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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No. 6:15-cv-01517-TC

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS

Oral Argument: March 9, 2016, 10:00 a.m.

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REPLY BRIEF

The claims in this case have no basis in federal jurisprudence, and are entirely unsuited for judicial resolution, as explained in the motions to dismiss of the intervenors and federal defendants. Doc. 20 at 1-2 ("Intv. Br."); Doc. 27-1 at 1 ("Fed. Br."). While the plaintiffs attempt to compare their claims to traditional tort or constitutional cases, or even to civil rights litigation, *see* Doc. 56 at 3 ("Pl. Intv. Opp."), they are nothing of the sort. The plaintiffs do not allege harms to their individual rights, or seek an order directing the defendants to comply with governing law; rather, they ask this Court to assume and exercise continuing supervisory authority over the entire Executive Branch of the United States, directing the President and federal agencies whether and how to regulate to address issues relating to greenhouse gas emissions and climate change—without regard to congressional directives and restrictions. Doc. 7 at 1, 3-4, 12, 94 ("Compl."). These claims were properly dismissed in *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd,* 561 F. App'x 7 (D.C. Cir. 2014), and the plaintiffs have not offered and cannot offer a reason why they should not be dismissed here as well.[1]

I. THE COMPLAINT DOES NOT ALLEGE A VALID FEDERAL CAUSE OF ACTION OR IMPLICATE A FEDERAL QUESTION SUBJECT TO FEDERAL JURISDICTION.

Dismissal is warranted, first, because the plaintiffs have not pled a valid cause of action within this Court's jurisdiction, as the intervenors demonstrated in their opening brief. Intv. Br. 6-11. The "public trust doctrine"—on which the plaintiffs' claims are principally based—is a

[1] The plaintiffs state in their response to the intervenors' motion to dismiss that they "do not repeat their arguments on standing or failure to state a claim … [i]n light of the Court's order on briefing motions to dismiss (Dkt. 50)," and instead rely on their original response to the federal defendants' motion. Pl. Intv. Opp. 2 n.2. However, the only mention of briefing in the Court's order is when the Court *declined* to impose any restrictions on the parties. In this reply, the intervenors address all arguments made by the plaintiffs, wherever presented, in opposition to points raised in the intervenors' motion.

creature of *state* law, and provides no federal cause of action. *Id.* Moreover, the plaintiffs have not presented and could not state a viable claim under either that doctrine or the various constitutional provisions they cite. *Id.*

1. It is clear, in light of the Supreme Court's decision in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012), that the public trust doctrine cannot apply here. Citing a series of earlier cases, the Court declared that "the public trust doctrine remains a matter of state law" and that its "contours ... do not depend upon the Constitution." 132 S. Ct. at 1235 (citing, *inter alia*, *Appleby v. City of New York*, 271 U.S. 364, 395 (1926); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894)). Thus, regardless of whether the roots of the public trust doctrine can "[be] traced from Roman law through the Magna Carta," Doc. 41 at 20 ("Pl. Fed. Opp."), *PPL Montana* confirms that the doctrine is not one of federal law—either constitutional, statutory, or common—and cannot support federal jurisdiction over the plaintiffs' claims.

The public trust discussion in *PPL Montana* cannot be simply disregarded as dicta, as the plaintiffs would apparently have it. *Id.* at 23-24. The question presented in that case was whether the State of Montana held title to certain riverbed lands and could properly demand compensation from a company using those lands or whether, as the United States asserted, the lands were instead subject to "federal regulatory authority under … the Commerce Clause." Br. for U.S. 8-10, *PPL Montana*, 132 S. Ct. 1215 (No. 10-218). Montana argued (among other things) that the "public trust doctrine"—which it described, like the plaintiffs in this case, as "embodied in American law," including the U.S. Constitution and federal statutes—restricted the federal government's regulatory authority over these lands and preserved Montana's rights over the lands as against claims by the United States. Br. for Resp. 20, 24-25, 52-53, *PPL Montana*, 132 S. Ct. 1215 (No. 10-218). The Court rejected this argument, explaining that although prior

cases (applying the related "equal footing" doctrine) "have noted that [a] State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution" but "remains a matter of state law." 132 S. Ct. at 1234-35. This conclusion was thus not merely an "afternote," as the plaintiffs describe it, Pl. Fed. Opp. 24, but represented part of the Court's holding, binding in this and other cases.

None of the cases or authorities cited by the plaintiffs support a different conclusion. The case on which they principally rely, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), does indeed refer to a federal statute, as the plaintiffs note, Pl. Fed. Opp. 20, but the statute had nothing to do with the public trust issue in the case; in fact, the Supreme Court has itself since stated that *Illinois Central* "was necessarily a statement of *Illinois* law." *Appleby*, 271 U.S. at 395. The other decisions they cite, including those from the Supreme Court and other federal courts, *see* Pl. Fed. Opp. 21-22, likewise include only passing references to the federal government's status as "trustee" of public lands without ever holding—or even suggesting—that the public trust doctrine restricts the federal government directly or provides a cause of action against it.[2] And the federal statutes the plaintiffs characterize as "recogniz[ing]" the federal government's public trust obligation, *id.* at 22-25, in fact confirm the opposite: the government does *not* owe "trust" obligations except as defined in the limited circumstances set forth in those statutes. *See, e.g.*, 42 U.S.C. § 9607(f). There was, quite simply, no basis for a

[2] *See, e.g.*, *Light v. United States*, 220 U.S. 523, 536-37 (1911); *Camfield v. United States*, 167 U.S. 518, 524 (1897); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890); *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447 (N.D. Cal. 1986); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981); *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980).

federal "public trust" doctrine before *PPL Montana*, and there is certainly no basis for one after it.[3]

2. The claims in this case would be subject to dismissal in any event, even if a federal version of the "public trust" doctrine could be recognized, because the plaintiffs have failed to state a valid claim under that doctrine or under any of the constitutional provisions they cite. Intv. Br. 8, 10-11.

Public Trust Doctrine. The intervenors showed in their opening brief that the plaintiffs have not stated, and cannot make out, a valid public trust claim. *Id.* That is because under the traditional common law articulation of that doctrine—which the plaintiffs appear to accept would govern their claims, *see* Pl. Fed. Opp. 20—the doctrine does not apply to the atmosphere and imposes no affirmative duty on the government to regulate. Intv. Br. 10-11.

The plaintiffs do not seriously contend otherwise, and do not even address this argument directly in their responses. While they assert at one point (in addressing separate issues relating to "justiciab[ility]," *see* Pl. Fed. Opp. 27-28) that some state courts have held that "the atmosphere is a public trust resource," they do not argue that these cases addressed or modified the traditional common law version of the doctrine, and indeed a review of the cited cases demonstrates that they all relied on specific state constitutional or statutory provisions that codified or expanded the public trust doctrine beyond its historical bounds.[4] Neither those cases

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[3] *See, e.g.*, *Brigham Oil & Gas, L.P. v. N.D. Bd. of Univ. & Sch. Lands*, 866 F. Supp. 2d 1082, 1088 (D.N.D. 2012) ("The United States Supreme Court recently made clear that the public trust doctrine is a matter of state law."); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533, 537 n.3 (4th Cir. 2013) (same); *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012) (same).

[4] *E.g.*, *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1, slip op. at 8 (Wash. King Cty. Super. Ct. Nov. 19, 2015); *Sanders-Reed* ex rel. *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015); *Bonser-Lain v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-11-

nor any of the other decisions or authorities mentioned by the plaintiffs establish that the common law doctrine applies to the atmosphere.[5] And at no time in their responses do the plaintiffs offer any support for the notion that the doctrine may be applied to impose an affirmative duty upon governments to adopt a particular regulatory regime. The claims in this case would do just that, and therefore do not present a valid cause of action under the doctrine.

Due Process Clause. The plaintiffs also cannot state a claim under the Due Process Clause of the Constitution. That provision, as noted in the motions to dismiss, does not compel government action and does not "confer [any] affirmative right to governmental aid," and therefore cannot support the claims asserted here. Intv. Br. 8; *see also* Doc. 57 at 10-14 ("Fed. Reply").

The plaintiffs do not challenge this characterization of the constitutional standard, or of their claims, but argue that they fall within an exception to the standard, as set forth in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989), which they say authorizes claims for affirmative relief "when the State places the victim in a position of danger, or enhances the position of danger, and acts with deliberate indifference." Pl. Fed. Opp. 5. The *DeShaney* "danger creation" exception does not apply here. That exception is, as an initial matter, not nearly as broad as the plaintiffs suggest: it is not satisfied whenever the government causes or creates a "danger" to which a person is exposed, but rather it is met only when the

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002194, 2012 WL 3164561 (Tex. 201st Dist. Aug. 2, 2012), *rev'd*, 438 S.W.3d 887 (Tex. App. 2014).

[5] *See, e.g.*, *United States v. Causby*, 328 U.S. 256, 261 (1946) (characterizing the Nation's airspace as a "public highway"); *cf.* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations*, 39 Envtl. L. 43, 63, 69, 87 (2009) (applying the public trust doctrine to the atmosphere would be a "radical movement away from the status quo").

government both creates a danger *and* exercises some form of "control" or "authority" over the individual, thereby limiting his or her ability to respond to or avoid the danger. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992); *Kneipp v. Tedder*, 95 F.3d 1199, 1209 (3d Cir. 1996), *cited with approval in*, *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086-87 (9th Cir. 2000). None of the alleged actions of the federal defendants in this case could be characterized as an affirmative exercise of direct "control" over these plaintiffs.[6] In addition, there is no allegation in this case, nor could there be, that the federal government either "created" the current atmospheric levels of greenhouse gases or climate change. The exception thus cannot apply, even as framed by the plaintiffs, and no due process claim can be stated.

Equal Protection Clause. The plaintiffs' equal protection claims fare no better. The claims in this case do not allege any intentional discriminatory classification, or indeed any governmental classification at all, and therefore cannot state an equal protection claim. Intv. Br. 8; *see also* Fed. Reply 14-19.

The plaintiffs suggest that a discriminatory classification or intent need not be shown when, as here, the complaint alleges violations of "fundamental … constitutional rights." Pl. Fed. Opp. 9-10. That is plainly incorrect. Numerous decisions of the Supreme Court and other

[6] The plaintiffs are correct that, under the "danger creation" exception of *DeShaney* (unlike the separate "special relationship" exception), an individual need not be in formal "custody" for the exception to apply. Pl. Fed. Opp. 5. However, numerous cases from this Circuit and others—including those cited by the plaintiffs—make clear that even under the "danger creation" exception the government must exercise some level of actual "control" over the individual. *E.g.*, *L.W.*, 974 F.2d at 120 (defendant employers directed plaintiff to work in dangerous situation); *Kneipp*, 95 F.3d at 1209 (defendant officers detained woman outside in freezing temperatures); *see also, e.g.*, *Munger*, 227 F.3d at 1084-85 (defendant officers forced man outside in freezing temperatures); *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) (defendant officers locked plaintiff with medical condition in his home); *Wood v. Ostrander*, 879 F.2d 583, 588-90 (9th Cir. 1989) (defendant officer arrested plaintiff, impounded her car, and then "abandoned" her in dangerous situation).

courts recognize that the *sine qua non* of an equal protection claim is a governmental "classification" that results in disparate treatment of similarly situated individuals. *E.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996). While allegations of infringement of a "fundamental right" may impact the level of scrutiny to be used in assessing the classification, such allegations do not obviate the need to show a classification in the first instance. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Similarly, the Supreme Court has consistently and unequivocally held that, to establish an equal protection violation, the plaintiff must prove that the classification was created with the "purpose to discriminate." *Washington v. Davis*, 426 U.S. 229, 245-47 (1976) (citing cases). The "malapportionment" cases cited by the plaintiffs, including *Reynolds v. Sims*, 377 U.S. 533 (1964) (Pl. Intv. Opp. 26-27), say nothing different, and indeed those very cases affirm that an equal protection claim requires "*both* intentional discrimination … and an actual discriminatory effect." *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (emphasis added).

The plaintiffs also assert that "youth" and "future generations" qualify as "protected classes." Pl. Fed. Opp. 14. But even accepting that premise (which is itself inconsistent with governing precedent[7]), it would not support an equal protection claim because none of the challenged governmental laws, regulations, or actions were drafted or designed to treat individuals in those groups differently than any others. Indeed, their principal argument is that

[7] *See, e.g.*, *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J. concurring in part) ("I am not aware of any suggestion that legislation affecting [minors] be viewed with the suspicion of heightened scrutiny"); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008) ("[A]ge is not a suspect class"); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944, 946 (9th Cir. 1997) (holding that "age is not a suspect classification" in the context of analyzing juvenile curfew ordinance, but applying strict scrutiny due to fundamental rights involved); *Ramos v. Town of Vernon*, 353 F.3d 171, 172, 180, 181 (2d Cir. 2003) (applying intermediate scrutiny to juvenile curfew ordinance, but also holding that "[w]e do not conclude that youth are a suspect class").

the government has *failed* to act. None of the challenged actions—and certainly not inaction—establishes a governmental "classification" that could implicate equal protection concerns, or support the claims in this case.

Ninth Amendment. The motions to dismiss also explained that the plaintiffs cannot establish a claim under the Ninth Amendment because that provision "does not confer substantive rights" and cannot support an independent cause of action. Intv. Br. 8; Fed. Br. 26-27. The plaintiffs do not argue otherwise, with good reason, and thus appear to have abandoned any claims under the Ninth Amendment.

3. The claims in this case could not proceed, even if they otherwise might have stated cognizable violations of the public trust doctrine or constitutional provisions, because Congress has displaced any such cause of action by statute. The Supreme Court held in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*") "that the Clean Air Act and the EPA actions it authorizes" displace federal common law claims seeking restrictions on greenhouse gas emissions. 131 S. Ct. at 2537. The claims here seek precisely that relief, and are thus displaced. Intv. Br. 8-9.

The plaintiffs do not disagree that their claims seek greenhouse gas emissions reductions, just as the claims in *AEP*, but argue that the claims may nonetheless proceed because, they say, public trust and constitutional claims "cannot be displaced by statute." Pl. Intv. Opp. 3-4. That argument is as remarkable as it is wrong. To be sure, Congress cannot "displace the Constitution," *id.*, but Congress certainly can—and often does—displace rights of action created by the federal courts, including those intended to remedy a constitutional violation. *E.g.*, *Hui v. Castaneda*, 559 U.S. 799, 807-08 (2010). Public trust claims are no different. Indeed, in *Illinois Central*, the "public trust" case upon which the plaintiffs principally rely, *see* Pl. Intv. Opp. 4, the

Supreme Court reiterated that any rights recognized would be "subject always to the paramount right of congress." 146 U.S. at 435.

The plaintiffs then suggest that that their claims should not be deemed displaced, even if they are subject to displacement (as they clearly are), because the Clean Air Act does not provide them an opportunity to secure all of the relief they are seeking here and because Congress has not "explicitly declared" that the Act serves as a "substitute" for their claims. Pl. Intv. Opp. 5-6. Neither point is correct. A statute need not offer the same remedies, or even "equally effective" relief, in order to displace a common law constitutional claim; rather, whenever a statute speaks directly to the issues addressed by the claim, and provides a mechanism to address those issues, the claim is displaced, even if the relief available under the statute is "not as effective as [a common law] remedy" and would not "fully compensate [the plaintiff] for the [alleged] harm." *Bush v. Lucas*, 462 U.S. 367, 372-73, 385-86 (1983). And the statute need not "explicitly declare" that common law remedies are unavailable; to the contrary, it is presumed, in the absence of an expression of legislative intent to *preserve* existing common law remedies, that Congress's decision to adopt a statutory system to address an issue reflects its expectation that any federal common law claims addressing the same issue will be displaced. *Id.*[8]

[8] The plaintiffs characterize *Carlson v. Green*, 446 U.S. 14 (1980) as holding that "a constitutional claim is precluded *only* 'when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.'" Pl. Intv. Opp. 5 (emphasis added). But, while the language they quote surely comes from *Carlson*, that opinion itself makes clear (in the sentence preceding the quoted language, no less) that common law claims are also precluded more generally when "special factors" counsel against their recognition. 446 U.S. at 18-19. Subsequent Supreme Court decisions affirm that these "factors" include, most notably, whether Congress has enacted an alternative scheme to address the relevant issues, and they hold unequivocally that common law claims may be displaced under this analysis even if the statutory remedy "[is] not as effective" as common law relief and even if the statute does not "expressly preclude[ ]" the common law claim. *E.g., Bush*, 462 U.S. at 372-73, 385-86.

The plaintiffs also complain that the Clean Air Act does not provide them a direct right of relief, or a forum to present their "public trust" or constitutional claims. Pl. Intv. Opp. 5-6. This is not only irrelevant, for (as discussed above) a statute need not offer precisely the same opportunity for hearing or relief in order to displace common law claims, but it is also inaccurate: several provisions of the Act (cited in *AEP*) allow individuals to petition EPA to adopt regulations or restrictions on greenhouse gas emissions and to seek judicial review of an unfavorable agency decision. *AEP*, 131 S. Ct. at 2537-40. Whether or not the plaintiffs agree with this approach, and whether or not they would prefer another avenue for presenting their claims, there is no doubt that those statutes speak directly to the issues raised by the claims in this case. Those claims have, for this reason, been displaced. *Id.*[9]

II. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

The claims should also be dismissed, as set forth in the intervenors' motion to dismiss, as barred by the political question doctrine. Intv. Br. 11-16. That is because the issues raised by the claims (i) are "textually…commit[ted]" to another branch by the Constitution; (ii) are not subject to "judicially discoverable and manageable standards"; or (iii) could not be resolved without "expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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[9] The displacement analysis in *AEP* is not in any way "contrary to" other Supreme Court decisions addressing displacement of constitutional claims, as the plaintiffs suggest. Pl. Intv. Opp. 7-8. All of those cases ask the same essential question—whether a statute "speaks directly" to the relevant issues—and all of them accordingly find claims to be displaced when a statute addresses the alleged violations or harms, regardless of whether the statute offers the same or equally effective relief. *Compare AEP,* 131 S. Ct. at 2537-40 (holding tort claims displaced even though statute did not provide same relief as common law claims), *with Bush*, 462 U.S. at 372-73, 385-86 (same, constitutional claims).

The plaintiffs devote much of their response not to addressing these factors but, rather, to arguing that the political question doctrine is entirely "inapplicable" to claims alleging violations of the public trust doctrine and the Constitution. Pl. Intv. Opp. 9-14. There is, quite simply, no support for that extraordinary argument. The justiciability limitations imposed by the political question doctrine flow from Article III of the Constitution and therefore apply to *all* causes presented in the federal judiciary, whatever the title appended to the claim or its asserted basis. *Baker*, 369 U.S. at 214, 216. None of the cases cited by the plaintiffs—and, to counsel's knowledge, no case whatsoever—holds or even suggests that public trust or constitutional claims are somehow exempt from the political question doctrine.[10] Indeed, numerous cases hold directly to the contrary, finding "constitutional" claims to be barred by the political question doctrine. *E.g., Vieth v. Jubelirer*, 541 U.S. 267, 271, 292 (2004) (plurality); *Nixon v. United States*, 506 U.S. 224, 226, 238 (1993).

However framed, a claim presents a non-justiciable political question if, upon a "discriminating inquiry into the precise facts and posture of the [case]," *Baker*, 369 U.S. at 217, its adjudication would require the court to address an issue that should be reserved for the representative branches. That is the situation here.

[10] At no point does *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), hold—as the plaintiffs assert repeatedly—that the "political question doctrine [is] inapplicable where the allegations, if true, would violate a federally protected right." Pl. Intv. Opp. 12. Quite the opposite, that opinion cited with approval prior decisions in which the Court found that claims asserting constitutional violations (including under the Due Process Clause) were deemed non-justiciable. *Gomillion*, 364 U.S. at 342-43. The Court concluded, however, that the claim at issue—alleging a violation of the right to vote guaranteed by the Fifteenth Amendment—could be adjudicated based on manageable standards without undue intrusion into areas constitutionally committed to other bodies. *Id.* at 343-44. In other words, far from holding the political question doctrine "inapplicable" (Pl. Intv. Opp. 12), *Gomillion* applied the doctrine to the "constitutional" claim presented there, and allowed it to proceed only because the Court determined that the claim did not implicate any of the political question concerns.

1. The claims would, as a threshold matter, require this Court to address issues "textually … commit[ted]" to another branch by the Constitution. Intv. Br. 11-12. Authority to "regulate commerce" is committed to Congress, U.S. Const. art. I, §§ 1, 8, and "executive power" is vested in the President, U.S. Const. art. II, § 1. Because the claims in this case would have this Court assume control over executive agencies, and direct them to adopt regulations in the absence of any authorizing statute, they cannot proceed.

The plaintiffs, although they attempt to downplay the scope of the remedy they seek by asserting that they do not ask for the "promulgation of specific regulations" (Pl. Intv. Opp. 17), cannot mask the extraordinary nature of their requested relief. The injunction that the plaintiffs seek would require the named federal agencies to coordinate their regulatory efforts to meet a very specific goal— to "cease the[ ] permitting . . . of fossil fuels and . . . move to swiftly phase out [carbon dioxide] emissions, as well as take such other action as necessary to ensure that atmospheric [carbon dioxide] is no more concentrated than 350 [parts per million] by 2100," Compl. at 4-5—and thus would undoubtedly involve the Court telling the agencies "how" to regulate. That the complaint does not dictate the "specific" regulations required to meet the plaintiffs' emissions goals does not in any way lessen the intrusion into the agencies' discretion.

Moreover, even if the complaint could be read as seeking only an order instructing the agencies to adopt a "plan" for regulation, without any other benchmarks or directives, that would not obviate the political question. After all, the decision of *whether* to regulate is, if anything, more dependent on policy judgments than the decision of *how* to do so. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007); *see also Gilligan v. Morgan*, 413 U.S. 1, 5-7 (1973) (rejecting as non-justiciable claims that would require the judiciary to craft particular "standards" for

governmental operations and monitor compliance thereafter).[11] The relief sought by the plaintiffs would represent nothing more than a bald—and unconstitutional—exercise of legislative and executive power by the judiciary, and is thus barred by the political question doctrine.

2. The claims also fail because, as explained in the intervenors' opening brief, there are no "judicially discoverable and manageable standards" for resolving them. Intv. Br. 12-14. The response brief, far from offering any such standard, confirms that none exists.

The plaintiffs suggest that the Court can simply "apply[ ] the abundance of case law concerning equal protection, due process, and public trust rights to the factual evidence before it." Pl. Intv. Opp. 20. But, as the Supreme Court has said, "[t]he requirements of Art[icle] III are not satisfied merely because a party … has couched [its] request for … relief … in terms that have a familiar ring to those trained in the legal process." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Whatever the label applied to these claims, and whatever the standards applied in prior cases alleging similarly titled claims, the fact remains that the plaintiffs have not offered any explanation of how this Court would adjudicate the claims in *this* case—which would, unlike all those prior cases, require the Court to undertake assessments of national policy and international relations to determine not

[11] The requested relief in this case bears no resemblance to that granted in civil rights cases and other decisions cited by the plaintiffs. In all of those cases, courts entered the relevant remedial orders pursuant to express statutory authority and to address violations of express federal statutory and constitutional mandates. *Brown v. Plata*, 563 U.S. 493 (2011) (Prison Litigation Reform Act); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971) (citing Civil Rights Act of 1964); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. 01-640, 2005 WL 2488447, at *1-3 (D. Or. Oct. 7, 2005) (citing Endangered Species Act). The complaint here, by contrast, asks the Court to create and impose on these agencies new, judicially crafted obligations and standards—which are not only unsupported by, but contrary to, statutory requirements.

only whether the United States' response to climate change has been deficient but also how the federal government should address these issues in the future. Intv. Br. 12-14. These are precisely the type of *ad hoc* policy judgments that the political question doctrine forbids.

3. There is also no doubt, and the plaintiffs raise none, that adjudication of their claims would "express[ ] lack of the respect due" other branches of government. *Id.* at 14-15. The relief requested would, contrary to the plaintiffs' assertions (Pl. Intv. Opp. 23), quite clearly "strip the other branches of their ability" to decide upon the appropriate regulatory response to issues relating to greenhouse gas emissions and climate change. Any "remedial plan" proposed by the federal agencies could go into effect only if approved by this Court, and once a plan is approved neither the executive nor legislative branch could direct the agencies to withhold those regulations, or to adopt targets different than those prescribed, even if those branches deem the regulations inconsistent with the public interest. *See* Compl. at 94. This relief would thus subvert our democratic system of government—and eliminate one of the essential checks and balances inherent in it—by allowing courts to exercise "general oversight of the elected branches of government." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

Courts addressing similar "climate change" claims have properly dismissed them as non-justiciable on this basis. Intv. Br. 12-14. The same result should apply in this case.

III. THE PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS.

The motions to dismiss also demonstrated that the plaintiffs lack standing because the injuries alleged are neither (i) "imminent" and "particularized" to these plaintiffs nor (ii) "'fairly traceable" to the defendants and "redress[able] by a favorable decision." Intv. Br. 16-20; Fed. Br. 7-19. Nothing in the plaintiffs' response shows otherwise.

1. The plaintiffs do not and cannot show that the injuries they allege are "imminent" or "particularized." While they characterize those injuries as "highly personal" (Pl. Fed. Opp.

30), they are in fact the opposite. Problems such as "diminished air quality," "crop loss[es]," and "drought"—and all others identified by the plaintiffs as resulting from *global* climate change, *id.* at 30-33—necessarily affect all individuals on the planet and are neither "particularized" nor "personal" in nature. Although the plaintiffs may experience the alleged effects of climate change in different ways (for example, depending on their location), all of them trace those effects to the same ultimate "harm"—that is, to the global atmosphere, allegedly caused by greenhouse gas emissions.

This is precisely the type of "generalized grievance" that the Supreme Court has held inadequate to support standing under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). Other federal courts have, notably, dismissed similar climate change claims for this very reason. *E.g., Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 857-62 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879-80 (N.D. Cal. 2009), *aff'd on other grounds,* 696 F.3d 849 (9th Cir. 2012); *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1133-36 (D.N.M. 2011); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 11-41, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011); *see also Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009). There is no reason for a different outcome here.

2. The plaintiffs also cannot show that the alleged risks of climate change are "fairly traceable" to the defendants or "likely redressable" by the emissions reductions the plaintiffs seek. Intv. Br. 19-20. While they assert that "the record demonstrates a favorable decision will redress the [p]laintiffs' injuries" (Pl. Fed. Opp. 38), that is plainly not true. The bulk of greenhouse gas emissions are from foreign sources, as the complaint itself acknowledges. *See* Compl. at 56 (alleging that the United States is responsible for approximately "25.5% of the

world's cumulative [carbon dioxide] emissions"). These foreign sources would not and could not be reached by a decree in this case, and as such there is no reason to believe that reductions ordered here would lead to *any* overall reduction in global greenhouse gas levels, much less the reduction allegedly needed to prevent or slow the ongoing global warming effect that the plaintiffs allege. Intv. Br. 19-20.

That is precisely why the Ninth Circuit held in *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), that common law claims of this sort, seeking more restrictive greenhouse gas regulations to address the asserted risks of climate change, cannot proceed. *Id.* at 1143. While the plaintiffs attempt to distinguish *Bellon* on grounds that it involved fewer agency defendants than this case (Pl. Fed. Opp. 36-37), they do not and cannot dispute the central premise of that case—that there is simply no way to determine whether and how changes to greenhouse gas regulations will affect global atmospheric greenhouse gas levels, or the risks of climate change, particularly in light of the contributions of other countries. *Bellon*, 732 F.3d at 1143-45. That premise remains true and defeats the claims here. Intv. Br. 19-20; *see also* Fed. Reply 4-7.

Nor does *Massachusetts v. EPA*, 549 U.S. 497 (2007), support the plaintiffs' standing, as they assert. Pl. Fed. Opp. 34. The claims in that case were allowed to proceed *only* because they were brought (i) by a State to address injuries to its sovereign interests and (ii) pursuant to express statutory authorization. *Massachusetts*, 549 U.S. at 516-21. Those injuries were not deemed "generalized grievances" because they related to the State's unique sovereign interests. The presence of a statutory right of action meant the State could assert the claims "'without meeting all the normal standards for redressability.'" *Id.* (citations omitted). These two factors

were "critical" to the standing inquiry in *Massachusetts*, *id.* at 516, and, because neither is present here, these plaintiffs lack standing. Intv. Br. 20; *see also* Fed. Reply 4.

CONCLUSION

For these reasons, and those stated in the motions to dismiss, the Court should dismiss the claims in the complaint under Federal Rule of Civil Procedure 12(b)(1) and (b)(6).

DATED this 19th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 5,728 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

Dated: February 19, 2016

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DATED this 19th day of February, 2016.

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