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15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

17 GENESIS B., a minor, by and through  
18 her guardian, G.P., *et al.*,

19 Plaintiffs,

20 v.

21 UNITED STATES ENVIRONMENTAL  
22 PROTECTION AGENCY, *et al.*,

23 Defendants.

No. 2:23-cv-10345-MWF-AGR

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
DISMISS COMPLAINT  
(ECF No. 1)**

Date: April 29, 2024

Time: 10:00 a.m.

Judge: Hon. Michael W. Fitzgerald

Courtroom: 5A

24 **TO THE HONORABLE COURT AND TO ALL PARTIES:**

25 PLEASE TAKE NOTICE that on April 29, 2024 at 10:00 a.m., or as soon  
26 thereafter as this matter may be heard in the above-entitled Court located at 350  
27 West First Street, Courtroom 5A, Los Angeles, California 90012, Defendants, the  
28 United States of America, the United States Environmental Protection Agency, and

1 Michael Regan in his official capacity as Administrator of the Environmental  
2 Protection Agency, will move the Court to dismiss the Complaint for Declaratory  
3 Relief (ECF No. 1) in its entirety pursuant to Federal Rules of Civil Procedure  
4 12(b)(1) and 12(b)(6). The jurisdictional grounds for dismissing the complaint are  
5 that: (1) Plaintiffs' claims are barred by sovereign immunity; (2) Plaintiffs lack  
6 Article III standing to bring this suit; and (3) the Complaint fails to assert a  
7 justiciable controversy. In addition, the claims should be dismissed because the  
8 Complaint fails to state cognizable claims based on (1) the Due Process Clause of  
9 the Fifth Amendment; (2) the equal protection component of the Due Process  
10 Clause of the Fifth Amendment; and (3) the Take Care Clause of Article II, § 3.

11 This motion is made following the conference of counsel pursuant to Local  
12 Rule 7-3, which took place on February 13, 2024.

13  
14 Dated: March 15, 2024

Respectfully submitted,

15  
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21 UNITED STATES ENVIRONMENTAL  
22 PROTECTION AGENCY, *et al.*,

23 Defendants.

No. 2:23-cv-10345-MWF-AGR

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS  
COMPLAINT**

Date: April 29, 2024

Time: 10:00 a.m.

Judge: Hon. Michael W. Fitzgerald

Courtroom: 5A

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**Introduction**

The climate crisis is an urgent problem, and the Executive Branch is taking a wide range of steps to address it, across many agencies in many different forms. *See generally* Exec. Order 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021). While Plaintiffs may challenge discrete government actions (or inaction) as part of this response, their demand for changes to the government’s response to climate change in its entirety “must be made to the political branches or to the electorate at large” rather than in district court. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). Courts may act only where “granted power to do so by the Constitution,” *Wash. Env’t Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013), and the district court lacks that power here for multiple reasons, including that plaintiffs have not identified a valid waiver of sovereign immunity, shown Article III standing, or asserted a justiciable controversy. Even if Plaintiffs could overcome threshold jurisdictional barriers, they have failed to state a claim as to each of the claims they assert—under the Due Process Clause of the Fifth Amendment, the equal protection component of the Due Process Clause, and the Take Care Clause of Article II, § 3. For all of these reasons, the Court should dismiss this case.

**BACKGROUND**

Plaintiffs are a group of minors—between the ages of 8 and 17—who reside in California. Complaint for Declaratory Relief and Further Relief as Warranted ¶¶ 24-99, ECF No. 1 (“Compl.”). They filed this Complaint on December 10, 2023, naming as defendants the United States, the United States Environmental Protection Agency, and Michael Regan in his official capacity as EPA Administrator (collectively, the “Defendants”). Plaintiffs allege that EPA exercises a measure of control over the pollution that enters the Nation’s air—particularly climate pollution caused by third parties’ release of emissions from fossil fuels into

1 the atmosphere—and that these Plaintiffs have experienced harms as a result of  
2 that pollution. Compl. ¶¶ 1-4, 10.

3 Plaintiffs bring five claims asserting violations of the Fifth Amendment Due  
4 Process Clause including its equal protection component (Claims I-IV), and the  
5 Take Care Clause of Article II, § 3 (Claim V). *Id.* ¶¶ 335-386. To remedy the  
6 alleged equal protection violations, Plaintiffs seek declarations that children are a  
7 protected class, and that Defendants’ conduct deprives Plaintiffs of equal  
8 protection of the law by (1) burdening their ability to live and enjoy their lives,  
9 (2) discriminating against them via inadequate regulation of climate pollution, and  
10 (3) applying discriminatory discount rates or otherwise devaluing children’s lives  
11 in cost-benefit analyses relating to climate regulations. Compl. 98-99 (Prayers for  
12 Relief 1-4). Turning to substantive due process, Plaintiffs seek declarations that “a  
13 life-sustaining climate system” is a fundamental right under the Fifth Amendment,  
14 and that Defendants have violated that right, as well as Plaintiffs’ fundamental  
15 right to life, by “allowing life-threatening levels of climate pollution to enter and  
16 accumulate in the air.” *Id.* at 99 (Prayers for Relief 5-6). Finally, Plaintiffs seek a  
17 declaration under the Take Care Clause that EPA exceeded its delegated authority  
18 by allowing unsafe levels of climate pollution to enter and accumulate in the  
19 Nation’s air. *Id.* at 100 (Prayer for Relief 7).

## 20 STANDARD OF REVIEW

21 “The district courts of the United States are courts of limited jurisdiction,  
22 defined (within constitutional bounds) by federal statute.” *Badgerow v. Walters*,  
23 591 U.S. 1, 7 (2022). “It is to be presumed that a cause lies outside this limited  
24 jurisdiction, and the burden of establishing the contrary rests upon the party  
25 asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,  
26 377 (1994) (cleaned up). A court reviews a motion to dismiss a complaint for lack  
27 of Article III standing under Fed. R. Civ. P. 12(b)(1). *Maya v. Centex Corp.*, 658  
28 F.3d 1060, 1067 (9th Cir. 2011). Where the jurisdictional attack is facial, the court

1 determines whether the allegations contained in the complaint are sufficient on  
 2 their face to invoke federal jurisdiction, accepting all material allegations in the  
 3 complaint as true and construing them in favor of the party asserting jurisdiction.  
 4 *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). Once a party has moved to dismiss  
 5 for lack of subject matter jurisdiction under Rule 12(b)(1), the party invoking  
 6 federal jurisdiction bears the burden of establishing the elements of standing. *Lujan*  
 7 *v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Meland v. Weber*, 2 F.4th 838, 843  
 8 (9th Cir. 2021). “[A] party must establish an Article III case or controversy before  
 9 [a court can] exert subject matter jurisdiction.” *Matter of E. Coast Foods, Inc.*, 80  
 10 F.4th 901, 905 (9th Cir. 2023).

11 A court may also dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(6)  
 12 for failure to state a claim upon which relief can be granted. In evaluating the  
 13 sufficiency of a complaint’s factual allegations, the court must accept as true all  
 14 well-pleaded material facts alleged in the complaint and construe them in the light  
 15 most favorable to the non-moving party. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629  
 16 F.3d 992, 998 (9th Cir. 2010) (cleaned up). However, a court need not accept as  
 17 true any legal conclusion set forth in a pleading. *Ashcroft v. Iqbal*, 556 U.S. 662,  
 18 678 (2009). Instead, to survive a Rule 12(b)(6) motion, “a complaint must contain  
 19 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
 20 on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

## 21 ARGUMENT

### 22 **I. The Court Should Dismiss the Complaint under Rule 12(b)(1) for Lack** 23 **of Subject Matter Jurisdiction.**

24 The Court should dismiss the Complaint under Rule 12(b)(1) for lack of  
 25 subject matter jurisdiction for at least three reasons. First, the United States has not  
 26 waived its sovereign immunity to this suit. Second, Plaintiffs lack Article III  
 27 standing, as binding and indistinguishable precedent establishes. And third, none of  
 28

1 Plaintiffs’ claims present a justiciable case or controversy within the meaning of  
2 Article III.

3 **A. Plaintiffs’ suit is barred by sovereign immunity.**

4 The Complaint must be dismissed because Plaintiffs’ suit is barred by the  
5 United States’ sovereign immunity. “It is axiomatic that the United States may not  
6 be sued without its consent and that the existence of consent is a prerequisite for  
7 jurisdiction.” *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011) (quoting  
8 *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). A “waiver of sovereign  
9 immunity cannot be implied, but ‘must be unequivocally expressed in statutory  
10 text.’” *Id.* (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The “terms of the  
11 United States’ consent to be sued in any court define that court’s jurisdiction to  
12 entertain the suit.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (cleaned up). And  
13 as the parties invoking jurisdiction, Plaintiffs must identify a valid waiver that  
14 encompasses their claims. *See Dunn & Black, P.S. v. United States*, 492 F.3d 1084,  
15 1088 (9th Cir. 2007).

16 Plaintiffs do not, and cannot, carry that burden.<sup>1</sup> The only arguably  
17 applicable waiver comes from the Administrative Procedure Act (“APA”) and is  
18 codified at 5 U.S.C. § 702.<sup>2</sup> There, Congress consented to suits “seeking relief  
19 other than money damages and stating a claim that an agency or an officer or  
20 employee [of the United States] acted or failed to act in an official capacity or  
21

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22 <sup>1</sup> Plaintiffs claim that this Court has jurisdiction under the federal question statute  
23 (28 U.S.C. § 1331) and the Declaratory Judgment Act (28 U.S.C. § 2201). Compl.  
24 ¶¶ 15-18. But neither of those statutes waives sovereign immunity. *See Holloman*  
25 *v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (no waiver in 28 U.S.C. § 1331);  
26 *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (9th Cir. 1954) (28  
27 U.S.C. § 2201 “is not a consent of the United States to be sued”).

28 <sup>2</sup> The Ninth Circuit has held that § 702’s waiver applies to “all non-monetary  
claims” alleging agency misconduct, not just claims plead under the APA. *Navajo*  
*Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).

1 under color of legal authority.” 5 U.S.C. § 702. But § 702 contains two crucial  
2 limitations: (1) nothing in that provision “affects other limitations on judicial  
3 review”; (2) and § 702 does not “confer[] authority to grant relief if any other  
4 statute that grants consent to suit expressly or impliedly forbids the relief which is  
5 sought.” *Id.* Because of those carve-outs, plaintiffs cannot “exploit[]” § 702 “to  
6 evade limitations on suit contained in other statutes.” *Match-E-Be-Nash-She-Wish*  
7 *Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012). That rule  
8 controls here.

9 The Clean Air Act (“CAA” or “Act”) “establishes a comprehensive program  
10 for controlling and improving air quality.” *Helping Hand Tools v. EPA*, 848 F.3d  
11 1185, 1190 (9th Cir. 2016). It delegates implementation authority to EPA. *See*,  
12 *e.g.*, 42 U.S.C. §§ 7408-7412. And it authorizes judicial review of EPA’s exercise  
13 of statutory authority, but only subject to certain limitations. Because Plaintiffs  
14 disregard those limitations, their suit thus falls outside § 702’s qualified waiver of  
15 sovereign immunity. And, because no other waiver authorizes this suit, the Court  
16 should dismiss the suit on sovereign immunity grounds.

17 As relevant here, “any” challenge to final EPA action under the CAA must  
18 be brought in circuit court within 60 days of the grounds giving rise to suit. 42  
19 U.S.C. § 7607(b)(1). That mandate “channels review of final EPA action  
20 exclusively to the courts of appeals, *regardless of how the grounds for review are*  
21 *framed.*” *California Dump Truck Owners Ass’n v. Nichols*, 784 F.3d 500, 506 (9th  
22 Cir. 2015) (quoting *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996)). It  
23 thus reaches suits that “effectively, if not facially, challenge []” EPA final action,  
24 including on constitutional grounds. *Id.* at 506; *see also id.* at 506–07 (discussing  
25 constitutional challenges to EPA action under the CAA). Plaintiffs’ suit does just  
26 that. Plaintiffs note, correctly, that agencies “have only those powers given to them  
27 by Congress.” Compl. ¶ 115 (citation and internal quotation marks omitted). They  
28 identify the CAA (and only the CAA) as the source of EPA’s “delegated federal



1 authority to regulate air pollution.” *Id.* ¶ 114. And they take issue with how EPA  
2 has exercised that authority in “setting national pollution control standards” and  
3 “regulating pollution from stationary sources like power plants and mobile sources  
4 like motor vehicles and airplanes.” *Id.* ¶ 120. But EPA does those things by issuing  
5 regulations or otherwise taking final actions. Thus, by alleging that “EPA forged  
6 an unlawful path by authorizing . . . climate pollution,” *id.* ¶ 9, Plaintiffs  
7 necessarily take aim at those final agency actions. There is, in short, no way that  
8 the “constitutional challenges of this lawsuit . . . can be[] separated from a  
9 challenge to final EPA action.” *Missouri v. United States*, 109 F.3d 440, 442 (8th  
10 Cir. 1997). This Court lacks jurisdiction to consider such a challenge.

11 Plaintiffs’ inability to proceed here does not deprive them of meaningful  
12 judicial review. They are free to press constitutional claims in a proper petition for  
13 review of EPA action in circuit court, which can “reverse” EPA action “found to  
14 be contrary to constitutional right, power, privilege, or immunity.” 42 U.S.C.  
15 § 7607(d)(9)(B); *see also Virginia*, 74 F.3d at 523 (noting that 42 U.S.C.  
16 § 7607(b)(1) creates “no impediment to the adjudication of constitutional issues”).  
17 And if Plaintiffs believe that EPA acts under the CAA without relying on the best  
18 available science, Compl. ¶¶ 307-25, then they are likewise free to raise those  
19 claims through the process that Congress prescribed. But they cannot evade  
20 limitations on suit that Congress imposed to ensure “speedy review of EPA rules  
21 and final actions” in circuit courts, and to minimize “duplicative or piecemeal  
22 litigation, and the risk of contradictory decisions.” *California Dump Truck Owners*  
23 *Ass’n*, 784 F.3d at 511 (cleaned up). Those limitations define the scope of the  
24 United States’ consent to suit and thus the scope of this Court’s jurisdiction. This  
25 suit falls outside that scope and the Court should therefore dismiss.

26 Plaintiffs get no further if their suit is construed as a challenge to EPA  
27 inaction. Suits alleging that EPA failed to act, or unreasonably delayed in acting,  
28 under the CAA are authorized under 42 U.S.C. § 7604. But such suits may proceed



1 only if the challengers first provide EPA with notice of the alleged violation. 42  
 2 U.S.C. § 7604(a), (b)(2). And Plaintiffs have not satisfied the “jurisdictional  
 3 prerequisite” of prior notice. *Hallstrom v. Tillamook Cnty.*, 844 F.2d 598, 600 (9th  
 4 Cir. 1987), *aff’d on other grounds*, 493 U.S. 20 (1989) (citation omitted). Their suit  
 5 thus disregards limitations on judicial review that Congress imposed “to strike a  
 6 balance between encouraging citizen enforcement of environmental regulations  
 7 and avoiding burdening the federal courts with excessive numbers of citizen suits.”  
 8 *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989).

9 In sum, whether Plaintiffs challenge EPA action or inaction under the CAA,  
 10 “the CAA is ‘addressed to the type of grievance’” that they seek “to assert.” *Sierra*  
 11 *Club v. Wheeler*, 956 F.3d 612, 619 (D.C. Cir. 2020) (quoting *Match-E-Be-Nash-*  
 12 *She-Wish Band of Pottawatomi Indians*, 567 U.S. at 216). And “when Congress  
 13 has dealt in particularity with a claim and has intended a specific remedy—  
 14 including its exceptions—to be exclusive, that is the end of the matter.” *Id.*  
 15 (cleaned up). Plaintiffs cannot “end-run” congressionally imposed limitations on  
 16 judicial review. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567  
 17 U.S. at 216. Sovereign immunity therefore bars this suit, and the Court should  
 18 dismiss it for lack of subject-matter jurisdiction.

19 **B. Plaintiffs lack Article III standing to bring this suit.**

20 To demonstrate Article III standing, Plaintiffs must establish that (1) they  
 21 “have suffered an injury in fact—an invasion of a legally protected interest which  
 22 is (a) concrete and particularized and (b) actual or imminent, not conjectural or  
 23 hypothetical”; (2) the injury is “fairly traceable to the challenged action of the  
 24 defendant, and not the result of the independent action of some third party not  
 25 before the court”; and (3) it is “likely, as opposed to merely speculative, that the  
 26 injury will be redressed by a favorable decision.” *Defs. of Wildlife*, 504 U.S. at  
 27 560-61 (1992) (cleaned up). Article III standing “serves to identify those disputes  
 28 which are appropriately resolved through the judicial process,” *Whitmore v.*

1 *Arkansas*, 495 U.S. 149, 155 (1990), and to “prevent the judicial process from  
2 being used to usurp the powers of the political branches.” *Clapper v. Amnesty*  
3 *International USA*, 568 U.S. 398, 408 (2013). In keeping with that purpose, a  
4 court’s inquiry must be “especially rigorous when reaching the merits of the  
5 dispute would force [it] to decide whether an action taken by one of the other two  
6 branches of the Federal Government was unconstitutional.” *Raines v. Byrd*, 521  
7 U.S. 811, 819-20 (1997).

8 To establish the third element of standing—redressability—“plaintiffs must  
9 show that the relief they seek is both (1) substantially likely to redress their  
10 injuries; and (2) within the district court’s power to award.” *Juliana*, 947 F.3d at  
11 1170 (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)). A plaintiff,  
12 moreover, must make this showing for “each form of relief that is sought.” *Town of*  
13 *Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (cleaned up).

14 The redressability analysis here is controlled by the Ninth Circuit’s decision  
15 in *Juliana*. There, much as here, a group of children and young adults asserted that  
16 the government had violated their right to a “climate system capable of sustaining  
17 human life.” *Juliana*, 947 F.3d at 1164. The Court agreed that two of the plaintiffs  
18 had identified cognizable harms resulting from climate change, and it concluded  
19 that those harms could be traced to the government conduct that the plaintiffs  
20 challenged. *Id.* at 1168-69. Still, the Court concluded that these plaintiffs’ asserted  
21 harms were not redressable by an Article III court. *Id.* at 1170. That is true here as  
22 well. Thus, under the Ninth Circuit’s binding precedent, the Complaint must be  
23 dismissed for lack of standing.

24 As *Juliana* establishes, Plaintiffs cannot make the two-part showing for  
25 redressability for either form of relief sought in the Complaint. Beginning with  
26 Plaintiffs’ request for a declaratory judgment, Compl. 98-100 (Prayers for Relief 1-  
27 7), the Ninth Circuit in *Juliana* concluded that an identical request for a declaration  
28 that the government is violating the Constitution was not “substantially likely to

1 redress [plaintiffs’] injuries,” and thus could not satisfy Article III. *Juliana*, 947  
 2 F.3d at 1170. The Court found that while a declaration may be “likely to benefit  
 3 the plaintiffs psychologically, [it] is unlikely by itself to remediate their alleged  
 4 injuries absent further court action.” *Id.*; see also *Clean Air Council v. United*  
 5 *States*, 362 F. Supp. 3d. 237, 249 (E.D. Pa. 2019) (addressing similar claims and  
 6 concluding that “[declaratory] relief will not redress the injuries Plaintiffs have  
 7 already suffered”). And because any “further court action” would have  
 8 impermissibly embroiled a federal court in ongoing oversight of the elected  
 9 branches’ response to climate change, all that was left for the plaintiffs was  
 10 “psychic satisfaction,” which “is not an acceptable Article III remedy because it  
 11 does not redress a cognizable Article III injury.” *Steel Co. v. Citizens for a Better*  
 12 *Env’t*, 523 U.S. 83, 107 (1998). On these bases, the Ninth Circuit concluded that  
 13 the plaintiffs in *Juliana* lacked Article III standing to seek declaratory relief. That  
 14 ruling is dispositive here because the declaration Plaintiffs seek in this case is not  
 15 materially different from the declaration sought in *Juliana*.<sup>3</sup>

16 It makes no difference that Plaintiffs now speculate that a declaratory  
 17 judgment in this case would induce the government to “begin to abate climate  
 18 pollution” in the way they desire. See Compl. ¶¶ 329-331. This theory is foreclosed  
 19 by the *Juliana* court’s statement that a declaratory judgment “is unlikely by itself  
 20 to remediate their alleged injuries absent further court action.”<sup>4</sup> *Juliana*, 947 F.3d  
 21

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22  
 23 <sup>3</sup> Indeed, Plaintiffs describe the *Juliana* case as “closely related,” and arising “from  
 24 the same or a closely related transaction, happening, or event.” Notice of Related  
 25 Cases 1, ECF No. 5. They also state that the two cases “call for determination of  
 the same or substantially related . . . questions of law and fact.” *Id.*

26 <sup>4</sup> After concluding that the federal judiciary lacks jurisdiction over the plaintiffs’  
 27 claims, the Ninth Circuit in *Juliana* remanded the case to the district court “with  
 28 instructions to dismiss for lack of article III jurisdiction.” *Juliana*, 947 F.3d at  
 1175. On remand, the district court permitted Plaintiffs to file an amended  
 complaint that purports to create Article III jurisdiction on the same flawed theory

1 at 1170. But in any event, induced regulatory actions would not adequately redress  
2 Plaintiffs’ climate injuries for the same reason the Ninth Circuit was “skeptical”  
3 that even the broad injunction sought in *Juliana* was “substantially likely to redress  
4 [plaintiffs’] injuries.” *Id.* at 1170-71. The plaintiffs in *Juliana* sought an injunction  
5 “requiring the government not only to cease permitting, authorizing, and  
6 subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to  
7 draw down harmful emissions.” *Id.* at 1170. Notwithstanding the extraordinary  
8 breadth of the requested injunction, the Ninth Circuit explained that the requested  
9 relief would at best ameliorate, but not solve, the plaintiffs’ climate injuries given  
10 the complexity and global nature of the problem. *Id.* at 1171. And it concluded on  
11 that basis that the requested injunction was not substantially likely to redress the  
12 plaintiffs’ climate-based injuries. *See id.* (explaining that the relaxed redressability  
13 standard Plaintiffs sought to invoke was unavailable to them because they asserted  
14 substantive claims rather than procedural rights claims) (citing *Massachusetts v.*  
15 *EPA*, 549 U.S. 497, 525-26 (2007)); *see also Bellon*, 732 F.3d at 1147 (“Plaintiffs  
16 are not sovereign states and thus the [Supreme] Court’s standing analysis [in  
17 *Massachusetts v. EPA*] does not apply.”).

18 Plaintiffs cannot plausibly contend that the declaratory relief sought here  
19 would redress their climate-based injuries more fully than the broad injunction  
20 sought—and deemed insufficient—in *Juliana*. But even assuming a declaratory  
21 judgment could theoretically provide such redress, Plaintiffs still would not  
22

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23 that the Court of Appeal rejected. The district court then largely denied the  
24 government’s motion to dismiss the amended complaint and refused to certify its  
25 order permitting amendment or its order on the motion to dismiss. The government  
26 petitioned the Ninth Circuit for a writ of mandamus. Pet. for a Writ of Mandamus  
27 and Opposed Mot. for a Stay of Proceedings, *United States Dist. Ct. for the Dist. of*  
28 *Or. v. Juliana*, No. 24-684 (9th Cir. Feb. 2, 2024). The Court of Appeals has  
ordered briefing on the petition. Order, *United States Dist. Ct. for the Dist. of Or.*  
*v. Juliana*, No. 24-684 (9th Cir. Feb. 29, 2024).

1 “surmount the remaining hurdle” in the redressability test—i.e., “establishing that  
2 the specific relief they seek is within the power of an Article III court.” *Id.* As with  
3 the expansive injunction sought in *Juliana*, the unbounded declaration that  
4 Plaintiffs seek here is not within the power of a federal court to award because it  
5 would amount to judicial assessment and oversight of EPA unmoored from the  
6 mechanisms for judicial review that Congress has enacted.

7 Turning to the remainder of the Prayer for Relief, Plaintiffs generally  
8 request, pursuant to 28 U.S.C. § 2202, “such other and further relief as the Court  
9 deems just and proper to redress” whatever constitutional violations the Court may  
10 declare. Compl. 100 (Prayer for Relief 8). While the Prayer for Relief does not  
11 explain what this additional relief may be, elsewhere in the Complaint Plaintiffs  
12 explain that they would seek “further relief . . . to enforce” any declaratory  
13 judgment this Court may issue. *Id.* ¶¶ 11, 341, 355, 366, 376, 386. This additional  
14 requested relief does not change the conclusions above, because an order enforcing  
15 a declaratory judgment would fail to redress Plaintiffs’ claims for the same reasons  
16 the injunction sought in *Juliana* failed—any injunction would necessarily be either  
17 too narrow to provide effective redress, or so broad as to fall beyond the power of  
18 an Article III court.

19 In sum, Plaintiffs have not shown that this lawsuit satisfies the test for  
20 standing. Accordingly, the Court should dismiss the case for lack of Article III  
21 jurisdiction.

22 **C. The Complaint fails to assert a justiciable controversy.**

23 Aside from the fact that this suit is barred by the United States’ sovereign  
24 immunity, and that Plaintiffs lack standing, this action should be dismissed because  
25 it simply is not one that a federal court may entertain consistent with the  
26 Constitution. “Sometimes, . . . the law is that the judicial department has no  
27 business entertaining the claim of unlawfulness—because the question is entrusted  
28 to one of the political branches or involves no judicially enforceable rights.” *Vieth*

1 *v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion). “In such a case the claim  
2 is said to . . . be nonjusticiable—outside the courts’ competence and therefore  
3 beyond the courts’ jurisdiction.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494  
4 (2019) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). That is the case here.

5 The “judicial Power of the United States,” U.S. CONST. art. III, § 1, is “one  
6 to render dispositive judgments” in “cases and controversies” as defined by Article  
7 III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (citation omitted).  
8 That power can “come into play only in matters that were the traditional concern of  
9 the courts at Westminster” and only in “cases and controversies of the sort  
10 traditionally amenable to, and resolved by, the judicial process.” *Vt. Agency of Nat.*  
11 *Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (citations omitted).  
12 “If a dispute is not a proper case or controversy, the courts have no business  
13 deciding it.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

14 Plaintiffs’ suit is not a case or controversy cognizable under Article III. They  
15 ask the Court to review and assess all of Defendants’ actions (and inaction) relating  
16 to climate change and then to pass on the comprehensive constitutionality of all of  
17 those actions (and inaction). Compl. ¶¶ 335-386. Federal courts cannot use the  
18 “judicial Power” to perform such a sweeping policy review—and for good reason:  
19 the Constitution entrusts to Congress and the Executive Branch the power to enact  
20 and implement comprehensive government-wide measures of the sort sought by  
21 Plaintiffs. These functions are not the province of Article III courts. The  
22 “Constitution’s central mechanism of separation of powers depends largely upon  
23 common understanding of what activities are appropriate to legislatures, to  
24 executives, and to courts.” *Defs. of Wildlife*, 504 U.S. at 559-60. As the *Juliana*  
25 court recognized, plaintiffs may challenge discrete government actions (or  
26 inaction), but their demand for changes to the government’s overall response to  
27 climate change “must be made to the political branches or to the electorate at  
28 large” rather than in district court. *Juliana*, 947 F.3d at 1175. Recognizing these



1 limits of Article III jurisdiction does not “discount the gravity” of climate change,  
2 *Bellon*, 732 F.3d at 1142; it simply observes the constitutional boundaries of the  
3 different branches of government.

4 Nor is the review that Plaintiffs seek within the Court’s equitable powers. A  
5 federal court’s equitable powers are “subject to restrictions: the suit must be within  
6 the traditional scope of equity as historically evolved in the English Court of  
7 Chancery.” *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945). The relief  
8 requested by Plaintiffs is plainly not of the sort “traditionally accorded by courts of  
9 equity.” *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S.  
10 308, 319 (1999). At bottom, this dispute over American energy and environmental  
11 policy “is not a proper case or controversy,” either at law or in equity, and “the  
12 courts have no business deciding it.” *Cuno*, 547 U.S. at 341. Accordingly, for this  
13 reason as well, the Complaint must be dismissed for lack of jurisdiction.

14 **II. The Court Should Dismiss the Complaint under Rule 12(b)(6) Because**  
15 **it Fails to State Cognizable Claims.**

16 The Court should also dismiss the Complaint because it fails to state any  
17 claim for which relief could be granted.

18 **A. Plaintiffs have not alleged any cognizable claim under the Due**  
19 **Process Clause.**

20 The government does not dispute that climate change poses a serious threat,  
21 nor that any solution to addressing climate change will require the active  
22 involvement of the federal government. The U.S. Constitution, however, does not  
23 explicitly recognize a right to a life-sustaining climate. Accordingly, Plaintiffs’  
24 claims in Count III and IV, which attempt to locate such a right in the Due Process  
25 Clause, fail on the merits.

26 Count IV must be dismissed because there is no implied due process right to  
27 a “life-sustaining climate system.” The Supreme Court has repeatedly instructed  
28 courts considering novel due process claims to “exercise the utmost care whenever

1 . . . asked to break new ground in this field, . . . lest the liberty protected by the Due  
 2 Process Clause be subtly transformed” into judicial policy preferences. *Washington*  
 3 *v. Glucksberg*, 521 U.S. 702, 720 (1997) (cleaned up). More specifically, the  
 4 Supreme Court has “regularly observed that the Due Process Clause specially  
 5 protects those fundamental rights and liberties which are, objectively, deeply  
 6 rooted in this Nation’s history and tradition.” *Id.* at 720-21 (cleaned up). Plaintiffs’  
 7 request that this Court recognize an implied fundamental right to a life-sustaining  
 8 climate system, Compl. ¶ 368, contradicts that directive, because such a purported  
 9 right is without basis in the Nation’s history or tradition.

10 The proposed right to a “life-sustaining climate system” is nothing like any  
 11 fundamental right ever recognized by the Supreme Court. The state of the climate  
 12 is a public and generalized issue, and so interests in the climate are unlike the  
 13 particularized personal liberty or personal privacy interests of individuals the  
 14 Supreme Court has previously recognized as being protected by fundamental  
 15 rights. And courts that have considered proposals to establish a healthy  
 16 environment or climate as rights protected by the U.S. Constitution have rejected  
 17 those proposals. *See, e.g., Guertin v. Michigan*, 912 F.3d 907, 921-22 (6th Cir.  
 18 2019) (The “Constitution does not guarantee a right to live in a contaminant-free,  
 19 healthy environment.”); *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d  
 20 1222, 1237-38 (3d Cir. 1980) (finding it “established in this circuit and elsewhere  
 21 that there is no constitutional right to a pollution-free environment”), *vacated on*  
 22 *other grounds sub nom. Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers*  
 23 *Ass’n*, 453 U.S. 1 (1981); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971)  
 24 (observing that arguments “in support of a constitutional protection for the  
 25 environment” have not “been accorded judicial sanction”); *cf. Lake v. City of*  
 26 *Southgate*, No. 16-10251, 2017 WL 767879, at \*4 (E.D. Mich. Feb. 28, 2017)  
 27 (“[W]henver federal courts have faced assertions of fundamental rights to a  
 28 ‘healthful environment’ or to freedom from harmful contaminants, they have



1 invariably rejected those claims.”); *SF Chapter of A. Philip Randolph Inst. v. U.S.*  
 2 *EPA*, No. C 07-04936 CRB, 2008 WL 859985, at \*7 (N.D. Cal. Mar. 28, 2008)  
 3 (rejecting asserted rights to be free from climate change pollution and to have a  
 4 certain quality of life).<sup>5</sup>

5 Making environmental policy involves balancing “competing social,  
 6 political, and economic forces.” *Collins v. City of Harker Heights, Tex.*, 503 U.S.  
 7 115, 128 (1992). The Constitution envisions that such balancing is distinctly the  
 8 province of the Executive and Legislative branches of government, not that of the  
 9 federal courts.

10 Count III also must be dismissed because Plaintiffs have failed to state  
 11 claims as to any other alleged fundamental rights (i.e., to bodily integrity and  
 12 health, the pursuit of happiness, enjoyment of life, and safety). At root, the due  
 13 process claim in Count III is predicated on the proposition that EPA has not  
 14 protected Plaintiffs’ lives or ensured Plaintiffs’ liberty by sufficiently regulating  
 15 climate pollution. However, the Due Process Clause does not impose an  
 16 affirmative duty on the government to take actions “to protect a person’s life,  
 17 liberty, or property; it acts as a ‘limitation on the State’s power to act’ rather than a  
 18 ‘guarantee of certain minimal levels of safety and security.’” *Polanco v. Diaz*, 76  
 19 F. 4th 918, 926 (9th Cir. 2023) (quoting *DeShaney v. Winnebago Cnty. Dep’t of*  
 20

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21  
 22 <sup>5</sup> An outlier among this collection of cases is the district court decision in *Juliana*  
 23 *v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev’d and remanded*, 947  
 24 F.3d 1159 (9th Cir. 2020) (holding that there is a fundamental right to a climate  
 25 system capable of sustaining life). But that decision lacks persuasive weight,  
 26 especially because, as the Ninth Circuit ultimately held, the district court lacked  
 27 jurisdiction over the case when it rendered its decision. *Juliana*, 947 F.3d at 1175.  
 28 And, in any event, other courts have recognized that the district court’s decision in  
*Juliana* was an outlier. *See, e.g., Clean Air Council*, 362 F. Supp. 3d at 250-251  
 (noting that the “*Juliana* Court certainly contravened or ignored longstanding  
 authority.”); *City of Southgate*, 2017 WL 767879, at \*4, n.3.

1 *Social Servs.*, 489 U.S. 189, 195 (1989)). Because Plaintiffs do not allege that EPA  
2 itself has emitted climate pollution, they fail to allege facts sufficient to support a  
3 claim for relief under Count III.

4 **B. The Complaint fails to allege a cognizable equal protection claim.**

5 Plaintiffs have similarly failed to state an equal protection claim. The  
6 general rule is that government action that classifies certain groups of people  
7 differently from others “is presumed to be valid and will be sustained if the  
8 classification drawn by the [government action] is rationally related to a legitimate  
9 state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)  
10 (citation omitted); *City and Cnty. of San Francisco v. U.S. Postal Serv.*, 546 Fed.  
11 App’x 697, 698 (9th Cir. 2013) (Mem.); *Lazy Y Ranch v. Behrens*, 546 F.3d 580,  
12 588-89 (9th Cir. 2008). This general rule gives way only when a government  
13 action burdens a fundamental right protected by the Constitution or uses a suspect  
14 classification such as race. Those government actions are subject to heightened  
15 scrutiny and will be sustained only if they are suitably tailored to a compelling  
16 state interest. *City of Cleburne*, 473 U.S. at 440.

17 Applying that framework, Plaintiffs’ equal protection claims fail at the  
18 threshold because none of the EPA actions or inactions contain any age-based  
19 classifications. Plaintiffs urge that the use of discounting in the context of  
20 regulatory impacts analyses—to weigh the costs and benefits of a policy over  
21 time—is “a weapon of intergenerational oppression,” Compl. ¶ 278, but they do  
22 not allege with particularity that Defendants have applied discounting in a  
23 discriminatory fashion. Their contention instead is that the practice of discounting  
24 is *per se* discrimination against children that violates the Constitution. That  
25 contention is extraordinary given widely accepted principles of basic economics  
26 and the lack of any equal protection precedent addressing discounting, despite its  
27 ubiquity in the federal rulemaking process. *See* Exec. Order No. 12866, 58 Fed.  
28 Reg. 51735 (Sept. 30, 1993) (requiring review by the Office of Information and

1 Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB)  
2 of significant regulatory actions); OMB Circular No. A-4 at 75-82 (Nov. 9, 2023),  
3 available at [https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-](https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf)  
4 [4.pdf](https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf) (explaining the use of discount rates as a standard methodology for  
5 measuring costs and benefits of regulatory actions in the context of OIRA review);  
6 *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-314 (1976) (rejecting  
7 contention that old age defines a “discrete and insular group” because it “marks a  
8 stage that each of us will reach if we live out our normal span.”) (cleaned up).

9 Because Plaintiffs have failed to identify any challenged action that  
10 classifies children differently from others, their equal protection claims must fail.  
11 But even if the challenged EPA actions did classify children or future generations  
12 differently, the equal protection claims would still fail for several reasons. Contrary  
13 to Plaintiffs’ contentions, strict scrutiny would not apply to the challenged EPA  
14 actions and inaction because Plaintiffs cannot show that they are a suspect class in  
15 need of extraordinary protection. Plaintiffs contend that “[c]hildren as a class are a  
16 prime example of a ‘discrete and insular’ minority requiring close judicial scrutiny  
17 of invidious discrimination.” Compl. ¶ 344. But the Supreme Court has declined to  
18 treat classifications based on age as suspect and has thus declined to apply  
19 heightened scrutiny to government actions that classify by age. In *Massachusetts*  
20 *Board of Retirement v. Murgia*, the Supreme Court explained that “a suspect class  
21 is one saddled with such disabilities, or subjected to such a history of purposeful  
22 unequal treatment, or relegated to such a position of political powerlessness as to  
23 command extraordinary protection from the majoritarian political process.” 427  
24 U.S. at 313 (cleaned up). The Court stated that a suspect class is a “‘discrete and  
25 insular’ group,” which the elderly are not because old age “marks a stage that each  
26 of us will reach if we live out our normal life span.” *Id.* at 313-14 (citing *United*  
27 *States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).  
28

1 Consistent with *Murgia*, courts have uniformly rejected Plaintiffs’  
 2 proposition (Compl. ¶ 344), that youth are a suspect class triggering heightened  
 3 judicial scrutiny under the Equal Protection Clause. *See United States v. Flores-*  
 4 *Villar*, 536 F.3d 990, 998 (9th Cir. 2008) (holding that “age is not a suspect class”);  
 5 *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) (“No cases have ever  
 6 held, and we decline to hold, that children are a suspect class.”). As the First  
 7 Circuit has explained, young people, though they “have historically been denied  
 8 full rights of adulthood while shouldering such burdens of citizenship as military  
 9 service,” have not been “saddled with such disabilities, or subjected to such a  
 10 history of purposeful unequal treatment, or relegated to such a position of political  
 11 powerlessness, as to justify searching judicial scrutiny.” *Gabree v. King*, 614 F.2d  
 12 1, 2 (1st Cir. 1980) (quoting *Murgia*, 427 U.S. at 313) (internal quotation marks  
 13 and citations omitted).

14 “Because age is not a suspect classification,” *Nunez by Nunez v. City of San*  
 15 *Diego*, 114 F.3d 935, 944 (9th Cir. 1997), the actions Plaintiffs challenge are  
 16 subject only to rational basis review, which affords those actions “a strong  
 17 presumption of validity.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314  
 18 (1993). Under this standard, a court must uphold government action “if there is any  
 19 reasonably conceivable state of facts that could provide a rational basis” for the  
 20 action. *Id.* at 313; *see also Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78  
 21 (1911). Plaintiffs attacking the rationality of government acts bear the burden “to  
 22 negative every conceivable basis which might support [them].” *Beach Commc’ns*,  
 23 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356,  
 24 364 (1973)).

25 The Complaint falls far short of this standard. It states in a conclusory  
 26 fashion that there is no justification by which the government could satisfy any  
 27 level of scrutiny (rational basis, intermediate scrutiny, or strict scrutiny) for the  
 28 EPA actions or alleged failures to act that Plaintiffs purport to challenge in the

1 Complaint. Compl. ¶ 135. Elsewhere, Plaintiffs generically state that: “There is no  
2 rational calculus that supports any decision not to immediately and swiftly control  
3 climate pollution to abate the climate crisis,” *id.* ¶ 306; “Climate pollution and  
4 dangerous air quality serve no rational, legitimate, important, or compelling  
5 government purpose,” *id.* ¶ 328; and “Defendants’ discriminatory conduct in  
6 allowing dangerous levels of climate pollution . . . and in discounting the value of  
7 Children’s lives is not rationally related to any legitimate government interest,” *id.*  
8 ¶ 353. Such legal assertions bear no weight in a Rule 12(b)(6) analysis. *Iqbal*, 556  
9 U.S. at 678.

10 Moreover, these generic statements are not directed at any particular agency  
11 action; they are instead directed at EPA’s actions (or inaction) under the CAA in  
12 the aggregate. Because Plaintiffs fail to direct a specific argument toward any  
13 discrete regulatory action or inaction, they necessarily fail “to negative every  
14 conceivable basis which might support” each such action or inaction. *Beach*  
15 *Commc’ns*, 508 U.S. at 315 (quoting *Lake Shore Auto Parts Co.*, 410 U.S. at 364).  
16 But even if Plaintiffs had specifically identified the EPA actions (or inaction) that  
17 they challenge under the CAA, their claim would still fail because agency decision  
18 making of this kind necessarily reflects a compromise among competing policy  
19 goals, as well as resource constraints and other considerations or limitations. *See*  
20 *Juliana*, 947 F.3d at 1172.

21 Because Plaintiffs have not alleged facts from which the Court could  
22 plausibly conclude that the challenged government actions lack a rational basis, *see*  
23 *Iqbal*, 556 U.S. at 678, Counts I and II should be dismissed for failure to state a  
24 claim.

25 **C. Plaintiffs have not stated a claim under the Take Care Clause.**

26 Finally, Plaintiffs allege that EPA violated the Take Care Clause of Article  
27 II, § 3 by “act[ing] far in excess of [its] . . . legal authority” under the CAA.  
28 Compl. ¶ 381; *see also id.* ¶¶ 377-86. This ignores the “well established”

1 distinction between “claims that an official exceeded his statutory authority, on the  
2 one hand, and claims that he acted in violation of the Constitution.” *Dalton v.*  
3 *Specter*, 511 U.S. 462, 473-74 (1994). The former simply “are not ‘constitutional’  
4 claims.” *Id.* at 474. That is reason enough to dismiss Count V.

5 Count V must be dismissed even if Plaintiffs’ statutory argument could  
6 implicate the Take Care Clause. The Take Care Clause does not furnish a basis for  
7 affirmative relief in an Article III court. The Supreme Court has recognized that  
8 “the duty of the President . . . to see that the laws are faithfully executed” “is  
9 purely executive and political,” and not subject to judicial direction. *Mississippi v.*  
10 *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866).

11 In addition, Plaintiffs cannot sue directly under the Take Care Clause  
12 because that provision supplies no private right of action. *See, e.g., Brnovich v.*  
13 *Biden*, 630 F. Supp. 3d 1157, 1178 (D. Ariz. 2022) (“separation of powers  
14 principles and the Take Care Clause do not provide Plaintiffs with causes of  
15 action”); *accord Las Americas Immigrant Advoc. Ctr. v. Biden*, 571 F. Supp. 3d  
16 1173, 1180 (D. Or. 2021); *City of Columbus v. Trump*, 453 F. Supp. 3d 770, 800  
17 (D. Md. 2020). So, they must rely instead on a judge-made cause of action that “is  
18 the creation of courts of equity.” *Armstrong v. Exceptional Child Center, Inc.*, 575  
19 U.S. 320, 327 (2015). But “[t]he power of federal courts of equity,” and thus the  
20 scope of any implied equitable cause of action, “is subject to express and implied  
21 statutory limitations.” *Id.* And here, those limitations would include, at minimum,  
22 Congress’s express limitations on suits challenging EPA action (or inaction) under  
23 the CAA. *See supra* Section I(A). Plaintiffs “cannot, by invoking [this Court’s]  
24 equitable powers, circumvent” those limitations. *Armstrong*, 575 U.S. at 328.  
25 Count V therefore would fail even if it passed muster under *Dalton*.

### 26 Conclusion

27 For all of the reasons explained above, the Court should grant Defendants’  
28 motion to dismiss and dismiss Plaintiffs’ claims in their entirety.

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Dated: March 15, 2024

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**Certificate of Compliance**

The undersigned, counsel of record for Defendants, certifies that this brief contains 6,841 words, which complies with the word limit of L.R. 11-6.1.

Dated: March 15, 2024

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