S. at 504-05; *accord Lujan*, 504 U.S. at 562. For precisely this reason, the Ninth Circuit rejected an attempt to tie climate-related injuries to government regulation of private oil companies. In *Washington Environmental Council v. Bellon*, plaintiffs challenged a failure by government agencies to set emissions standards for refineries. The court found that plaintiffs had failed to demonstrate causation because, 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." 732 F.3d at 1143 (internal quotation marks and citation omitted).

Plaintiffs' causal chain is even more attenuated than that in *Bellon*. Plaintiffs fail to point

to any specific regulatory action[3] or failure to regulate that has harmed them and rely instead on vague allegations of aggregated actions and omissions by the Executive Branch over a period of decades.[4] *See, e.g.*, Am. Compl. ¶ 9 ("Will is harmed by the Government's actions and inactions to stem the severity of climate change."); *id.* ¶ 18 (Willow is harmed as "a result of the Government's failure to mitigate the impacts of climate change on wilderness."); *id.* ¶¶ 279, 287 (asserting the government's "aggregate acts and omissions" have violated Plaintiffs' First and Ninth Amendment rights). They then ask the Court to overlook the intermediate step in the causal chain and assume that the GHG emissions that result from the activities of millions of private actors are, in fact, traceable to these unidentified government actions and omissions.

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[3] Although Plaintiffs have identified a handful of specific government actions as "examples" of the types of aggregate actions and omissions they are challenging, they have not even attempted to tie their alleged harms to those particular actions. *Compare* Am. Compl. ¶¶ 5-39 (Plaintiffs' alleged harms), *with id.* ¶¶ 139-52 (three "examples of major fossil fuel projects": the Keystone XL and Dakota Access pipelines, Congress's decision to open the Coastal Plain of the Arctic National Wildlife Refuge to drilling, and Executive Order 13783). The Ninth Circuit has observed that making such a connection is impossible: "it is currently beyond the scope of existing science to identify a specific source of CO_2 emissions," let alone a specific regulatory action, "and designate it as the cause of specific climate impacts at an exact location." *Bellon*, 732 F.3d at 1143 (internal marks omitted). Moreover, the example actions identified by Plaintiffs do not actually authorize any GHG-emitting activities. Executive Order 13783 did not repeal any rules or regulations governing GHG emissions; it merely asked agencies to review certain rules in light of the Administration's policies and revised existing rulemaking guidance. 82 Fed. Reg. 16,093 (Mar. 28, 2017). As to the pipelines, in 2017, the Under Secretary of State issued a Presidential Permit for the Keystone XL pipeline's international border crossing. That permit has since been revoked and superseded by a Presidential Permit issued directly by the President. Separately, in 2016, the U.S. Army Corps of Engineers approved certain wetland crossings for the Dakota Access pipeline. Neither the President nor the Army Corps authorized mineral development. *See* https://www.usace.army.mil/Dakota-Access-Pipeline/; https://www.whitehouse.gov/presidential-actions/presidential-permit/. Finally, any mineral development in the Arctic National Wildlife Refuge would depend on hypothetical future events, such as the issuance of mineral leases and drilling permits and a private company's decision to drill.

[4] Plaintiffs do not set a beginning date for their aggregated actions and omissions, but the Amended Complaint suggests that Plaintiffs may be including actions and omissions as far back as 1965 when, they allege, President Johnson recognized climate change as a threat but the government "took no action" in response. Am. Compl. ¶ 62.

Importantly, Plaintiffs' causal chain does not stop at the farmers and drilling and logging companies who engage in animal agriculture, mineral development, and commercial logging. It extends to those who engage in the downstream activities that release GHGs into the atmosphere, such as driving cars, flying in airplanes, and heating homes, and to every person who engages in procreation—that is, *all of us*.

Plaintiffs cannot sidestep their burden of demonstrating causation by challenging essentially everything the government has or has not done over a period of 50 years and then pinning the GHG emissions of all individuals and companies in the United States (including Plaintiffs themselves) on those unidentified actions and omissions, without any effort to trace the connection. *See Clean Air Council,* 362 F. Supp. 3d at 249 (finding Plaintiffs failed to prove causation element of standing because they "ignore that any plausible connection between Defendants' actions and increased [e]missions depends on the hypothetical future actions of third parties"); *Ctr. for Biological Diversity*, 563 F.3d at 478–79 (rejecting causal chain connecting a federal leasing program to climate-related injuries because "Petitioners rely on the speculation that various different groups of actors not present in this case—namely, oil companies, individuals using oil in their cars, cars actually dispersing carbon dioxide—might act in a certain way in the future"); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01:11-CV-41, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011) (rejecting attempt to link government fuel purchase contracts to alleged climate change injuries through series of "logical leaps and attenuated assumptions" involving "the independent actions of third parties").

Plaintiffs' causal chain also fails on the back-end. Even assuming Plaintiffs could demonstrate that the unidentified challenged government actions and omissions will cause third parties to emit GHGs into the atmosphere and that those emissions will contribute to climate

change, they cannot (and have not attempted to) show that the particular emissions emitted as a result of the government's challenged actions and omissions are responsible for their specific injuries, such as blue-green algae in a New Jersey state park or particular wildfires in Oregon and Wyoming. Climate change "is the result of a vast multitude of emitters worldwide whose emissions mix quickly, stay in the atmosphere for centuries, and, as a result, are undifferentiated in the global atmosphere." *Bellon*, 732 F.3d at 1143 (quoting *Native Vill. of Kivalina*, 696 F.3d at 868); *see also* Am. Compl. ¶ 50 (alleging that "a century and a half of industrialization . . . has driven up quantities of greenhouse gases" in Earth's atmosphere.). "[E]missions in New Jersey may contribute no more to flooding in New York than emissions in China." *Am. Electric Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 422 (2011). Thus, there is "a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect." *Bellon*, 732 F.3d at 1143. Plaintiffs have not traced their injuries to the specific emissions allegedly caused by the federal government's actions and omissions as opposed to the emissions caused by everyone else in the world. Here, as in *Bellon*, "[b]ecause a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries, the causal chain is too tenuous to support standing." *Id.* at 1144.

4. Plaintiffs' Alleged Injuries Cannot Be Redressed By the Court.

Even if Plaintiffs could somehow establish injury-in-fact and causation, they cannot demonstrate that their asserted injuries could likely be redressed by an order of a federal court. "It is a prerequisite of justiciability that judicial relief will prevent or redress the claimed injury, or that there is a significant likelihood of such redress. Redressability in this sense is an aspect of standing." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (citations omitted). There is no standing where "the prospect of obtaining relief from the injury as a result of a

favorable ruling [is] too speculative[.]" *Allen v. Wright*, 468 U.S. 737, 752 (1984).

For two reasons, Plaintiffs cannot establish that the specific remedies they seek (*see* Am. Compl. 6, 71-72) are likely to redress their harms: (1) it is wholly speculative whether Plaintiffs' requested remedies could alleviate their alleged climate change-related injuries, and (2) this Court lacks authority to enter such remedies. First, even if the federal government were to eliminate all emissions that it causes or could eliminate via all conceivable forms of regulation, it is entirely speculative whether that would stop or slow climate change, let alone redress Plaintiffs' specific injuries. *See, e.g., Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976) (holding that plaintiffs challenging tax subsidies for hospitals lacked standing where they could only speculate whether a change in policy would "result in [the plaintiffs'] receiving the hospital services they desire"). Every other country in the world emits GHGs, and combined they emit far more GHGs than those directly or indirectly regulated by the federal government.[5] *See, e.g.*, EPA Global Greenhouse Emissions Data, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#Country. Plaintiffs' own statistics bear this out. For example, Plaintiffs claim that, in 2015, "federal lands accounted for 42 percent of all coal, 22 percent of all crude oil, and 15 percent of natural gas produced in the United States." Am. Compl. ¶ 124. This means that the majority of mineral development in the United States occurs on private lands and would not be affected by the requested court order directing the government to "phase out fossil fuel extraction . . . on federal lands." *Id.* at 72. Similarly, Plaintiffs claim that improving management "on federal lands in the U.S. alone would sequester 11 million additional tons of

[5] This is a "fact not subject to reasonable dispute" and thus appropriate for judicial notice. Fed. R. Evid. 201(b); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment." (citation omitted)).

Carbon Dioxide annually." *Id.* ¶ 180. But that is an infinitesimal fraction of the "7.1 gigatons of carbon dioxide-equivalents" emitted each year by the global livestock sector alone.[6] *Id.* ¶ 154. Just as Plaintiffs have failed to trace their specific localized injuries to emissions that result from U.S. government actions and omissions, so too have they failed to demonstrate that a court order reducing or eliminating those emissions would likely redress their injuries.[7] *See Bellon*, 732 F.3d at 1146-47 (holding plaintiffs lack standing because even if court assumes requested relief would eliminate all challenged emissions, the effect of those emissions on global climate change is "scientifically indiscernable"); *Clean Air Council*, 362 F. Supp. 3d at 249 (Because plaintiffs' alleged climate injuries "are not traceable to Defendants' challenged actions, I cannot say that the relief Plaintiffs seek will prevent Plaintiffs' future injuries.").

Second, even if Plaintiffs could demonstrate that their requested remedies are likely to redress their claimed injuries, this Court does not have the authority to enter them. In asking the Court "to prepare and implement an enforceable national remedial plan to mitigate climate change impacts," Am. Compl. 6, Plaintiffs ask it to infringe on the powers of Congress and the Executive Branch. After all, to create an "enforceable national remedial plan," the Court would have to itself determine the proper quantities of GHGs that may be emitted by a variety of entities within the United States, how best to reduce current emissions to achieve those

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[6] According to the UN document that Plaintiffs cite for this statistic, the 7.1 gigatons of CO_2-equivalents emitted by the global livestock sector accounts for just 14.5% of all human-induced GHG emissions worldwide. Am. Compl. ¶ 154 n.24 (citing P.J. Gerber et al., U.N. Food & Agric. Org., *Tackling Climate Change Through Livestock: A Global Assessment of Emissions and Mitigation Opportunities* xii (2013) available at www.fao.org/docrep/018/i3437e/i3437e.pdf).

[7] It is also impossible to determine whether the requested relief would redress Plaintiffs' injuries to "wilderness" because Plaintiffs do not identify the particular areas they consider to be wilderness. *See infra* Section II.B.1. Without knowing the specific places they believe are being harmed by government actions and omissions, the Court cannot determine whether the requested relief would redress those harms.

quantities, and how to implement and enforce those reductions. As the Supreme Court has recognized,

> The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.

AEP, 564 U.S. at 427. For precisely this reason, the Constitution assigned the duty to make laws to Congress, and "Congress designated [] expert agenc[ies]" to engage in this type of complex policymaking. *Id.* at 428. The judicial branch is wholly unsuited for the complex policymaking and policy balancing necessary to address climate change. *Id.* ("Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.").

Plaintiffs' other requested remedies are equally problematic. For example, they seek an order requiring the government to "phase out fossil fuel extraction, animal agriculture, and commercial logging of old-growth forests on federal lands." Am. Compl. 72. But Congress has already balanced energy, agricultural, and economic needs with conservation benefits and specifically directed government agencies to authorize these activities in certain circumstances. For example:

- The Mineral Leasing Act of 1920 requires public quarterly lease sales of certain federal lands containing oil or gas deposits. 30 U.S.C. § 226(b).
- In the Surface Mining Control and Reclamation Act of 1977, Congress declared that "coal mining operations presently contribute significantly to the Nation's energy requirements . . . and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry." 30 U.S.C. § 1201(b).
- In the Mining and Minerals Policy Act of 1970, Congress declared "that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . (2) the orderly and economic development of

domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a.

- The National Forest Management Act of 1976 states that "It is the policy of the Congress that all forested lands in the National Forest System shall be maintained in appropriate forest cover with species of trees, degree of stocking, rate of growth, and conditions of stand designed to secure the maximum benefits of multiple use sustained yield management in accordance with land management plans." 16 U.S.C. § 1601(d)(1).

- The Dairy and Tobacco Adjustment Act of 1983 declares it "to be the policy of Congress that it is in the public interest to" carry out "a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products." 7 U.S.C. § 4501(b).

It is not the province of this Court to override wholesale 50-plus years of Congress's policy judgments, especially in a case that does not even purport to challenge the myriad statutes containing those judgments.

Plaintiffs' request that the Court appoint "a special master to facilitate the immediate review of potential Wilderness Areas" is a tacit concession by Plaintiffs that the scope of the extreme relief they seek is extraordinary and unprecedented. Am. Compl. 72. Plaintiffs seek to place the Court in charge of a task—determining how best to manage public lands with wilderness characteristics—that is within the discretion of entire departments of the federal government and performed by a host of public servants.[8] *See Or. Natural Desert Ass'n v. BLM*,

[8] It is also not clear how the designation of additional lands for *more* regulation would redress Plaintiffs' alleged harms. Plaintiffs' harms are premised on the loss of the benefit of the social contract—that is, climate change has allegedly prevented Plaintiffs from exiting the social contract and returning to a "state of nature" outside of "civil society." *See, e.g.*, Am. Compl. ¶¶ 228, 241, 265. But wilderness areas do not exist outside of the body politic. Rather, they are some of the most highly regulated public lands, with significant restrictions on permissible activities, active monitoring for impairment, and penalties for violations of these regulations. *See, e.g.*, 16 U.S.C. § 1133; 43 C.F.R. Part 6302 (BLM regulations); 36 C.F.R. Part 293 (Forest Service regulations). Similarly, Plaintiffs' complaints about lost or diminished opportunities to recreate on public lands are in tension with their alleged desire to exit the social contract. In Locke's state of nature, the government presumably does not maintain hiking or biking trails;

625 F.3d 1092, 1113–14 (9th Cir. 2010) (The Federal Land Policy and Management Act's process for recommending the designation of lands as wilderness "is just one aspect of the BLM's broader management authority for lands with wilderness characteristics. . . . BLM's wide authority to 'manage the public lands under principles of multiple use and sustained yield,' 43 U.S.C. § 1732(a), allows it ample discretion for management of lands with wilderness values."). Moreover, even if the Court could force the agencies to recommend additional wilderness areas to Congress for designation under the Wilderness Act, such an action would not redress Plaintiffs' alleged injuries because it would "not make it likely, as opposed to merely speculative" that Congress would ultimately designate the recommended areas, or that the designation of additional wilderness areas would redress Plaintiffs' specific injuries. *See Wilderness Society v. Norton*, 434 F.3d 584, 593 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

Because Plaintiffs assert generalized grievances shared by all of humankind that are not traceable to particular government actions and cannot be redressed by this Court, they lack standing.

B. Plaintiffs' Action Is Not a Case or Controversy Cognizable Under Article III.

Aside from Plaintiffs' lack of standing, this Court also lacks jurisdiction over Plaintiffs' claims because this action simply is not one that a federal court may entertain consistent with the Constitution. The "judicial Power of the United States," U.S. Const. art. III, § 1, is "one to render dispositive judgments" in "cases and controversies" as defined by Article III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (internal quotation marks omitted). That

provide maps; manage avalanche, rockslide, or tree fall risks; or provide any of the other services that Plaintiffs take advantage of when accessing federal "wilderness."

power can "come into play only in matters that were the traditional concern of the courts at Westminster" and only in "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (internal quotation marks and citations omitted). "If a dispute is not a proper case or controversy, the courts have no business deciding it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

Plaintiffs' suit is not a case or controversy cognizable under Article III. Plaintiffs ask the Court to review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to energy development, agriculture, public land management, and family planning and then to pass on the comprehensive constitutionality of all of those policies, programs, actions, and omissions in the aggregate. No federal court (other than the district court in *Juliana*) has ever purported to locate in the "judicial Power" the ability to perform such a sweeping policy review—and for good reason: the Constitution commits to Congress the power to enact comprehensive government-wide measures of the sort sought by Plaintiffs. And it commits to the President the power to oversee the Executive Branch in its administration of existing laws and to draw on its expertise to formulate policy proposals for changing that law. Such functions are not the province of Article III courts: "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan*, 504 U.S. at 559-60. The actions that Plaintiffs seek to compel are appropriately considered by the legislature and the executive, not by the courts.

Allowing Plaintiffs' claims to proceed in open-ended litigation, divorced from a statutory duty to undertake a specific action to reduce GHG emissions or address climate change, would

require the Court to make determinations about strategies to protect the climate that are essentially legislative in character, as well as determine how Executive Branch agencies should carry out those strategies. It is not the role of the district court to resolve questions such as how much the nation's GHG emissions should be reduced to address global climate change; how much of the burden of reducing worldwide GHG emissions should be borne by the United States; which federal agencies should promulgate regulations or alter their modes of operation; whether a sum certain reduction in GHGs is reasonable given the economic impact of ceasing certain activities; and what is the appropriate level of funding for such efforts. By design, Article III confines a federal district court's jurisdiction to resolving disputes between specific parties; courts are institutionally ill-suited to balance the various interests of, and the burdens to be borne by, the many entities, groups, and sectors of the economy that, although not parties to this litigation, are affected by global climate change. *See AEP*, 564 U.S. at 427-28; *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) ("[Q]uestions of how to appropriately balance these worldwide negatives [of energy development] against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate."), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018).

II. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted.

Even if this Court had jurisdiction over Plaintiffs' claims, it should nevertheless dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. Plaintiffs have failed to state a cognizable claim under the sole right of action available to them, the APA, and their asserted constitutional right to wilderness has no basis in the Fifth, Ninth, or First Amendments.

A. Plaintiffs Fail to State a Claim Under the Administrative Procedure Act, Which Provides the Sole Right of Action for Their Claims.

Because they challenge government agency actions and omissions, Plaintiffs must comply with the requirements of the APA, which provides the sole right of action for their claims. Under the APA, Plaintiffs must challenge discrete final agency actions and failures to act. As Plaintiffs have instead brought only nebulous programmatic challenges to "aggregate actions and omissions," they fail to state a claim under the APA.

Congress enacted the APA to provide a "comprehensive remedial scheme" for harms inflicted by agency action and inaction. *W. Radio Serv. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) (quoting 5 U.S.C. § 702); *see also Wilkie v. Robbins*, 551 U.S. 537, 551-54 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions"). The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. It defines "agency action" broadly to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). The APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "contrary to constitutional right, power, privilege, or immunity," *id.* § 706(2)(A)-(B), and to "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1).

Congress's enactment of the APA channeled challenges to agency actions into a carefully organized framework. Under the APA, a plaintiff must challenge specifically identified final agency actions or failures to act, and judicial review must be based on the administrative record for those actions. *Id.* § 704, 706. A party aggrieved by agency actions may not mount a "broad

programmatic attack" on agency policies but must instead identify "circumscribed, discrete" actions that allegedly harmed the party. *Norton v. S. Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 62, 64 (2004); *accord Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990).

Here, Plaintiffs challenge a vast array of unidentified "actions and omissions" undertaken by numerous defendant (and non-defendant)[9] agencies that allegedly "promote, subsidize, and develop carbon-intensive industries" such as "fossil fuel extraction, animal agriculture, and large-scale commercial logging" as well as "contribut[e] to and facilitat[e]" the "overpopulation and overcrowding of wilderness." Am. Compl. 5-6. But the types of actions they challenge are all subject to review under the APA. Plaintiffs mention, for example, being harmed by oil, gas, and coal leases and permits issued by the Departments of the Interior and Agriculture, *id.* ¶¶ 126-36; the Under Secretary of State's issuance of a Presidential Permit for the Keystone XL pipeline's international border crossing, *id.* ¶¶ 139-44; the U.S. Army Corps of Engineers' authorization of certain wetland crossings for the Dakota Access pipeline, *id.*; government agricultural subsidies, *id.* ¶¶ 162, 174; livestock grazing leases issued by the Department of the Interior, *id.* ¶ 177; commercial logging permits issued by the Departments of the Interior and Agriculture, *id.* ¶¶ 189, 191, 195-96; government rulemakings affecting family planning, *id.* ¶¶ 200-01; and agencies' failure to designate additional wilderness areas, *id.* ¶ 215. The Supreme

[9] For example, Plaintiffs mention the "rolling back of the Affordable Care Act birth control mandate" in their challenge to the government's "pronatalism policies." Am. Compl. ¶ 200. The changes to the contraceptive mandate were implemented by the Departments of Treasury, Labor, and Health and Human Services, none of which are defendants in this case. *See* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018). Likewise, Plaintiffs have not named the Department of State as a defendant even though the Under Secretary of State issued the (now revoked and superseded) Presidential Permit for the Keystone XL pipeline. *See* Am. Compl. ¶¶ 139-44.

Court has made clear that these are the very types of challenges that Congress envisioned proceeding under the APA, *SUWA*, 542 U.S at 62, and courts nationwide hear challenges to these types of agency actions under the APA every day. *See, e.g., Indigenous Envtl. Network v. U.S. Dep't of State*, No. 17-cv-29 (D. Mont. filed Mar. 27, 2017) (APA challenge to Under Secretary of State's issuance of Presidential Permit for Keystone XL pipeline alleging climate change impacts); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-1534 (D.D.C. filed July 27, 2016) (APA challenge to Army Corps' authorizations for Dakota Access pipeline). *High Country Conservation Advocate v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014) (APA challenge to Forest Service and BLM authorizations of mining exploration in roadless area alleging climate change impacts); *Or. Wild v. Cummins*, 239 F. Supp. 3d 1247 (D. Or. 2017) (APA challenge to Forest Service's approval of grazing allotments alleging failure to consider climate change); *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010) (APA challenge to Forest Service authorization of commercial logging project alleging failure to consider climate change); *Humane Society of U.S. v. Perdue*, 290 F. Supp. 3d 5 (D.D.C.) (APA challenge to USDA's acquisition of trademarks used to promote pork production), *amended in part by* No. 12-1582 (ABJ), 2018 WL 1964305 (D.D.C. 2018); *Or. Nat. Desert Ass'n v. BLM*, No. 2:10-CV-01331-SU, 2014 WL 4832218 (D. Or. Sept. 29, 2014) (APA challenge to BLM's failure to designate certain lands as wilderness study areas).

Plaintiffs cannot avoid the APA by aggregating challenged actions and omissions and bringing their lawsuit directly under the Constitution. Neither the Supreme Court nor the Ninth Circuit has held that the Constitution itself provides an across-the-board cause of action for all constitutional claims—and especially for the sweeping constitutional claims concerning governmental regulation that Plaintiffs advance or for the sweeping relief they seek. To the

contrary, the Supreme Court ruled in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015), that a court's equitable authority to "enjoin unlawful executive action is subject to express and implied statutory limitations." *Id.* Thus, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," courts rightly "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (citation omitted). Here, even if the equitable authority of an Article III court could otherwise extend to an action remotely resembling the one brought by Plaintiffs, the APA provides "statutory limitations" that "foreclose" equitable review of Plaintiffs' asserted constitutional claims. *Armstrong*, 135 S. Ct. at 1385 (internal quotation marks omitted).[10]

Plaintiffs' attempt to short-circuit the APA in this case illustrates precisely why Congress enacted the APA in the first instance. By failing to identify specific agency actions and omissions, Plaintiffs challenge both everything and nothing making it impossible for Defendants to defend their actions. Without knowing which specific rulemaking, lease, permit, order, subsidy, or other action Plaintiffs are challenging, Defendants cannot explain to the Court their reasons for taking (or not taking) that action or the impact of that specific action on climate change. Plaintiffs seek to litigate this case purely on generalities and assumptions, without having to determine precisely what is injuring them and how it is causing those injuries. Congress has rejected that approach and so must this Court. *See Lujan*, 497 U.S. at 891

[10] In addition to the APA, other statutes provide causes of action which confirm that the courts' general equitable authority is not available here. For example, Section 307 of the Clean Air Act provides for exclusive review in the courts of appeal of specified "action" or "final action" of the EPA Administrator under the Act. 42 U.S.C. § 7607(b); *cf. Massachusetts v. EPA*, 549 U.S. at 514 n.16 (noting that it was pursuant to this provision that the state brought its climate change-related challenge to EPA's decision).

("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.").

B. Plaintiffs Fail to State a Claim Under the Fifth Amendment.

The Court need not reach the merits to dispose of this case, but, if it does, it will find that Plaintiffs' novel constitutional claims are untethered to history, tradition, and precedent. Plaintiffs first allege a violation of their substantive due process right to wilderness under the Fifth Amendment. Am. Compl. ¶¶ 265-66. Because there is no fundamental right to wilderness and because Plaintiffs have not alleged facts that support a "state-created danger" claim, Plaintiffs' Fifth Amendment claim must fail.

1. There Is No Fundamental Right to Wilderness.

Plaintiffs' first claim for relief must be dismissed because there is no fundamental right to wilderness. Plaintiffs frame the alleged right to wilderness as a "precondition" to their alleged fundamental right to be let alone. Am. Compl. 60. Their argument goes, the framers intended to incorporate into the Declaration of Independence and the Constitution John Locke's theory of social contract. *Id.* ¶¶ 238-39. The social contract is "an implicit agreement" between citizens and the government in which citizens "sacrific[e] some individual freedom" in exchange for "social benefits" such as "state protection." *Id.* ¶ 239. To function meaningfully, "the social contract requires that a 'state of nature,' or wilderness, exist so that individuals" have the option to "revoke consent" and "exit" the contract by "returning to the 'state of nature.'" *Id.* ¶¶ 239-41. Thus, according to Plaintiffs, all citizens have a fundamental right to exit the social contract by seeking refuge from government and "human interference" in wilderness. *Id.* at 71 & ¶¶ 48, 265.

Any substantive due process analysis begins with a "careful description" of the asserted

right because "[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). The party asserting the right has the burden of establishing it. *See Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989). The Supreme Court has identified fundamental rights under the Due Process clause in discrete and intimate areas such as the right to marry, to have children, to direct the upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). The common touchstone of these rights is that they are intrinsically personal and are "deeply rooted in [the] Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721 (internal marks and citations omitted). The Ninth Circuit has recognized that "[t]hese fields likely represent the outer bounds of substantive due process protection." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 n.4 (9th Cir. 1998).

Plaintiffs' alleged Fifth Amendment right to wilderness fails at the outset because it is premised on a non-existent right to renounce or otherwise revoke consent to and exit government. *Keller v. Los Osos Cmty. Servs. Dist.*, 39 F. App'x 581, 583 (9th Cir. 2002) ("There is no recognized fundamental right to live free of governmental regulation . . . ."). Indeed, fundamental substantive due process rights do not provide absolute freedom from government; they remain subject to government regulation and infringement in limited circumstances. *Glucksberg*, 521 U.S. at 721.

This fundamental flaw is dispositive of Plaintiffs' claim. Even if the Court were willing to overlook this, however, the alleged right to wilderness still fails because Plaintiffs are unable to define it in any meaningful way, let alone provide the "narrow" and "careful description"

required by the Supreme Court. *Glucksberg*, 521 U.S. at 703; *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) ("*Glucksberg* instructs courts to adopt a narrow definition of the interest at stake."). Plaintiffs define wilderness as "an environment as near as possible to that which existed at the time of the Nation's founding, akin to John Locke's 'state of nature,' where a right to such an environment is in turn an 'interpolation and extrapolation' of the constitutional right to be let alone." Am. Compl. 4 n.2, 23 n.4, ¶ 219. Whatever its abstract philosophical merit, this definition is *legally* unhelpful. It defines "wilderness"—an actual place or places to which Plaintiffs believe they have a right to go—based on two purely theoretical concepts (the environment as it existed at the Nation's founding and Locke's "state of nature") that provide no guidance as to which specific locations Plaintiffs believe they have a right to access. If that is not enough, the two concepts are in tension with one another. The former—the environment as it existed at the time of the Nation's founding—is a place inhabited for thousands of years by numerous complex political societies and for over 150 years by European colonists. The latter—Locke's state of nature—is a philosophical construct subject only to the "law of nature" outside of any political society.[11] Am. Compl. ¶ 240. Plaintiffs' newly proposed and ill-defined fundamental right hardly meets the Supreme Court's very demanding standard.

Even putting aside the failure to adequately define their right, Plaintiffs cannot carry their burden because no court has ever recognized a fundamental right to wilderness, and there is no basis in history, tradition, or precedent for such a right. Plaintiffs' right to wilderness is, at bottom, a right to a particular type of environment. Numerous courts have rejected such a claim,

[11] The irony here, of course, is that Plaintiffs want one branch of government—this Court—to order another branch to maintain and provide to them on public, government-owned lands a "state of nature" that, according to Locke, is meant to exist separate and apart from society and the body politic.

holding that there is no fundamental right to a specific type of environment or specific environmental conditions. *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102, 108 (D.C. Cir. 2018) (The "right to a healthy environment" is not a "'liberty' interest" protected by the Due Process Clause.); *Nat'l Sea Clammers Ass'n v. City of N.Y.*, 616 F.2d 1222, 1237-38 (3d Cir. 1980) ("[T]here is no constitutional right to a pollution-free environment."), *vacated on other grounds sub nom., Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426–27 (8th Cir. 1992) (no fundamental right to an environment free of non-natural radiation); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (no constitutional right to a healthy environment); *Clean Air Council*, 362 F. Supp. 3d at 250-51 (no fundamental right to a "life-sustaining climate system"); *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at *3–4 (E.D. Mich. Feb. 28, 2017) (no fundamental right to health or freedom from bodily harm caused by environment); *SF Chapter of A. Philip Randolph Inst. v. U.S. EPA*, No. 07-4936, 2008 WL 859985, at *7 (N.D. Cal. Mar. 28, 2008) (no constitutional right to be free from climate change pollution); *In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (no "constitutional right to a healthful environment" (citations omitted)); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (same); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972) (same); *Fed. Emp. for Non-Smokers' Rights v. United States*, 446 F. Supp. 181, 185 (D.D.C. 1978) (no constitutional right "to a clean environment"), *aff'd*, 598 F.2d 310 (D.C. Cir. 1979). Although one district court has recognized a constitutional "right to a climate system capable of sustaining human life," *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248-50 (D. Or. 2016), it is an outlier and, in so holding, "certainly contravened or ignored longstanding authority." *Clean Air Council*, 362 F. Supp. 3d at 250-51 (collecting cases).

Juliana is also on appeal to the Ninth Circuit now.

The requested right is also divorced from any of the rights that the Supreme Court has recognized as fundamental. These rights relate to marriage, family, procreation, and bodily integrity and involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Obergefell*, 135 S. Ct. at 2597. They all involve private relationships and choices that have little to no impact on the rights and interests of the public at large, and which can be protected simply by the government refraining from interference.

The asserted right to wilderness differs from these recognized fundamental rights in two key ways. First, it does not concern a private aspect of a person's body or relationship with another individual. Rather, it concerns the public relationship between a citizen and the government. *See* Am. Compl. ¶ 239. Moreover, in seeking to require that federal lands be maintained as a "state of nature" free from "human influence," *id.* ¶ 287, it implicates the rights of all other citizens who also have an interest in how public lands are managed and utilized.

Second, Plaintiffs do not ask merely that the government stay out of their way when they access wilderness; they ask that the government take affirmative steps to manage public lands and regulate the GHG-emitting activities of third parties in a manner that allegedly protects the specific characteristics that, according to Plaintiffs, make an area "wilderness."[12] *See, e.g., id.* at 6 (seeking injunction "compelling the Government to protect Plaintiffs' constitutional right to wilderness"); *id.* ¶ 249 (seeking recognition of "the government's continued affirmative duty to

[12] For this reason (among others), the asserted right to wilderness has no basis in the right to travel between the states. *See* Am. Compl. ¶ 248 & n.35. The right to interstate travel is a freedom from the government's restriction of one's movement. Here, no one is preventing Plaintiffs from traveling to "wilderness." Rather, the asserted violation is a failure to adequately protect those lands from the actions of third parties.

safeguard" the "'state of nature' in the face of climate change."). The Supreme Court has made clear that such a positive right—a right to affirmative government action on one's behalf—is not guaranteed by the Constitution. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (The Due Process clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."); *Sandage v. Bd. of Comm'rs of Vanderburgh Cty.*, 548 F.3d 595, 596 (7th Cir. 2008) ("The Constitution is a charter of negative liberties; it tells the state to let people alone."); *see also Obergefell*, 135 S. Ct. at 2634-35 (Thomas, J., dissenting) (explaining that Lockean natural rights, as envisioned by the framers, are those that exist outside of government and are therefore negative freedoms, freedoms from government restraint).

Plaintiffs cannot save their right to wilderness by framing it as arising out of the rights of liberty, privacy, and autonomy and a "right to be let alone." *See, e.g.*, Am. Compl. ¶¶ 48, 220, 246, 251. These rights do not exist in a vacuum. They derive meaning from the specific contexts in which they are applied, and must be applied narrowly "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the" courts. *Glucksberg*, 521 U.S. at 720. Plaintiffs are not the first litigants to appeal to high-minded rhetoric, including Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), a Fourth Amendment case,[13] to argue for a broad "right to be let alone." *See* Am.

[13] Plaintiffs also cite another Fourth Amendment case, *United States v. Munoz*, to support their alleged Fifth Amendment right to wilderness. In *Munoz*, Oregon police pulled over Munoz in a national forest, found a dead golden eagle in his truck, and charged him with a violation of the Eagle Protection Act. 701 F.2d 1293, 1295 (9th Cir. 1983). Munoz appealed his conviction on the grounds that the stop violated the Fourth Amendment. Plaintiffs have latched on to the

Compl. ¶ 246. "But the impressive pedigree of this political ideal does not readily translate into a constitutional right." *Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989). In rejecting an asserted right to be free from paternalistic legislation that relied on, among other sources, John Stuart Mill's *On Liberty* and Thomas Jefferson's *Notes on the State of Virginia*, the Eleventh Circuit said:

> [T]here is no broad legal or constitutional "right to be let alone" by government. In the complex society in which we live, the action and nonaction of citizens are subject to countless local, state, and federal laws and regulations. Bare invocation of a right to be let alone is an appealing rhetorical device, but it seldom advances legal inquiry, as the "right"-to the extent it exists-has no meaning outside its application to specific activities. The Constitution does protect citizens from government interference in many areas-speech, religion, the security of the home. But the unconstrained right asserted by appellant has no discernable bounds, and bears little resemblance to the important but limited privacy rights recognized by our highest Court.

Picou, 874 F.2d at 1521; *see also, e.g., Hill v. Colorado*, 530 U.S. 703, 717 n.24 (2000) (noting that Justice Brandeis' right to be let alone "is more accurately characterized as an 'interest' that States can choose to protect in certain situations."); *King v. Saddleback Jr. Coll. Dist.*, 445 F.2d 932, 938 & n.11 (9th Cir. 1971) (refusing to recognize single broad Fifth Amendment "right to be let alone").

Plaintiffs' asserted right is equally unconstrained. Plaintiffs do not define the scope of their alleged right, and the unprecedented relief they request—including phasing out all fossil fuel development, animal agriculture, and commercial logging of old-growth forests on federal

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case because, in rejecting the government's argument that people have a reduced expectation of privacy in national parks, the court said that the argument "undercuts one of the primary purposes of our national parks by compromising the visitors' fundamental right to be left alone." *Id.* at 1298. But *Munoz's* description of a person's privacy rights were in the context of an analysis of whether the search and seizure at issue was reasonable under the Fourth Amendment. The case never purported to identify a new substantive due process right under the Fifth Amendment, and certainly never anticipated a right to affirmative government action to maintain an environment of one's choosing.

lands, and implementing a national remedial plan to mitigate climate change—makes clear the right "is without apparent limit." *Clean Air Council*, 362 F. Supp. 3d. at 251. If all federal lands, and the Earth's climate as a whole, are implicated in Plaintiffs' alleged right to wilderness, then any decision the government makes regarding those lands and resources, or any decision that could conceivably affect the climate, would be subject to constitutional review.

Finally, Plaintiffs' attempt to locate the alleged right to wilderness in various statutes also fails. *See* Am. Compl. ¶¶ 251-61. Plaintiffs claim that Congress "implicitly" recognized the right in statutes such as the National Park Organic Act, the Wilderness Act, and the Federal Land Policy and Management Act. *Id.* But those statutes recognize the many competing uses for public lands and grant wide-ranging discretion to the President and agencies to balance those uses. *See, e.g.*, 16 U.S.C. § 1133(d) (allowing among other things, prospecting for minerals, establishment of power projects and transmission lines, and grazing in some wilderness areas); 43 U.S.C. § 1701(a)(12) (declaring it policy of the United States that public lands be managed "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber"). There is no indication that Congress believed that discretion would be limited by the need to accommodate a constitutional right to wilderness.

Because Plaintiffs' Fifth Amendment claim hinges on an alleged fundamental right to wilderness that does not exist, it must be dismissed.[14]

[14] If Plaintiffs had identified a valid fundamental right, the inquiry under the Fifth Amendment would not be over. The court would then have to determine whether Defendants' alleged infringements on that right are narrowly tailored to serve a compelling government interest. *Glucksberg*, 521 U.S. at 721. Because Plaintiffs have not identified the specific government actions and omissions that allegedly infringe upon their rights, they would not be able to demonstrate a Fifth Amendment violation.

2. Any State-Created Danger Claim Must Also Fail.

Plaintiffs' Amended Complaint uses language such as "deliberate indifference," "shocks the conscience," and "reckless disregard" throughout. *See* Am. Compl. ¶¶ 5, 151-52, 228, 250, 267-68. This language suggests they intend to assert a "state-created danger" claim alleging that the government "affirmatively and with deliberate indifference" placed Plaintiffs in danger of climate-related harms inflicted by third parties. *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

The "state-created danger" doctrine is a narrow exception to the rule that the Due Process Clause imposes no duty on the government to protect persons from harm inflicted by third parties that would violate due process if inflicted by the government. *DeShaney*, 489 U.S. at 195; *accord Patel v. Kent School Dist.*, 648 F.3d 965, 971-72 (9th Cir. 2011). Under this exception, "a state actor can be held liable for failing to protect a person's interest in his personal security or bodily integrity when the state actor affirmatively and with deliberate indifference placed that person in danger." *Pauluk*, 836 F.3d at 1122. The exception has "limited applicability," and the Ninth Circuit does not often approve its application. *Kennedy v. City of Ridgefield*, 440 F.3d 1091, 1095 (9th Cir. 2006) (Tallman, J., dissenting from denial of rehearing en banc).

Importantly, the "state-created danger" exception applies only when a person's constitutional rights are at stake; it is not a means of generating a due process claim in the absence of a constitutionally-protected interest. *See id.* at 1093 (identifying plaintiff's constitutional right to bodily security as first step in analysis); *accord Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (noting first step in due process analysis is to determine "whether the plaintiff has alleged a deprivation of a constitutional right at all"). Because

Plaintiffs have no right to wilderness, they also have no cognizable state-created danger claim.

Even if Plaintiffs' asserted right could form the basis for a state-created danger claim, that claim would fail. "Every instance" in which the Ninth Circuit has "permitted a state-created danger theory to proceed has involved an act by a government official that created an obvious, immediate, and particularized danger to a specific person known to that official." *Pauluk*, 836 F.3d at 1129-30 (Murguia, J., concurring in part and dissenting in part) (internal quotation marks omitted); *see also id.* at 1130 (collecting cases). None of these elements exist here. First, Plaintiffs have identified no harms to their "personal security or bodily integrity" that qualify for the state-created danger exception. Under Ninth Circuit precedent, viable harms are physical harms that result in immediate bodily suffering such as rape, *e.g., L.W. v. Grubbs*, 974 F.2d 119, 120 (9th Cir. 1992); *Wood v. Ostrander*, 879 F.2d 583, 586, 590 (9th Cir. 1989); other physical assault, *e.g., Hernandez v. City of San Jose*, 897 F.3d 1125, 1129-30 (9th Cir. 2018); *Bracken v. Okura*, 869 F.3d 771, 779-80 (9th Cir. 2017); and death, *e.g., Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1082-83 (9th Cir. 2013); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1084-85 (9th Cir. 2000). But here, Plaintiffs allege climate-related degradation of wilderness that harms their aesthetic, recreational, spiritual, cultural, and psychological interests. *See, e.g.*, Am. Compl. 4, ¶ 5. Those alleged harms do not remotely resemble the immediate, direct, physical harms found to support a state-created danger claim.

Second, Plaintiffs identify no specific government actions—much less government actors—that put them in "obvious, immediate, and particularized danger." *Pauluk*, 836 F.3d at 1129-30 (Murguia, J., concurring in part and dissenting in part) (internal quotation marks omitted). Instead, Plaintiffs contend that an indefinite number of unspecified "actions and omissions" potentially spanning the last fifty years have indirectly exposed them to harm. This

allegation of slowly-recognized, long incubating generalized harm by itself distinguishes their claim from every other state-created danger case. *See, e.g., Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) (recognizing a due process violation where officers "took affirmative actions that significantly increased the risk facing" the victim including, after finding the victim in need of medical assistance, cancelling 911 call to paramedics, dragging the victim into an empty house, and locking the door and leaving him there alone); *Wood*, 879 F.2d at 588 (same where officer arrested driver, impounded his car, and left female passenger by the side of the road at night in a high-crime area).

Third, Plaintiffs do not allege that government actions endangered Plaintiffs in particular. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1067 (9th Cir. 2006). The "duty to protect arises where a police officer takes affirmative steps that increase the risk of danger *to an individual*." *Munger*, 227 F.3d at 1089 (emphasis added) (citation omitted); *see also Martinez v. California*, 444 U.S. 277, 284-85 (1980) (refusing to find state officers liable where officers were not aware that the victim "as distinguished from the public at large, faced any special danger"). Plaintiffs assert that their injuries arise from a diffuse, global phenomenon that affects every other person in the United States and the world. The federal government's actions and omissions regarding fossil fuel development, animal agriculture, commercial logging, and family planning did not increase the danger to Plaintiffs in particular. *See Clean Air Council*, 362 F. Supp. 3d at 252 (rejecting state-created danger claim for climate harms in part because "Plaintiffs' challenge to the current Administration's environmental policies makes out a 'relationship' between Defendants and the entire population of the United States" rather than between Defendants and the plaintiff).

Fourth and finally, Plaintiffs cannot show that their alleged climate-related harms would

not have existed but for the challenged government actions and omissions. A state-created danger occurs where the government's action created a danger "that would not otherwise have existed." *Grubbs*, 974 F.2d at 121. Even taking the alleged facts in the complaint as true, climate change is a global phenomenon to which most every individual and country contributes. Plaintiffs cannot show that their harms would not have existed but for Defendants' actions.[15]

To the extent Plaintiffs mean to identify Executive Order 13783 as the specific government action that has endangered them, *see* Am. Compl. ¶¶ 267-68, that order places the individual Plaintiffs in no immediate danger of bodily harm. It has no on-the-ground impact on anyone; it merely rescinds certain White House guidance documents and requires agencies to "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources" and provide "specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production." 82 Fed. Reg. at 16093-94. Moreover, it does not apply to Plaintiffs in particular. It has the same impact on Plaintiffs as it does on every other person in the United States.

As Plaintiffs have not alleged facts that support a state-created danger claim, any such claim must be dismissed.

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[15] The Court need not reach Plaintiffs' allegations of deliberate indifference or conscience-shocking conduct because they have not alleged the immediate, particularized, and individualized harm necessary to state a state-created danger claim. Nonetheless, Defendants note that any claims of deliberate indifference are belied by the extensive deliberations in which agencies engage before taking action. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (requiring agencies to consider potential impacts of their actions and provide a "rational" basis for their decision). In the ordinary course, where a plaintiff challenged a specific agency action, Defendants would provide evidence of those deliberations in an administrative record as required by the APA. *See supra* II.A. In any event, Plaintiffs' disagreement with complex federal policies does not render those policies conscience-shocking.

C. Plaintiffs Fail to State a Claim Under the Ninth Amendment.

Plaintiffs assert a freestanding Ninth Amendment claim, alleging that "[a]mong the rights 'retained by the people' under the Ninth Amendment is the right to self-determination through the right to wilderness, as informed by the social contract principles of consent and exit." Am. Compl. ¶ 275. This claim must be dismissed because "the [N]inth [A]mendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (citations omitted); *see also Juliana v. United States*, 339 F. Supp. 3d 1062, 1102 (D. Or. 2018) (finding Ninth Amendment claim "not viable as a matter of law"). While the Ninth Amendment may provide a basis for the recognition of unenumerated rights, which may be enforceable under the Fifth or Fourteenth Amendments, the Ninth Amendment itself secures no substantive rights. *See Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991) (dismissing claim on the ground that "the [N]inth [A]mendment does not confer substantive rights in addition to those conferred by other portions of our governing law"); *Tanner*, 340 F. Supp. at 535 ("[T]hrough its 'penumbra' or otherwise," the Ninth Amendment "embodies no legally assertable right to a healthful environment." (citations omitted)).

D. Plaintiffs Fail to State a Claim Under the First Amendment.

Plaintiffs' third cause of action under the First Amendment can be dismissed at the outset because it is intertwined with and dependent upon the alleged right to wilderness. Am. Compl. ¶ 287 (alleging the "aggregate acts and omissions of the Government have unconstitutionally caused, and continue to materially contribute to, degradation of our country's wilderness, intruding Plaintiffs' First Amendment rights by impermissibly infringing upon Plaintiffs' right to be let alone free from human influence in wilderness"). As there is no constitutional right to

wilderness, Plaintiffs' First Amendment claim also fails. Even if the Court does not reject the claim due to its reliance on the non-existent right to wilderness, it should nonetheless dismiss the claim because there is no First Amendment right not to associate with the rest of humanity and to instead be "free from human influence in wilderness." Am. Compl. ¶¶ 287, 235-36.

The First Amendment protects the freedom of "expressive association," which is the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *see also Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 458, *amended by* 881 F.3d 792 (9th Cir. 2018). This freedom is necessary because an "individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *U.S. Jaycees*, 468 U.S. at 622.

The freedom of association includes a corollary freedom not to be forced to associate with an individual or a group that does not represent one's views. *U.S. Jaycees*, 468 U.S. at 623. This corollary right ensures that an association has "the freedom to identify the people who constitute the association, and to limit the association to those people only," *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (citation omitted), and that an individual has a right to be free from "coerced association with groups holding views with which [they] disagree." *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1275 (9th Cir. 1982).

Plaintiffs' allegations do not fall within the ambit of the First Amendment and thus cannot support a freedom of association claim. Plaintiffs have not alleged that the government has prevented them from coming together with others to express their views. Nor do they allege

that the government has forced Plaintiffs to join a group that holds different views or to open their group to unwanted individuals. Rather, Plaintiffs contend that the government has failed to provide an adequate location—an appropriately pristine wilderness—for them to seek solitude away from other humans.

The Constitution provides no such right. No court has ever recognized a general First Amendment right to be free from government, society, and the proximity of other humans. And for good reason. The freedom not to associate is a freedom not to be compelled to associate with a group of people that has views different from your own; it is not a freedom to be physically distant from other people. Humanity writ large is not an association that threatens to force its views upon Plaintiffs. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("[T]he right of expressive association extends to groups organized to engage in speech[.]"). And there is no freedom from association with the government. *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45, 55 (D.D.C. 2006) ("It is well-settled that the First Amendment offers no protection against compelled association with government actors or the government itself." (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J. , concurring); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

Tellingly, the Supreme Court has rejected the corollary to Plaintiffs' asserted right: the alleged right to be with other people in society. In *City of Dallas v. Stanglin*, the Court held that there is no "generalized" First Amendment "right of 'social association.'" 490 U.S. at 25. Just because an activity "might be described as 'associational' in common parlance" does not mean it "involve[s] the sort of expressive association that the First Amendment has been held to protect." *Id.* at 24. Just as there is no general right to associate with other people, there is also no concomitant general right to not associate with other people.

Plaintiffs' First Amendment claim also suffers the same flaw as their Due Process claim. The claimed right would not merely obligate the government to refrain from infringing on Plaintiffs' choice not to associate; it would further obligate the government to affirmatively maintain suitable wilderness areas to facilitate that choice. As discussed above, the Constitution provides negative rights—freedoms from unnecessary government intrusion. It does not obligate the government to take affirmative actions on one's behalf. *Supra* Section II.B.1.

Because Plaintiffs' alleged right to not associate with others in wilderness is not protected by the First Amendment, their Third Claim for Relief fails as a matter of law.

III. In the Alternative, the Court May Stay Proceedings Pending Resolution of the United States' Appeal in *Juliana v. United States*.

As an alternative to deciding Defendants' motion to dismiss, the Court may stay proceedings pending the Ninth Circuit's resolution of the United States' appeal in *Juliana v. United States*. Argument in the *Juliana* appeal is scheduled for June 4, 2019.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In determining whether to issue a stay, "the competing interests which will be affected by the granting or refusal to grant a stay must be weighed." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). These interests include

> the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Id. "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent

proceedings which bear upon the case." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979).

A stay of this case would be appropriate pending the Ninth Circuit's decision in *Juliana v. United States*, No. 6:15-cv-1517-AA, 2018 WL 6303774 (D. Or. Nov. 21, 2018), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018). The issues in this case overlap substantially with those in *Juliana*, and the Ninth Circuit's ruling in *Juliana* will almost certainly impact the law governing this case and the parties' positions. In *Juliana*, the plaintiffs argue that the federal government's aggregate (and unspecified) actions and inactions over a period of over fifty years have caused and contributed to climate change, thereby violating, among other things, their substantive due process right to a climate system capable of sustaining human life. They also seek similar relief to Plaintiffs here, including an "enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." *Compare* Am. Compl. 6 *with* First Am. Compl. 94, ECF No. 7, *Juliana*, No. 6:15-cv-1517-AA (D. Or. filed Sept. 10, 2015). In response, the government has made many of the same arguments that Defendants make here: (1) plaintiffs lack standing because their alleged climate change-related injuries are too generalized, too attenuated from the challenged government actions, and cannot be redressed by the court; (2) plaintiffs' claims are not cognizable under Article III; (3) plaintiffs' claims must be brought under the APA; (4) plaintiffs' asserted right to a life-sustaining climate is not a fundamental right protected by the Fifth Amendment; and (5) there is no basis for a state-created danger claim. *See* Appellants' Opening Br., Dkt. Entry 16, *Juliana v. United States*, No. 18-36082 (9th Cir. filed Feb. 1, 2019). Those arguments are all before the Ninth Circuit in the current appeal. *Id.* Because the arguments and issues in *Juliana* overlap so substantially with those in this case and any order issued by the Ninth Circuit would be binding upon this Court,

the Ninth Circuit's decision is likely to significantly narrow the issues in dispute here. Rather than expend resources evaluating the same issues that the Ninth Circuit is currently considering and likely to rule upon soon, this Court may stay proceedings pending the Ninth Circuit's decision in *Juliana*.

A stay will not prejudice Plaintiffs. This case has only just begun: this motion represents Defendants' initial responsive pleading to Plaintiffs' complaint. Thus, there are no pending deadlines that will be impacted by a stay. Moreover, Plaintiffs cannot claim any urgency in having their claims litigated sooner than the months it will likely take the Ninth Circuit to issue a decision after the June 4 argument. The Amended Complaint states that climate change has been occurring for decades, Am. Compl. ¶¶ 53, 55, 62, 65, and Plaintiffs claim to have been experiencing harms from climate change for many years, *id.* ¶¶ 7, 29; *see also, e.g.*, *id.* ¶¶ 84, 91, 102. Yet Plaintiffs themselves did not find these issues sufficiently pressing to file this case until late 2018. In addition, Plaintiffs took over three months to properly serve Defendants in this case, thereby undermining any suggestion of urgency.

In sum, a stay would help clarify the issues before this Court and avoid wasting resources on arguments and issues that may shortly be addressed by the Ninth Circuit in an order that would bind this Court.

CONCLUSION

Because this Court lacks jurisdiction over Plaintiffs' claims and because those claims fail as a matter of law, the Court should dismiss this case. In the alternative, the Court should stay the case pending resolution of the pending appeal in *Juliana*.

Respectfully submitted this 16th day of May, 2019.

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