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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' REPLY 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

It has never been the role of the judiciary to unilaterally resolve major international challenges. Though Plaintiffs have tried hard to downplay the scope of this case, what they seek is to bypass the executive and legislative branches and enlist this Court to impose their policy preferences on the United States and its citizens. They seek to accomplish this by inventing a new substantive due process right that they themselves struggle to meaningfully define. Rather than own the monumental and unpredictable impact of their novel, amorphous right, Plaintiffs ignore the harder issues such as the numerous statutes that direct agencies to engage in the very activities Plaintiffs seek to prohibit and the many cases that have already rejected analogous asserted rights.

Plaintiffs have not met their burden to establish jurisdiction—they have not even attempted to connect their alleged injuries to emissions resulting from the (unspecified) challenged government actions and inactions. And they respond to a strawman political question doctrine argument instead of the Article III argument actually made by Defendants. On the merits, they blame their failure to state a claim on the novelty of their alleged right, but novelty does not excuse compliance with the Federal Rules of Civil Procedure. Nor is the Fifth Amendment a mere tool to be wielded by any plaintiff frustrated by current federal policy, without regard to the ramifications of recognizing a new fundamental right. This case should be dismissed or, if the Court prefers, stayed pending the Ninth Circuit's resolution of the pending appeal in *Juliana v. United States*.

ARGUMENT

I. The Court Does Not Have Jurisdiction Over Plaintiffs' Claims.

A. Plaintiffs Have Not Pled Facts that Demonstrate Standing.

Even accepting all of the facts alleged in the Amended Complaint as true, Plaintiffs do not have standing in this case.

1. Plaintiff Seeding Sovereignty Lacks Associational Standing.

Plaintiffs concede that an organization seeking associational standing must have at least one member who has standing. Pls.' Resp. to Defs.' Mot. to Dismiss 13, ECF No. 72 ("Resp."). But they claim that the organization need not specifically identify that member.[1] *Id.* (citing *NAACP v. Ameriquest Mortg. Co.*, 635 F. Supp. 2d 1096 (C.D. Cal. 2009)). Even if an organization is not required to name a specific member who has standing, it still must, at the very least, make clear that "one or more members have been or will be adversely affected by a defendant's action." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). In *NAACP*, the Court held that the plaintiff organization met this requirement by specifically alleging that "Members of the NAACP have been injured in fact by each Defendant" due to the defendants' predatory lending practices. 635 F. Supp. 2d at 1102.

The Amended Complaint does not meet this minimal requirement. It does not contain a single allegation about harm to Seeding Sovereignty's members due to Defendants' challenged conduct. *See* Am. Compl. ¶¶ 11-13, ECF No. 28. Plaintiffs contend that references to harm to the "indigenous way of life" are sufficient. Resp. 14. But harm to a "way of life" is not the same as harm to an individual person. And presumably not all indigenous people are members of

[1] Contrary to Plaintiffs' assertion, Defendants did not claim in their motion that a member of Seeding Sovereignty must individually participate in the litigation. *See* Defs.' Mot. to Dismiss Pls.' 1st Am. Compl. 8-9, ECF No. 66 ("Mot.").

Seeding Sovereignty. It is Plaintiffs' burden to demonstrate standing and, where they have not identified, even in the abstract, a single member of Seeding Sovereignty harmed by Defendants' alleged conduct, they fail to meet that burden.

2. Plaintiffs' Alleged Injuries Are Generalized Grievances that Cannot Support Standing.

Plaintiffs claim that they have satisfied the injury-in-fact requirement for standing by identifying specific concrete injuries, such as recreational harms due to wildfires, that allegedly result from climate change. But climate change is not like a mass tort, widespread voter fraud, or a tax imposed on the entire U.S. population. *See* Resp. 7. It is not a single specific problem that injures a large but discrete group of people in the same way. Rather, "climate change is [an alleged] harm that is shared by humanity at large" and experienced in a multitude of ways. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). Every single person, not only in the United States but on the planet, can allege a way in which they are harmed by the asserted effects of climate change, be it through sea level rise, natural disasters, rising temperatures, recreational or aesthetic harms, or even economic impacts to a particular business model. Plaintiffs' theory would therefore grant every person on the planet sufficient injury-in-fact to support standing. Such an expansion would swallow the injury-in-fact requirement altogether.

Plaintiffs claim *Massachusetts v. EPA* supports their claim of standing. But in *Massachusetts*, the Supreme Court applied a "relaxed" standing test because of the procedural right involved in the petition to perform a Clean Air Act rulemaking and because of Massachusetts' special position as a sovereign State. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1144-45 (9th Cir. 2013) (citing *Massachusetts*, 549 U.S. at 517-18); *see also Ctr. for Biological Diversity*, 563 F.3d at 476-77 ("*Massachusetts* stands only for the limited proposition

that, where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm."). The Ninth Circuit has refused to extend *Massachusetts*' relaxed standing requirements to non-sovereign litigants such as Plaintiffs here. *Bellon*, 732 F.3d at 1144.

Plaintiffs' attempt to distinguish *Center for Biological Diversity v. U.S. Department of the Interior* is equally misplaced. There, a tribal plaintiff asserted standing under *Massachusetts* as a sovereign entity. 563 F.3d at 477. The D.C. Circuit held that even if the tribal government was a sovereign entitled to special solicitude under *Massachusetts*, it had not alleged "individual harm" to its sovereign characteristics, i.e., its territory, "apart from the general harm caused by climate change." *Id.* What Plaintiffs ignore is that the court separately held that the non-sovereign plaintiffs' alleged aesthetic harms from climate change were insufficient to support standing because injuries allegedly caused by climate change are "shared by humanity at large" and thus "too generalized to establish standing." *Id.* at 478.

The fact that alleged climate change harm is so generalized and widely shared that it is difficult for any individual to establish standing "gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." *United States v. Richardson*, 418 U.S. 166, 179 (1974). Vindicating broad public interests that affect every citizen, let alone every human, "is the function of Congress and the Chief Executive," and the injury-in-fact requirement exists to ensure that role is not usurped by the courts in situations like this one. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

3. Plaintiffs' Alleged Injuries Are Not Traceable to the Challenged Government Actions and Inactions.

As Defendants established in their motion to dismiss, Plaintiffs' Complaint lacks any specific factual allegations supporting a causal connection between government actions and

greenhouse gas ("GHG") emissions, and between those emissions and Plaintiffs' alleged injuries. In response, Plaintiffs contend that they need not provide evidence of a causal chain at the motion to dismiss stage. But the fact that this case is before the Court on a Rule 12 motion does not give Plaintiffs a free pass on their burden to establish standing. While it is true that no admissible *evidence* is yet required, Plaintiffs bear the burden of *pleading* sufficient facts to support standing even at this early stage. *Lujan*, 504 U.S. at 561; *see also, e.g.*, *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 249 (E.D. Pa. 2019) (dismissing on Rule 12 motion lawsuit challenging government actions that allegedly contribute to climate change in part because plaintiff failed to allege facts demonstrating causation). They have failed to meet that burden.

First, Plaintiffs begin their causal chain with an "aggregate" of unidentified government actions and omissions. They expect the Court to draw a line from the specific wildfires and other natural events that have allegedly harmed them to potentially millions of unidentified individual agency actions occurring over a 50-year period. This is an impossible task, as it asks the Court to trace something (specific climate-related injuries) to nothing (unidentified government actions that "subsidize, promote, ensure price support, permit, lease, or otherwise encourage deforestation, animal agriculture, and fossil fuel development on federal lands," with no explanation of what those broad terms specifically refer to).

Second, Plaintiffs are not claiming that Defendants release GHGs into the atmosphere. They are claiming that Defendants allow third parties not before this Court to engage in activities on federal land that directly release GHGs into the atmosphere, remove carbon sequestration opportunities, and/or result in the production of resources that, when eventually consumed, release GHGs into the atmosphere. Thus, they ask the Court to assume that Defendants'

allowance of particular activities *necessarily* results in independent third parties choosing to partake in those activities on federal lands, and in downstream companies and individuals choosing to utilize various produced resources. A causal chain that relies on speculation about the behavior of independent third parties is inadequate for standing. *Bellon*, 732 F.3d at 1143-44; *Ctr. for Biological Diversity*, 563 F.3d at 478-79; *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 85-86 (D.D.C. 2012); *Clean Air Council*, 362 F. Supp. 3d at 249.

Third, Plaintiffs ask this Court to assume that the emissions attributable to development on federal lands cause their specific alleged injuries. But climate change is caused by "a multitude of independent third parties" who are therefore all "responsible for the changes contributing to Plaintiffs' injuries." *Bellon*, 732 F.3d at 1144. Plaintiffs' own statistics confirm this problem. Plaintiffs claim that "the lifecycle emissions associated with publicly-owned fossil fuel resources amount[] to 20 percent of all U.S. greenhouse gas emissions."[2] Resp. 10 (quoting Am. Compl. ¶ 125). In 2014, the United States produced 15% of the world's total GHG emissions. EPA Global Greenhouse Emissions Data, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data. If Plaintiffs are correct and 20% of those emissions are attributable to fossil fuel development on federal land, then fossil fuel development on federal land accounted for only 3% of the world's total GHG emissions in 2014.[3] Plaintiffs therefore

[2] "Lifecycle emissions" refers to the emissions generated at all stages of a resource's life, from initial development of the resource to production of a commodity using the resource and consumption of that commodity. Thus, this 20% figure includes downstream emissions totally divorced from government involvement and attributable to every American (e.g., emissions from driving cars and using electricity). *See, e.g.*, https://www.epa.gov/renewable-fuel-standard-program/lifecycle-analysis-greenhouse-gas-emissions-under-renewable-fuel.

[3] Plaintiffs do not provide statistics regarding the percentage of U.S. emissions attributable to animal agriculture or logging on federal lands. Rather, they allege that in 2016, 9% of U.S. GHG emissions "came from agriculture." Resp. 10; Am. Compl. ¶ 158. This allegation provides no evidence that *animal* agriculture *on federal lands* contributes meaningfully to U.S. GHG emissions. Likewise, Plaintiffs allege "federally-permitted, subsidized, and promoted

ask this Court to pin wildfires in Oregon, algae blooms in New Jersey, ice melt in the Arctic, and all their other specific injuries on the 3% of emissions allegedly attributable to mineral development on federal lands, ignoring all other sources of GHG emissions since the industrial revolution. *See Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1135 (D.N.M. 2011) ("[C]limate change is a global phenomenon whose manmade causes originated decades or centuries ago with the advent of the industrial revolution and continue today. Thus, climate change is dependent on an unknowable multitude of GHG sources and sinks, and it is impossible to say with any certainty that Plaintiffs' alleged injuries were the result of any particular action or actions by Defendants."). And they ask the Court to make this leap on faith. The Amended Complaint is conspicuously silent on whether a change in worldwide emissions by 3% (or by any specific amount) would have any effect whatsoever on Plaintiffs' specific injuries. Absent that allegation, Plaintiffs' causal chain is incomplete and insufficient to support standing.

When faced with a similarly attenuated causal chain linking alleged climate change injuries to the government's regulation of third parties, the Ninth Circuit rejected it, holding that "conclusory, generalized statements" concerning an activity's "contribution" to climate change, "without any plausible scientific or other evidentiary basis that the [challenged activity's] emissions are the source of their injuries," are insufficient to support standing. *Bellon*, 732 F.3d at 1142. This Court should follow the Ninth Circuit and reject Plaintiffs' request that it infer a causal chain between government actions and specific climate change-related injuries when

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commercial logging reduces the carbon storage potential of U.S. forests by 42 percent." Resp. 10; Am. Compl. ¶ 191. This statistic says nothing about the impact of that alleged reduction on U.S. carbon storage as a whole, or how that reduction affects worldwide climate change. *Cf. Bellon*, 732 F.3d at 1146 (holding plaintiffs lacked standing where they did "not provide any evidence that places" alleged GHG statistics "in national or global perspective to assess whether the refineries' emissions are a 'meaningful contribution' to global GHG levels").

Plaintiffs themselves have not alleged facts that support such a connection.

4. Plaintiffs' Injuries Cannot Be Redressed by This Court.

Instead of addressing Defendants' arguments as to why their injuries are not redressable, Plaintiffs simply assert that the Court must accept as true their conclusory allegations that the relief sought in the Amended Complaint will redress their injuries and mitigate climate change. This is incorrect. To survive a motion to dismiss on the issue of redressability, a plaintiff "must allege facts from which it reasonably could be inferred that, absent the [challenged policy], there is a substantial probability that . . . if the court affords the relief requested, the asserted [injury] will be removed." *Warth v. Seldin*, 422 U.S. 490, 504 (1975). The Court need not accept Plaintiffs' legal conclusions regarding the scope of its jurisdiction as true, and it need not rely on Plaintiffs' purely speculative assertions regarding whether "a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of plaintiff's injuries." *Darensburg v. Metro. Transp. Comm'n*, No. 05-cv-01597, 2005 WL 2277031, at *7 (N.D. Cal. Sept. 19, 2005) (quoting *Nat'l Wrestling Coaches Ass'n v. Dep't of Education*, 366 F.3d 930, 938 (D.C. Cir. 2004)).

As Defendants explained in their motion, it is entirely speculative whether the relief requested by Plaintiffs would have any effect on climate change, let alone on Plaintiffs' specific injuries. Mot. 17; *cf. Allen v. Wright*, 468 U.S. 737, 758 (1984) (holding parents lacked standing to challenge IRS regulations granting tax exemption to racially discriminatory schools because "it is entirely speculative" whether withdrawing the exemption "would have a significant impact on the racial composition of the public schools"), *abrogated on other grounds by Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Even if the federal government phased out fossil fuel development, animal agriculture, and logging on federal lands, there are no

allegations in the Amended Complaint indicating that total U.S. emissions would drop meaningfully, that global climate change would slow or halt, or that Plaintiffs' specific injuries, such as wildfires in Oregon, would improve or cease. Indeed, even if accepted as true, Plaintiffs' statistics support only a 3% reduction in worldwide emissions. And that assumes, without evidence, that emissions-generating activities that are currently occurring on federal lands would not simply move to non-federal lands (at least in part). This Court is not required at any stage of the litigation to defer to conclusory speculation that is not supported even by Plaintiffs' own allegations. Because Plaintiffs have not alleged facts suggesting a "substantial probability" that the requested relief would redress their injuries, they fail to satisfy the third standing prong.

Plaintiffs also overlook the over 100 years of federal statutes that, taken together, all but forbid the relief requested by Plaintiffs.[4] Plaintiffs ask this Court to outlaw fossil fuel development, animal agriculture, and commercial logging on federal lands. But Congress has unambiguously expressed its preference that defendant agencies allow these activities. *See, e.g.*, Mot. 19-20; 43 U.S.C. § 1903(b) (The "goal" of federal public rangeland management "shall be to improve the range conditions of the public rangelands" for grazing among other uses); 43 U.S.C. § 1702(c) (Federal Land Policy and Management Act requires BLM to manage lands for "multiple uses" including but not limited to "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values"); *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 801 (9th Cir. 2005) (National Forest Management Act "obligat[es] the Forest Service to balance competing demands on national forests, including

[4] Plaintiffs mistakenly read Defendants' motion to argue that Plaintiffs ought to bring their claims under various federal statutes instead of the Constitution. Resp. 12. Defendants' point is not that these statutes necessarily provide a cause of action, but that they limit the scope of any relief. The Administrative Procedure Act ("APA"), however, does provide a cause of action to pursue constitutional claims against federal agencies. 5 U.S.C. § 706; *see also infra* Section II.

timber harvesting, recreational use, and environmental preservation" (internal quotation marks and citation omitted)).

Plaintiffs seek a monumental shift in the management of federal lands away from Congress' preference for balancing multiple uses of public lands and toward their own preference of favoring preservation of "wilderness" over development in nearly all circumstances.[5] But accomplishing such a sea change would require the vacatur or amendment of myriad statutes governing federal energy, environmental, and agricultural policy. If that is truly what Plaintiffs seek, *see* Resp. 12 ("Statutes must yield to constitutional rights"), they must do the work of challenging each of those statutes directly.

B. Plaintiffs Do Not Satisfy Article III's Case or Controversy Requirement.

Instead of responding to Defendants' argument that Plaintiffs' claims do not constitute a case or controversy under Article III, Plaintiffs address a political question doctrine argument that Defendants did not make. The two arguments are not the same.

"The Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional case or controversy, that the issues presented are definite and concrete, not hypothetical or abstract." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (internal quotation marks and citation omitted). "A party invoking

[5] Plaintiffs' failure to fully understand the scope of their requested relief is highlighted by their statement that "defendants alone have permitted these climate change-causing activities to occur on federally owned public lands." Resp. 11. Defendant federal agencies act within the authority delegated by Congress and in accordance with directives established by statute. To the extent Defendants "promote, permit, and subsidize" aspects of fossil fuel development, grazing, and logging on federal lands, it is because they have been directed to do so by Congress. Thus, Plaintiffs' statement that "[*o*]*nly defendants* have the means to end the federal permission, subsidization, encouragement, and promotion of animal agriculture, fossil fuel development, and deforestation on public lands," *id.*, is wrong. Congress has the means to end these activities; in many cases, Defendants do not have the ability to end them because doing so would violate the laws governing these agencies.

federal jurisdiction has the burden of establishing that it has satisfied the 'case-or-controversy' requirement of Article III of the Constitution." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008).

The political question doctrine involves a second step: it asserts that even if the matter at issue is a "case or controversy," it is not justiciable if it involves "policy choices and value determinations constitutionally committed to the Congress or the Executive Branch." *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990). While the determination of whether there is a political question requires application of the six-factor test in *Baker v. Carr*, there is no set test for determining whether Plaintiffs have shown that there is, in fact, a case or controversy in the first instance. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979) ("The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test."). In misrepresenting Defendants' case or controversy argument as a political question argument, Plaintiffs attempt to leapfrog over the initial question, which is their burden to prove. Nor do Plaintiffs provide any historical analogue to the ability to bring an action like the sprawling one they have brought here to the kinds of actions cognizable at the Courts of Westminster. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) ("'Cases' and 'Controversies' is properly understood to mean cases and controversies of the sort traditionally amenable to, and resolved by" the Courts at Westminster).

Plaintiffs' open-ended challenge to 50+ years of unidentified "aggregate actions and inactions" and their requested relief of rewriting vast swathes of federal policy is simply too abstract for Article III. It is not a discrete "case" or "controversy," but instead a broad policy disagreement. *See Bellack v. United States*, 962 F.2d 13 (9th Cir. 1992) (Table) ("The complaint is too abstract to constitute a case or controversy."). The abstract nature of the suit is evidenced

by the fact that it bypasses the usual restraints that limit a matter to a discrete case or controversy such as challenging specifically identified government actions, policies, or statutes, or seeking narrowly-tailored relief. For example, by not identifying the specific actions they are challenging, Plaintiffs attempt to skirt the traditional means of evaluating a case under Article III, such as ripeness and mootness. But no amount of artful pleading can relieve Plaintiffs of their burden to demonstrate the existence of a justiciable case or controversy.

Instead of responding to this overarching concern head on, Plaintiffs cherry-pick two narrow points made in Defendants' motion and respond solely to them. First, Plaintiffs note Defendants' contention that this Court is not equipped to determine the GHG reductions necessary to address climate change. They claim they are not asking the Court to make that determination but to instead require Defendants to phase out fossil fuel development, animal agriculture, and logging on federal lands.[6] Resp. 17-18. This is a distinction without a difference. Defendants' point here is that Plaintiffs are asking this Court to address issues far beyond its ken. Whether the relief requested by Plaintiffs could, as a matter of science, "mitigate the impacts of climate change on wilderness degradation" is only part of the analysis. *Id.* at 18. The other part, which Plaintiffs overlook, is whether the requested relief represents the appropriate means of balancing the interests of all affected individuals and entities—including not only the individuals who enjoy accessing public lands for recreation but also, for example, the ranchers and companies who depend on public lands for their livelihood and have paid for

[6] Plaintiffs ask this Court to declare that the "United States Government has violated and is violating Plaintiffs' constitutional rights . . . by causing and/or contributing to a dangerous concentration of greenhouse gases in the atmosphere." Am. Compl. 71. It is not clear how Plaintiffs expect the Court to determine the existence of a "dangerous concentration" of GHGs if they are not asking the Court to opine on what constitutes a safe concentration of GHGs, and thus serves as the ultimate goal of emissions reductions. Resp. 17.

leases and permits, the utilities that use oil and gas from federal lands to produce electricity, and the consumers who consume that electricity. This Court is not equipped to answer either of those questions. *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 427-29 (2011).

Second, Plaintiffs claim their requested relief would not require the Court to determine which federal agencies must promulgate regulations or alter their modes of operation. Resp. 19. This is wrong. If the Court orders all four defendant agencies to phase out fossil fuel development, animal agriculture, and logging on federal lands, it will as a practical matter be ordering those agencies to rewrite their regulations and fundamentally change their operations in a manner that accords with the Court's order.

Plaintiffs consistently attempt to minimize the extent of their claims and relief sought, comparing this case to other cases in which courts "fashioned complex remedies." *Id.* at 18. But this case is not analogous to *Brown v. Board of Education*, 349 U.S. 294 (1955), or *Brown v. Plata*, 563 U.S. 493 (2011). *Brown* and *Plata* involved state systems and thus did not raise the same separation of powers concerns. Even putting that important distinction aside, Plaintiffs are not asking this Court to rule on a discrete controversy wholly contained within a single state prison system (overcrowding in *Plata*) or a single school district (segregation in *Brown*).[7] They are asking this Court to evaluate (at minimum) the energy, environmental, economic, agricultural, family planning, and national security policies of the federal government over a more than 50-year time period, as manifested in likely millions of different agency actions, and

[7] Plaintiffs also cite *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Supreme Court held that abortion restrictions may not place an "undue burden" on a woman's decision to terminate a pregnancy before fetal viability. 505 U.S. 833 (1992). The undue burden test is a legal test for determining whether a woman's due process rights have been infringed. It is not a remedy and thus it is not clear why Plaintiffs believe the case relevant to their discussion of complex remedies.

to implement Plaintiffs' preferred policies, regardless of the harm to numerous other non-parties or the inconsistency of those policies with Congressional intent. And they ask this despite the fact that the alleged cause of their injuries—climate change—is a complex international phenomenon to which every country and human being contributes.

In short, Plaintiffs improperly seek to vindicate their alleged constitutional violations at the expense of Article III.

II. Plaintiffs Must Bring Their Claims Under the APA.

Plaintiffs contend that they can avoid the cause of action specifically created by Congress for challenges to agency action and inaction by bringing their claims directly under the Constitution. This argument ignores the Supreme Court's warning that "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015). A plaintiff cannot "circumvent" Congress's remedial scheme for constitutional violations resulting from agency action and inaction "by invoking" the Court's "equitable powers." *Id.*; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." (citing *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988))).

Plaintiffs try to avoid *Armstrong* by claiming that the "APA contains no express language suggesting Congress intended that it eliminate the availability of constitutional claims for equitable relief." Resp. 47. But this misstates the test. The equitable power of federal courts "is subject to express *and implied* statutory limitations." *Armstrong*, 135 S. Ct. at 1385 (emphasis added). The question is whether the design of the statute establishes Congress' "'intent to

foreclose' equitable relief." *Id.* The APA meets these criteria. It expressly creates a cause of action against agency action and inaction for alleged constitutional violations. 5 U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity[.]"). And it establishes the method of review—based on the administrative "record"—and available remedies. *Id.* § 706. This "express provision of one method of enforcing" constitutional violations caused by agency actions "suggests that Congress intended to preclude others." *Armstrong*, 135 S. Ct. at 1385 (addressing the Medicaid Act, and quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)); *see also Cousins v. Dole*, 674 F. Supp. 360, 363 (D. Me. 1987) ("[T]he existence of an effective and substantial statutory remedy in the Administrative Procedure Act obviates the need to imply a constitutional remedy from the Fifth Amendment in this case."); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014) (holding First Amendment claim "arises under the Constitution, but it is subject to the APA's procedural provisions").[8]

Plaintiffs misread *Webster v. Doe* to require a "heightened showing" to establish Congress' intent to channel constitutional claims into a particular statutory scheme. Resp. 47. In

[8] In a July 3, 2019 decision, a majority of the Ninth Circuit motions panel found that, between the APA and the court's equitable authority, plaintiffs in that case had "at least one" cause of action available for an alleged constitutional violation. *Sierra Club v. Trump*, No. 19-16102, 2019 WL 2865491, at *17-21 (9th Cir. July 3, 2019). As did the plaintiffs in *Juliana*, Plaintiffs here will no doubt contend that this decision is relevant to the United States' argument that the APA provides the sole cause of action for their claims. *See* Ex. A (Rule 28(j) letter filed by Plaintiff-Appellees in *Juliana*). Those arguments are erroneous for the reasons set forth in the government's response in *Juliana*. *See* Ex. B (United States' response to Rule 28(j) letter in *Juliana*). Additionally, on July 26, 2019, the Supreme Court stayed the injunction granted by the district court and affirmed by the Ninth Circuit in *Sierra Club v. Trump* because "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action . . . ." Ex. C. In any event, the Ninth Circuit's pending consideration of *Sierra Club* in *Juliana* provides an additional reason for the Court to stay this case. *See infra* Section VI.

Webster, a former CIA employee whose employment was terminated by the CIA director allegedly due to the employee's homosexuality brought two sets of claims, both under the cause of action provided by the APA. 486 U.S. 592, 596, 602 (1988). The first set alleged a violation of the APA's arbitrary and capricious standard; the second alleged violations of the employee's First, Fourth, Fifth, and Ninth Amendment rights. The Court held that the provision of the National Security Act ("NSA") under which the employee was terminated committed "individual employee discharges to the Director's discretion" and that the employee's statutory claims alleging violation of the APA were therefore precluded by Section 701(a)(2) of that statute. *Id.* at 601. However, the Court rejected the CIA's argument that the discretionary language of the NSA also precluded the employee's constitutional claims, holding that a "heightened showing" is needed to demonstrate Congress' intent "to *preclude* judicial review of constitutional claims." *Id.* at 603 (emphasis added).

The heightened showing required by *Webster* does not apply here because Defendants are not alleging that Congress has entirely precluded review of Plaintiffs' constitutional claims. Rather, those claims must proceed under the auspices of the APA. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (*Webster*'s heightened standard "does not apply where Congress simply channels judicial review of a constitutional claim to a particular court."). Moreover, Plaintiffs are wrong in contending that the Court in *Webster* found that constitutional claims challenging agency action may proceed outside of the APA. In fact, the Court expressly noted that the employee brought his constitutional claims "under the APA." *Webster*, 486 U.S. at 602. The Court's holding went to the scope of Section 701(a)(2)'s preclusive reach; it did not exempt constitutional claims from the rest of the APA's requirements. *See Sierra Club*, 2019 WL 2865491, at *20 (interpreting *Webster* as "holding that a plaintiff may raise under the APA a

constitutional challenge to agency action even where the plaintiff lacks an avenue under the APA to argue that the same agency action is invalid for statutory or procedural reasons").[9]

Plaintiffs also cite *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017), but that case addressed the APA's waiver of sovereign immunity, not its cause of action. In *Navajo Nation*, the Ninth Circuit held that the APA waives sovereign immunity for claims seeking non-monetary relief against the government whether the claims are brought pursuant to the APA or another cause of action. *See id.* at 1167-73. Contrary to Plaintiffs' representation, it did not hold that constitutional claims "do not depend" on the APA's cause of action. Resp. 47. In fact, the court stated: "Claims not grounded in the APA, like the constitutional claims in *Presbyterian Church* and *VCS I*, 'do[ ] not depend on the cause of action found in the first sentence of § 702' and thus § 704's limitation does not apply to them." 876 F.3d at 1170 (quoting *Veterans for Common Sense v. Shinseki* (*VCS I*), 644 F.3d 845, 867 (9th Cir. 2011)). Unlike the claims in this case, the constitutional claims in *Presbyterian Church* and *VCS I* did not clearly challenge agency actions and thus arguably could not proceed under the APA. *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523-26 & n.8 (9th Cir. 1989); *VCS I*, 644 F.3d at 868-70.[10]

Finally, Plaintiffs' contention that requiring them to bring their claims under the APA "gives the Government unlimited opportunity to decline review of the aggregate and systemic harms . . . because each court could consider the single federal agency action before it only" is

[9] Even if *Webster* could be read to suggest that the employee's constitutional claims could proceed outside of the APA, the case is different from this one because Plaintiffs here have not argued that any provision of the APA precludes review and thereby makes the APA cause of action unavailable.

[10] In *Sierra Club v. Trump*, the Ninth Circuit relied on *Navajo Nation* and *Presbyterian Church* to support its conclusion that the APA may not foreclose an equitable cause of action, but the court ignored the distinctions noted above. 2019 WL 2865491, at *20-21.

baseless. Resp. 48. A plaintiff can challenge more than one agency action under the APA in the same lawsuit, and they can assert aggregate harms from multiple actions. *See, e.g.*, *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019) (challenging more than 300 oil and gas drilling permits and alleging aggregate cumulative impacts on air and water). Moreover, this argument is purely speculative because Plaintiffs have never tried to bring their claims in this case under the APA. In fact, rather than allowing the government to evade review, the APA provides a formal framework for accountability, but prevents plaintiffs from evading their burden and seeking review only on assumptions and generalities by requiring the identification of the actual actions that are allegedly causing harm.

Plaintiffs do not contend that they could not bring their claims under the APA, only that they have "chosen" not to. Resp. 47. But where Congress has established a "comprehensive remedial scheme" for constitutional violations arising from agency actions, Plaintiffs may not opt out of it. *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009).

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

Plaintiffs' Fifth Amendment claim fails as a matter of law because there is no fundamental right to wilderness and Plaintiffs have not alleged facts that support a "failure to protect" claim.

A. There Is No Fundamental Right to "Wilderness."

Plaintiffs have failed to state a claim under the Fifth Amendment because they have failed to articulate a coherent right. Plaintiffs' "right to wilderness" is an undefined moving target. As explained in Defendants' motion to dismiss, the definition of "wilderness" in Plaintiffs' Amended Complaint is meaningless as it is based on abstract philosophical constructs that provide no guidance as to what Plaintiffs believe they have a right to. Mot. 29-30. Rather

than clarifying the asserted right, Plaintiffs' response further clouds it. Plaintiffs now assert that their alleged right to wilderness is premised on the concept of solitude, which "is not a specific environment, but rather a range of wilderness or nature that was always assumed, and relied upon . . . ." Resp. 21-22. So we have now gone from an amorphous right to "wilderness" to an even less definite right to a "range of wilderness or nature," with no clarification as to what environments might fall within that "range." Additionally, having premised their asserted right on Locke's social contract theory in the Amended Complaint, Plaintiffs now accuse Defendants of "misunderstanding" Plaintiffs' use of that concept. *Id.* at 25 n.10. Despite asserting in their Amended Complaint that "Plaintiffs now find themselves bound to a contract (1) to which they cannot meaningfully consent, with no remaining state of nature as an alternative, and (2) that should be dissolved as the Government has not met its fundamental social contract obligations as envision[ed] by the Framers," Am. Compl. ¶ 250, Plaintiffs now contend that they did not, in fact, intend to claim a right to "escape to an ungoverned sanctuary." Resp. 25 n.10. They further confuse the issue by asserting that "practically" their "sole means of enjoying access to wilderness now runs through federal lands," *id.* at 40, while at the same time alleging harms flowing from the impact of climate change on state lands and areas in other countries. Am. Compl. ¶¶ 10, 29, 16-20.

Plaintiffs' inability to define their right, and their inconsistent explanations of the nature of the right, are fatal to their claim. "'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). The Ninth Circuit has cautioned against defining a right too broadly so as to avoid

"unintended consequences." *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007). Plaintiffs, however, have ignored these warnings and defined their right in a way that renders it impossible for Defendants and this Court to grasp the contours of the asserted right. It is not a right to exit governance but it is a right to "dissolve" the social contract. *See* Am. Compl. ¶ 250. It is not a right to a specific environment but it is a right to a "range" of environments. *See* Resp. 21. It is a right to "experience solitude or an absence of coercive human control," *id.* at 28, but yet it is available primarily on federal lands that are open to all and subject to extensive government regulation. These inconsistencies are a far cry from the "careful description" required for an expansion of the substantive due process doctrine and cannot be overlooked on the ground that Plaintiffs raise a "novel legal theory." *Id.* at 21 n.7. Novelty does not excuse a plaintiff's failure to state a coherent claim.

The "right to wilderness" is also not "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" as is required for a substantive due process right.[11]

[11] Plaintiffs inaccurately claim that Defendants misrepresented this test and that it is properly disjunctive: "deeply rooted in this Nation's history and tradition" *or* "implicit in ordered liberty." Resp. 21 & n.8. In fact, in *Glucksberg*, the Supreme Court connected the two concepts with an "and," making clear that both elements are required. 521 U.S. at 721. Justice Scalia made this explicit in *Lawrence v. Texas* where he explained in dissent that "An asserted 'fundamental liberty interest' must not only be 'deeply rooted in this Nation's history and tradition,' but it must also be 'implicit in the concept of ordered liberty' . . . ." *Lawrence v. Texas*, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting) (internal citation omitted); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) ("Our precedents have required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' *and* 'implicit in the concept of ordered liberty . . . .'" (emphasis added)). Plaintiffs reach the opposite conclusion by quoting the Court in *McDonald v. City of Chicago* out of context. 561 U.S. 742, 767 (2010) ("[W]e must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'" (internal citation omitted)). Indeed, in his concurrence, Justice Thomas makes clear that the Court in *McDonald* concluded the right to keep and bear arms met both prongs of the test. *Id.* at 806 (Thomas, J., concurring).

Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted). Plaintiffs first contend that the alleged right is fundamental to our ordered scheme of liberty because it is a necessary part of the broader "right to be let alone," which allegedly anchors the "continuum of liberty and autonomy." Resp. 22-23. But the cases that Plaintiffs cite to support this concept undermine their argument. In *Roe v. Wade*, Justice Stewart wrote in concurrence that the "full scope of the liberty guaranteed by the Due Process Clause" is a "rational continuum which, broadly speaking, includes a freedom *from all substantial arbitrary impositions and purposeless restraints . . . .*" 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added). But as explained in Defendants' motion, the alleged right to wilderness does not merely ask Defendants to leave Plaintiffs alone and allow them to exercise their "freedom of personal choice" without government interference. *Id.* It instead asks Defendants to take affirmative steps to provide a particular environment (or range of environments) to Plaintiffs. Mot. 32-33.

Plaintiffs claim that "[w]ithout wilderness, there is no baseline against which to determine whether the right to be let alone has been meaningfully infringed." Resp. 24. They ask, without a right to wilderness, "[h]ow else can we justify the fundamental right of privacy . . . as it appears in modern substantive due process?" *Id.* at 22. First, Plaintiffs' starting premise is flawed because "[t]here is no constitutional right of privacy, as such," nor a broad "right to be let alone." *Roe*, 410 U.S. at 167 n.2 (Stewart, J., concurring). "[T]he protection of a person's general right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 350-51 (1967)). Regardless of its merits for academic debate, the amorphous and undefined "right to be let alone" is not a substantive due process right recognized

by the Supreme Court and thus cannot serve as the foundation for a new fundamental right. *See id.*; *Hill v. Colorado*, 530 U.S. 703, 717 & n.24 (2000) (The right to be let alone "is more accurately characterized as an 'interest' that States can choose to protect in certain situations.").

Second, Plaintiffs' contention that their alleged right to wilderness is somehow necessary to conceive of other liberties is logically incoherent. A right that asks the government to affirmatively provide something cannot be the baseline for "being let alone" by the government. Moreover, courts have been recognizing and protecting other fundamental liberties for decades without ever invoking "wilderness." One would think that if wilderness were a necessary "baseline" for the "continuum of liberty," courts would have acknowledged it. One would also think that if "wilderness" were the "baseline" against which we measured being "let alone," it would not be primarily defined to include highly regulated government-owned lands.

Plaintiffs accuse Defendants of "taking the unhinged position that the continuum of liberty and autonomy occurs in some abstract reality outside of our physical environment . . . ." Resp. 24. But it is Plaintiffs who steadfastly refuse to define their right to wilderness using real places on Earth or identifiable physical characteristics and instead persist in describing the right solely in abstract philosophical terms. Plaintiffs' alleged right to have access to certain unidentified locations maintained by the government in a particular undefined condition based on a broad "right to be let alone" that the Supreme Court has never recognized is far from "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721.

The right to wilderness is also not "deeply rooted in this Nation's history and tradition."[12]

[12] According to Plaintiffs, European colonists, including the Framers, were "highly conscious" of Locke's state of nature, which they believed "literally" existed "amongst the Indians of the Americas." Resp. 25. Plaintiffs therefore premise their alleged fundamental right on John Locke's misconception of native tribes as living in a "state of nature" apart from government. *Cf.* The Constitution of the Iroquois Nations, https://sourcebooks.fordham.edu/mod/iroquois.asp.

Id. Plaintiffs acknowledge that the historical record demonstrates the longstanding use of public lands for the very purposes—farming, logging, and mineral development—that Plaintiffs now wish to outlaw as incompatible with "wilderness." Resp. 28-29. Indeed, Plaintiffs' own allegations suggest that these practices are more entrenched in the American tradition than the concept of protecting "wilderness." *See id.* at 29 (suggesting that attempts to preserve wilderness did not begin until the mid-nineteenth century after decades of farming, logging, and mineral extraction).

Equally important, none of the sources cited by Plaintiffs support an individual fundamental right that guarantees access to a government-provided environment of a certain quality. Assuming Plaintiffs' representations are true for the purposes of a motion to dismiss, their allegations demonstrate an interest at various times in the nineteenth and twentieth centuries in protecting certain natural places. But Plaintiffs' allegations do not support an individual right or entitlement to access specific places on federal lands that are maintained by the government to preserve their "wilderness" qualities. *See Glucksberg*, 521 U.S. at 724 (noting question is whether history supports the specific carefully and narrowly described right). Recognition that nature is important and certain places should be protected is not the same as a recognition of a fundamental *right* to wilderness that the government may not infringe unless "the infringement is narrowly tailored to serve a compelling [government] interest." *Id.* at 721. While Plaintiffs' sources may evidence an acknowledgement of the significance of natural places, not one supports the idea that the government has an affirmative legal obligation to protect those areas or that failure to protect those areas would violate an individual's constitutional rights.

Plaintiffs also oversimplify history, assuming past conceptions of preserving nature align with Plaintiffs' conception of wilderness as a place where one can seek solitude apart from

"human influence." For example, Plaintiffs note that Yellowstone was reserved "as a public park" in 1872. Resp. 31 (quoting Act of Mar. 1, 1872, 17 Stat. 32 § 1). They omit, however, that it was specifically identified as a "pleasuring ground" and that Congress authorized "the construction of roads" and the leasing lands inside the park for "the erection of buildings for the accommodation of visitors." 17 Stat. 32 §§ 1-2. Likewise, the grant of lands in the Yosemite Valley to California in 1864 contemplated leasing lands within the area to private interests. Act of June 30, 1864, 13 Stat. 325 § 1. Plaintiffs tout the creation of the National Forest system as evidence of the historical protection of wilderness, but the statutes establishing most forests expressly protect prospecting and mineral development rights on those lands. *See, e.g.*, 16 U.S.C. §§ 478, 482. And the Wilderness Act itself provides for mineral prospecting, livestock grazing, and the construction of power projects and transmission lines in wilderness areas. *Id.* § 1133(d)(2), (4). Plaintiffs are presenting a skewed version of history by ignoring the aspects that do not align with their alleged right.[13]

Plaintiffs also allege that the "pro-protection win rate" in cases challenging agency actions as insufficiently protective of the environment under the Wilderness Act "implicitly recognize[s] the right to wilderness." Resp. 34. This argument is completely divorced from

[13] In support of their claim that legislation has consistently recognized "the need to maintain a certain environmental baseline on federal wild lands," Resp. 37, Plaintiffs cite statutes designating historic buildings like forts, towns, and villages as part of national parks. *Id.* (citing 16 U.S.C. § 230, which establishes the Jean Lafitte National Historic Park and Preserve in Louisiana and includes locations in the French Quarter of New Orleans, and 16 U.S.C. § 410kkk-1, which establishes the Lewis and Clark National Historic Park and includes an encampment and salt claim). One would think that locations in the built environment would not qualify as "wilderness." *See* 16 U.S.C. § 1131(c) ("A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."). Thus, either Plaintiffs' definition of their asserted right is far more expansive than suggested in their complaint and briefing, or the cited legislation demonstrates that history and tradition is far more complex than simply conserving wild places for their wilderness features.

every recognized method of identifying new fundamental rights. It is also unfounded. The win rate on a statute enacted in 1964 hardly demonstrates "deeply rooted . . . history and tradition." *Glucksberg*, 521 U.S. at 721. And decisions on agency implementation of a particular statute say nothing about substantive due process rights. While courts may find merit in a majority of civil actions asserting Wilderness Act claims, Plaintiffs' extrapolation that "judges implicitly recognize wilderness" as a "fundamental right," Resp. 35, is speculative and unsupported.

As explained in Defendants' motion, every court to consider a similar alleged constitutional right to an environment of a particular type or quality has rejected it. Mot. 30-31. Plaintiffs cursorily dismiss these cases as "inapposite and off point," Resp. 35 & n.13, but their attempts to distinguish the cases are unconvincing. Plaintiffs first dismiss *Delaware Riverkeeper Network v. FERC* as addressing a state constitutional right. Resp. 35 n.13. However, while the case did involve state law, it expressly rejected a "federally protected liberty interest" in a "right to healthy environment."[14] 895 F.3d 102, 108 (D.C. Cir. 2018). They next argue that they are not seeking a "pollution-free environment" but rather "use and enjoyment of existing public wild lands." Resp. 35 n.13. This distinction is belied by Plaintiffs' claim that their right to wilderness is infringed by government-approved activities that result in GHG emissions. Plaintiffs do not just want access to "existing public wild lands"; they already have access to existing public wild lands. Rather, Plaintiffs want access to a "wilderness" unaffected by GHG emissions—that is, a pollution-reduced, if not pollution-free, natural environment. Tellingly, Plaintiffs completely ignore *Clean Air Council v. United States*, 362 F. Supp. 3d 237 (E.D. Pa. 2019), which rejected the same novel constitutional right that the court in *Juliana* embraced and which Plaintiffs in this

[14] Plaintiffs also inexplicably distinguish two cases that Defendants did not cite in their motion. Resp. 35 n.13 (citing *Baker v. Dep't of Envtl. Conservation*, 634 F. Supp. 1460 (N.D.N.Y. 1986), and *Nat'l Ass'n of Prop. Owners v. United States*, 499 F. Supp. 1223 (D. Minn. 1980)).

case consistently reference as support for their claims.

Faced with eleven cases rejecting analogues of their asserted right, Plaintiffs identify only one (aside from *Juliana*) that allegedly supports it: *Environmental Defense Fund v. Corps of Engineers of the U.S. Army*, 325 F. Supp. 728 (E.D. Ark. 1971). But this case confirms Defendants' position. There, the court rejected the plaintiffs' alleged Fifth Amendment right "to live in an environment that preserves the unquantified amenities of life." *Id.* at 739. In doing so, the court quoted Judge Learned Hand: "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." *Id.* (quoting *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Learned Hand, J., dissenting)). The court went on to explain that "final decisions in matters of this type must rest with the legislative and executive branches of government." *Id.* Thus, this case adds a twelfth to Defendants' list of cases that reject a constitutional right to an environment of a particular quality and confirms Defendants' position that broad matters of environmental policy are best left to the representative branches of government.

Plaintiffs' remaining scattershot arguments are equally unavailing.[15] Plaintiffs attempt to analogize their asserted right to the personal rights at issue in other fundamental rights cases like procreation, child-rearing, and bodily integrity by claiming that their alleged right "implicates plaintiffs' personal relationship with wilderness." Resp. 36. But courts have never treated a relationship to a place or philosophical concept the same as a relationship to one's body or another human being. And while Plaintiffs are correct that the Fifth Amendment does not expressly limit unenumerated rights to marriage, abortion, and other intimate personal arenas,

[15] Plaintiffs contend that Defendants' failure to identify a case specifically rejecting a right to wilderness supports their claimed right. Resp. 35. But the absence of a case rejecting an unsupported right is hardly evidence that such a right exists.

there is an obvious difference between a right that implicates few other people and requires only that the government stop interfering, and the right asserted by Plaintiffs. Plaintiffs have failed to justify recognition of a new right that not only implicates the rights of every other person who lives in the United States, but also likely impinges on their interests. After all, one person's wilderness and place of solitude is another person's rangeland for cattle. *See Hawthorn Envtl. Pres. Ass'n v. Coleman*, 417 F. Supp. 1091, 1095 (N.D. Ga. 1976) ("[P]laintiffs have not cited any cases recognizing a constitutional right to environmental tranquility, or extending the 'right to be let alone' into the environmental context. All governmental action ultimately infringes on some individual's desire for peace and privacy; however, it is clear that one person's environmental tranquility may be another person's environmental nightmare of clogged streets during rush hour traffic."). Plaintiffs' request that the Court constitutionalize their desired use of public lands at the expense of someone else's puts the Court in the position of making the tough policy choices that our form of government assigns to agencies and elected officials with the relevant expertise and constituencies. *See AEP*, 564 U.S. at 427-29; *Lujan*, 504 U.S. at 559-60.

Plaintiffs misleadingly assert that Defendants' contention that there is no fundamental right to wilderness translates to an assumption that "defendants may at will denude federal wild lands of their natural character, making these lands unsuitable for public enjoyment." Resp. 37. This claim ignores the statutes that govern agencies' management of public lands and require agencies to balance various uses, including recreation. *See, e.g.*, 43 U.S.C. §§ 1701(a)(7)-(8), 1732(a) (requiring management of BLM lands for "multiple uses"); 16 U.S.C. § 1600(3) (same for national forests). Defendants' point is not that agencies may do whatever they want to public lands; it is that Congress has historically weighed the various competing uses of public lands and has never once found that a single individual has a right to force the government to accommodate

their desire for "wilderness" or "solitude" at the expense of other interests.

Plaintiffs' contention that the right they seek is "no greater than what has been traditionally afforded to the citizens of this country," Resp. 37, severely understates the impact of their claims. Never before has an individual been able to direct the government to maintain government-owned property in a particular manner for a particular use, at the expense of competing public uses. And while Plaintiffs try to downplay the ramifications of their claim, by suggesting that "limited destruction or impairment" would not necessarily infringe on the right to wilderness, *id.*, they ignore that alleged violations of fundamental rights are not subject to a "limited impairment" standard; they are subject to strict scrutiny.

It is for precisely this reason—the possibility of significant, unpredictable real-world consequences—that the Supreme Court has cautioned against recognizing new expansive and poorly defined substantive due process rights. This court should heed that advice and refuse Plaintiffs' invitation to recognize a "right to wilderness."

B. Plaintiffs Fail to State a Failure to Protect Claim.

Plaintiffs remain evasive about whether they are actually asserting a failure to protect claim. They first contend that "[t]his is not a mere failure-to-protect claim" and does not fit within the failure to protect case law under *DeShaney v. Winnebago County*, 489 U.S. 189, 195 (1989). Resp. 38. This concession makes sense because *DeShaney* is clear that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," 489 U.S. at 195, and thus the government is not liable for its alleged failure to regulate the GHG emissions of third parties. Notwithstanding that initial contention, however, Plaintiffs claim that the two exceptions to *DeShaney* apply here. They are wrong on both accounts.

First, the "special relationship"[16] exception "applies when a state 'takes a person into its custody and holds him there against his will,'" thereby "assuming some responsibility for the person's safety and wellbeing." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 972 (9th Cir. 2011) (quoting *DeShaney*, 489 U.S. at 199-200). It "does not apply when a state fails to protect a person who is not in custody." *Id.* Here, Plaintiffs have not alleged that the government has incarcerated, institutionalized, or otherwise prevented them from "act[ing] on [their] own behalf." *DeShaney*, 489 U.S. at 200. And they have not cited a single case to support their unprecedented claim that the special relationship exception applies to individuals who are in no way restrained by the government. *See* Resp. 39 (citing cases imposing duties on government for incarcerated persons and criminal defendants under the First and Sixth Amendments).[17]

Plaintiffs attempt to generate a special relationship by pointing to the government's alleged "duty to care" for public lands in a way that prevents "dangers to invitees." Resp. 39. But Plaintiffs cite nothing to support their extension of the language of tort claims to the government's management of public lands. And more fundamentally, they conflate an alleged statutory or common law "duty to care" for public lands with a constitutional duty to protect an individual's due process rights when the government has taken an individual into custody. *Id.* *DeShaney's* special relationship exception applies to the latter situation, not the former.[18]

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[16] Though they do not use the term "special relationship," Plaintiffs argue this case falls into the category of cases in which "an individual is harmed due to a 'limitation which [the State] has imposed on his freedom to act on his own behalf.'" Resp. 38 (quoting *DeShaney*, 489 U.S. at 200). This is known as the "special relationship" exception. *DeShaney*, 489 U.S. at 197; *Patel*, 648 F.3d at 971-72.

[17] Plaintiffs also cite the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), but *Obergefell* was not a failure to protect case and did not address the special relationship exception.

[18] Plaintiffs' assertion that they are "unable to protect wilderness" themselves overlooks the nature of our government. Resp. 39. Every citizen has the right to vote in favor of candidates and policies that align with their beliefs about how public lands should be managed.

Second, the "state-created danger" exception applies when the government puts a person at risk of immediate and particularized physical injury. Mot. 37-38. Those circumstances are not present here, where the government's alleged actions and inactions over the past 50+ years have allegedly contributed to, at most, an incremental increase in GHGs in the atmosphere that, when combined with other emissions over the past 150+ years, have led to the climate change that now allegedly threatens wilderness. *See id.* Plaintiffs liken this case to *Hernandez v. City of San Jose*, 897 F.3d 1125 (9th Cir. 2018). But in that case police officers put protestors in immediate danger of bodily harm by preventing them from safely exiting a rally and funneling them into a violent crowd. *Id.* at 1133. The alleged slow build-up of GHGs in the atmosphere over a period of decades and the lengthy causal chain between Defendants' alleged actions and Plaintiffs' asserted injuries are inherently different from every cited state-created danger case.

Plaintiffs also try to evade another limitation of the state-created danger exception by suggesting that the exception can apply here even though the relevant danger—climate change's alleged impact on wilderness—is not unique to or directed only at them. To support that argument, they cite a 1998 case in which the Ninth Circuit chose not to resolve the question of "whether the danger-creation exception applies only when the danger created by a state official is directed toward a particular plaintiff, as opposed to being directed toward the general public." *Huffman v. Cty. of Los Angeles*, 147 F.3d 1054, 1061 n.4 (9th Cir. 1998). But more recent case law shows that in every case where the Ninth Circuit found a state-created danger, "the danger that the defendants created was specific to identifiable individuals or groups, and thus 'distinguishe[d] [them] from the general public and trigger[ed] a duty . . . to afford [them] some measure of peace and safety.'" *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1024 (N.D. Cal. 2017) (quoting *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989)); *see also*

Bologna v. City & Cty. of San Francisco, No. 09-cv-2272, 2009 WL 2474705, at *6 (N.D. Cal. Aug. 11, 2009) (noting Ninth Circuit has only found state-created danger "when a state actor creates a risk that is specific to an individual or small group of individuals, rather than to the general public" and rejecting state-created danger allegedly applicable to "the entire general population of people in San Francisco who are (or appear to be) black or Latino"); *Doe v. Round Valley Unified Sch. Dist.*, 873 F. Supp. 2d 1124, 1134 (D. Ariz. 2012) (noting "[e]very Ninth Circuit case permitting a state-created danger theory to go forward involves a danger that a government official created with respect to a specific person known to that official" and refusing to apply exception where no evidence that official had specific knowledge of plaintiff). The fact that the district court in *Juliana* ignored Ninth Circuit precedent in finding that the plaintiffs' state-created danger claim survived the motion to dismiss stage does not justify this Court making the same mistake.

IV. Plaintiffs Cannot State a Claim Under the Ninth Amendment.

It is black letter law that the Ninth Amendment does not "independently secur[e] 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 Mont. Caregivers Ass'n, LLC v. United States*, 526 F. App'x 756, 758 (9th Cir. 2013) (Mem.). For that reason alone, Plaintiffs' Second Claim for Relief alleging violation of the Ninth Amendment must be dismissed.

Rather than acknowledge the limitations of the Ninth Amendment, Plaintiffs incorrectly claim that the Ninth Circuit in *United States v. Munoz*, 701 F.2d 1293 (9th Cir. 1983), "afforded Munoz relief through the unenumerated rights contemplated by the Ninth Amendment . . . ." Resp. 44. In fact, *Munoz* was a Fourth Amendment case, *see* Mot. 33 n.13, and it never once mentions the Ninth Amendment. Likewise, Plaintiffs quote a portion of Justice Goldberg's

concurrence in *Griswold* but ignore his clarification that "Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government." *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring). Because the law is clear that the Ninth Amendment secures no independent rights, Plaintiffs' claims under it must be dismissed.

V. Plaintiffs Have Failed to State a Claim Under the First Amendment.

Plaintiffs acknowledge that the First Amendment's right to associate (and not associate) has "historically" reached only "close human relationships." Resp. 45. Nevertheless, they ask the Court to extend the right to their "intimate, personal relationships with the Nation's wild lands and wild spaces." *Id.* To the extent this argument asserts a right to associate with wilderness, as opposed to a right not to associate with other people, it is a new formulation of their First Amendment claim and should not be permitted at this stage. *See Foster v. Edmonds*, No. 07-cv-05445, 2008 WL 4415316, at *5 (N.D. Cal. Sept. 26, 2008) (holding plaintiff cannot add new claims in a response brief).

Regardless of whether it is a right to associate with wilderness or a right not to associate with other humans, Plaintiffs' First Amendment claim fails as a matter of law. As explained in Defendants' motion, the First Amendment protects the freedom of expressive association, which allows people to associate (or not associate) with other people for the purpose of engaging in the activities protected by the First Amendment. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); Mot. 40-43. Because Plaintiffs have not identified any expressive intent underlying their alleged associational rights, they have failed to state a claim under the First Amendment.

Plaintiffs' only response is that the Court should not dismiss their claim because it is "novel." Resp. 46. But a claim that fails on its face as a matter of law is not "novel," it is legally

unsound and must be dismissed. For this same reason, Plaintiffs' assertion that they have "pled facts sufficient to support a cause of action," *id.*, misses the mark—facts cannot save a legally flawed claim. This Court should refuse Plaintiffs' invitation to extend the freedom of association to relationships completely divorced from the purposes of the First Amendment.

VI. The Court May Exercise Its Discretion to Stay This Case Pending the Ninth Circuit's Resolution of the Appeal in *Juliana*.

Plaintiffs do not dispute that this Court has discretionary authority to stay a case "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). But they contend the Court should not exercise its authority to stay this case pending the Ninth Circuit's decision in *Juliana* because the cases are "quite different." Resp. 49. Their attempt to distinguish this case from *Juliana* is undermined by their reliance on *Juliana* throughout their Amended Complaint and briefing.[19] *See, e.g.*, Am. Compl. ¶¶ 233-34, 249; Resp. 7, 15, 36, 42-43, 47.

While Plaintiffs here claim a right to wilderness and plaintiffs in *Juliana* claim a right to a climate that sustains human life, both allege that (1) the federal government (2) through 50+ years of aggregate actions and inactions (3) has caused third parties to emit GHGs into the atmosphere, (4) these emissions contribute to climate change, and (5) climate change has injured them (6) by causing wildfires, ice melt, sea level rise, etc. The differences in the label given to the novel right asserted do not alter the fact that the Ninth Circuit's analysis in *Juliana* will be binding on this Court and will almost certainly resolve issues presented in this case.

Plaintiffs' attempt to minimize the overlap in defendants and issues is not persuasive. Both cases name the United States as a defendant, and every individual defendant agency in this

[19] At the very least, a Ninth Circuit decision in *Juliana* will clarify whether the district court's decisions in that case are as persuasive as Plaintiffs allege.

case is also a defendant in *Juliana*. The fact that *Juliana* names additional agency defendants hardly reduces the overlap when both cases make broad claims about the federal government's actions and inactions over a period of 50+ years. Plaintiffs allege that the claims in *Juliana* focus on fossil fuel development rather than agriculture and deforestation, but the complaint in *Juliana* demonstrates otherwise. *See* Am. Compl. ¶ 112, *Juliana v. United States*, No. 6:15-cv-1517 (D. Or. filed Sept. 10, 2015), ECF No. 7 (alleging Department of the Interior has contributed to climate change by permitting "logging, livestock grazing" among other things); *id.* ¶ 117(d) (alleging USDA has contributed to climate change "by permitting large-scale logging in national forests," "supporting polluting farming and agricultural practices," and "not protect[ing] the nation's National Forest System as a carbon sink"). And both cases request as a remedy ongoing judicial involvement in specific court-ordered actions intended to address climate change.[20] Moreover, Plaintiffs' assertion that "nothing decided" in *Juliana* "could automatically affect the rights or positions of the parties" here, Resp. 50, ignores the fact that the Ninth Circuit's decision of any relevant legal issues (like standing, Article III case and controversy, the standard for identifying a new fundamental right, or the prerequisites for a state-created danger claim) would be binding on the Court and parties.

Contrary to Plaintiffs' contention otherwise, courts routinely grant stays in situations like this where a pending decision in another case could inform or resolve key issues. *See, e.g.*, *Campbell v. Or. Dep't of State Lands*, No. 16-cv-01677, 2017 WL 3367094 (D. Or. Aug. 4, 2017) (stay pending Ninth Circuit decision in unrelated case where both cases involved question

[20] Plaintiffs in this case initially requested identical relief to that in *Juliana*: a "national remedial plan" to mitigate climate change. Am. Compl. 6. In their opposition brief, they purport to withdraw that request, perhaps in an attempt to distinguish this case from *Juliana*. Resp. 19 n.5. But the attempted removal of this one specific form of relief does not change the fact that the cases involve substantially overlapping claims and issues.

of whether federal mining law preempts a particular state law); *Ramsden v. Ocwen Loan Servicing, LLC*, No. 17-cv-03464, 2017 WL 10543558, at *3 (C.D. Cal. Aug. 16, 2017) (stay pending D.C. Circuit's resolution of separate case involving related issues where "a decision by the D.C. Circuit could come at any moment" and thus "the risk of possible damage caused by granting a stay is not high"); *McConnell v. Lassen Cty.*, No. 05-cv-0909, 2007 WL 4170622, at *2 (E.D. Cal. Nov. 20, 2007), *as amended* (Nov. 26, 2007) (stay pending Ninth Circuit's en banc rehearing in separate case that involved related issues). And unlike the plaintiffs in those cases, Plaintiffs here have not explained what hardship, if any, a brief stay pending the Ninth Circuit's resolution of the appeal in *Juliana* would impose upon them, given that their alleged climate change-related harms have been occurring for years.

The Ninth Circuit heard argument in the *Juliana* appeal on June 4 and is poised to issue a decision. A stay pending that decision will allow both the parties and Court to reassess this case in light of new binding authority, and prevent the Court from wasting resources on issues and arguments that may be refined or called into question by the Ninth Circuit's decision. *See Campbell*, 2017 WL 3367094, at *5 ("This Court is reluctant to decide defendants' Motion to Dismiss with the prospect of a potentially contrary and binding appellate decision looming."). In these circumstances, a stay is appropriate.

CONCLUSION

The Court should dismiss this case for lack of jurisdiction and failure to state a claim upon which relief can be granted. In the alternative, it may stay the case pending the Ninth Circuit's resolution of the *Juliana* appeal.

Respectfully submitted this 29th day of July, 2019.

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