IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

XP VEHICLES, INC. *et al.*, Plaintiff, v. THE UNITED STATES DEPARTMENT OF ENERGY *et al.*, Defendants.	Case No. 1:13-cv-00037 (KBJ)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE OFFICIAL CAPACITY CLAIMS

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INTRODUCTION

Plaintiffs, XP Vehicles, Inc. (XPV) and Limnia, Inc. (Limnia), oppose the motion to dismiss filed by the U.S. Department of Energy (DOE) and DOE Secretary Ernest Moniz in his official capacity.

Political cronyism infected DOE's decision-making in both the Advanced Technology Vehicles Manufacturing Loan (ATVM) and the Section 1703 Loan Guarantee (LG) programs. Am. Ver. Compl. ¶¶ 4, 7, 54–63, 84–109, 113, 118. Through these programs, Congress authorized DOE to transfer tens of billions of taxpayer dollars to private companies for the purposes of freeing the United States from our dependence on foreign oil and supporting American advanced-technology and manufacturing companies. *See* Energy Independence and Security Act, Pub. L. No. 110-140 § 136, 121 Stat. 1492, 1514 (2007) (EISA). Yet, instead of practicing honest, fair, and level stewardship of the public trust, DOE officials treated these

taxpayer-funded programs as a piggy bank for the politically-connected and powerful. Am. Ver. Compl. ¶¶ 83, 85–89, 112–18.

Of the 144 ATVM loan applications it received, DOE only granted five from a tight circle of well-known and famously well-connected companies—the Ford Motor Company, Nissan, Tesla, and Fisker. *See* Am. Ver. Compl. ¶¶ 90–109. In March of 2013, the Government Accountability Office (GAO) reported that DOE was not considering any more ATVM loan applications, contrary to its Congressional directive, and would make no more awards. *See* Ex. 1 (U.S. Gov't Accountability Office, GAO 13-331R, Status of DOE Loan Programs (2013)). Among other things, this allowed DOE to protect the politically-connected ATVM "winners" against competition from forward-thinking entrepreneurs, including XPV, Limnia, and others.

The LG program was also pervasively tainted. Internal DOE emails show that politics drove loan award decisions. For example, an internal email said "DOE has made a political commitment to get Unistar through the approval process by 6/15." *Id.* ¶ 112; *id.* Ex. 16; *see also id.* ¶ 113 (Senator Harry Reid became "desperate," which led a DOE loan officer to email another saying that the "[White House] may want to help" and that "Short term considerations may be more important than long term considerations and what's a billion anyhow?").

DOE's politically-motivated abuse of the ATVM and LG loan programs put XPV out of business and hamstrung Limnia. Am. Ver. Compl. ¶¶ 1, 9, 19, 67–74, 117–19. The Government now argues, among other things, that Executive Branch cronyism, abuse and disregard for the law, and the attendant harm caused thereby to XPV, Limnia, and the public trust are not subject to judicial review because: (1) the agency's actions are not yet final; (2) XPV lacks standing because it is in the process of winding up its affairs, even though it was run out of business by the very acts that form the basis of this litigation; (3) DOE is not bound by the promises made by

then-Secretary Steven Chu because of a regulation that was not yet effective at the time his promises were made; and (4) that XPV's and Limnia's equal protection and due process rights were not violated. These and DOE's other arguments, however, are contrary to well-established controlling authorities.

Government cronyism, abuse, and disregard for the law are subject to the check of judicial review. XPV's and Limnia's claims are not premature, unripe, or unfit for judicial review under the Administrative Procedure Act (APA). 5 U.S.C. § 706(a)(2). Additionally, DOE acted *ultra vires* when implementing and administering the loan programs. Finally, by unfairly and arbitrarily denying XPV and Limnia loan funds, DOE violated their constitutional rights to equal protection and due process. The administrative record should be—once and for all—revealed by the agency, and this case should proceed to adjudication on the merits.

FACTS

I. The Statutory and Regulatory Framework

Congress carefully limited DOE's discretion to award or deny loans when it created the ATVM and LG loan programs, intending the agency to support advanced technology vehicle manufacturing in the United States and reduce American dependency upon foreign oil. Am. Ver. Compl. ¶ 8. In EISA § 136, Congress directed that not later than one year after the date of enactment, and subject to the availability of appropriated funds, "[DOE] shall carry out a program to provide a total of not more than $25,000,000,000 in loans to eligible individuals and entities."[1] EISA § 136(d)(1); *see* 42 U.S.C. § 17013 (codifying the public law).

[1] A "shall" in the statutory language may be read to require that DOE continue to allocate funds to the extent that eligible applicants exist, or become available. 42 U.S.C. § 17013(d)(1) (emphasis added); *Fed. Trade Comm'n v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir 2009) (stating that the word "shall" is mandatory as it carries with it a fixed usage meaning "something on the order of 'must' or 'will'").

By statute, Congress specified application criteria and required that applicants must demonstrate: (1) the company's financial viability without receiving additional federal funding for their given project; (2) that the "qualified investment" was being expended efficiently and effectively; and (3) that compliance would be had with respect to the other criteria, which the agency would eventually establish and publish. EISA § 136(d)(3). DOE eventually published ATVM regulations in 10 C.F.R. Part 611. These set a three-stage review for ATVM loan eligibility, ostensibly in order for the loans to be awarded fairly.[2] At present, DOE still possesses approximately $16.6 billion of unused lending authority for the ATVM program. Am. Ver. Compl. ¶¶ 8, 120.

Congress did *not* provide DOE unfettered discretion to reject applicants. Nor did it authorize DOE to deny loan funds to otherwise qualified applicants through a secret, unpublished, and criteria-less "merit review." Moreover, Congress did *not* authorize DOE to arbitrarily stop making loans to qualified applicants or to otherwise prioritize the applications of

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[2] First, DOE said it would screen applicants for eligibility. To pass this first phase, the applicant would have to be either a manufacturer of automobiles or of qualifying components, 10 C.F.R. § 611.100(a); *see also* 42 U.S.C. § 17013(b), and be financially viable, 10 C.F.R. § 611.100(c) (setting forth eight factors DOE considers when assessing the applicant's financial viability); *see also* 42 U.S.C. § 17013(d)(3)(A).

Second, DOE said it would screen the applications for eligibility and assess whether the application contained all the information required by regulation, 10 C.F.R. § 611.101, and determine whether the proposed loan complied with all the other statutes and regulations. 10 C.F.R. § 611.103(a). During this second phase of the review, DOE could only "reject an application, in whole or in part, *that does not meet these requirements*." *Id.* (emphasis added).

Third, DOE said it would conduct a substantive review of the application, evaluating a given company for the technical merit of its proposal, on factors including: (1) "economic development and diversity in technology, company, risk, and geographic location;" (2) whether the proposed provisions would financially protect the government; and (3) priority consideration for manufacturers that have been operational for the longest amount of time. 10 C.F.R. § 611.103(b); *cf.* 42 U.S.C. § 17013(g). By its terms, it said the "Secretary shall, in making awards or loans to those manufacturers that have existing facilities, give priority to those facilities that are oldest or have been in existence for at least 20 years or are utilized primarily for the manufacture of ultra-efficient vehicles. Such facilities can currently be sitting idle." *Id.*

better-known and more well-connected corporations above those of emerging technology companies that filed first. Nonetheless, DOE did all of these things. *See id.* ¶ 38; *see also id.* ¶¶ 40–74, 115–20.

Congress also set clear limits on DOE's discretion to grant or deny LG program applications, defining eligible projects and setting loan and repayment terms. *See* 42 U.S.C. §§ 16511 *et seq*. DOE subsequently promulgated rules clarifying these requirements. *Loan Guarantees for Projects That Employ Innovative Technologies*, 74 Fed. Reg. 63,544 (Dec. 4, 2009). DOE promised to consider applications using a "competitive process." 10 C.F.R. § 609.7(a). DOE appeared to be rolling out a fair and transparent loan application process, but in reality, it was anything but fair and transparent.

II. The Travails of XPV and Limnia

XPV was an advanced technology vehicle company and an ATVM loan applicant. Am. Ver. Compl. ¶¶ 1, 14. In response to a DOE solicitation, XPV applied for a loan and offered over $100 million in collateral to secure the company's request for $40 million in loan funding to mass produce an advanced, family-friendly, electric, SUV-style vehicle using polymer plastics and foam pressure membranes wrapped around a lightweight alloy frame. *Id.* ¶¶ 14, 17. XPV carefully projected that the company would sell a base model SUV to families for approximately $20,000. *Id.* ¶ 16.

Limnia is an advanced-technology, "green energy" company that has worked with DOE's own Sandia National Laboratory (Sandia) since 2002 on an advanced energy storage system for electric cars. DOE has provided grant, technical support, and validation services in connection with Limnia's work with Sandia over the course of this past decade. *Id.* ¶ 12. Limnia applied for both LG funding and for a $15 million ATVM loan to build a battery system. Sandia wanted to be, and was named as, one of Limnia's key subcontractors. *Id.* ¶¶ 12–13, 68.

DOE told XPV that its ATVM loan application was deemed "substantially complete" on December 31, 2008, and, at all times relevant, XPV qualified for a loan under DOE's published criteria. *Id.* ¶ 66. Indeed, DOE staff deemed XPV a "qualified applicant", and DOE's own Excel comparison matrices in December of 2008 and March of 2009 placed XPV in the top five percent of all applicants. *See id.* ¶¶ 21–23.

XPV was under the impression that DOE's underwriting review would be consistent with normal industry standards, meaning that it would take only a matter of weeks to determine XPV's eligibility and funding. However, DOE delayed for months, setting aside XPV's application in favor of politically-connected insider applicants. *Id.* ¶¶ 24–26. DOE consistently denied, over a period of months, XPV's repeated offers to supply additional technical information and to make its business team available for in-depth interviews with DOE underwriters. *Id.* ¶ 25; *see id.* Ex. 4. Then, at the end of April of 2009, DOE notified XPV that its application had been assigned to a technical eligibility and merit review team. *Id.* ¶ 27. About a month later, DOE told XPV that it had passed the technical review of the agency's newly-composed technical review team and that "everything looked good." *Id.* ¶ 28–29.

Shortly thereafter, XPV discovered that two applicants, both with very close Executive Branch political ties to were receiving special assistance from DOE with their applications. *Id.* ¶¶ 30, 90–109. XPV requested similar treatment, which DOE denied; ostensibly, XPV's application was "so good" that special assistance was unnecessary. *Id.* ¶ 31. By June 15, 2009, DOE staff knew that XPV was a semi-finalist for the "America's Most Promising Companies" list in Forbes Magazine. *Id.* ¶ 32. There was no reason for XPV to think that had fallen out of DOE's top five-percent. *Id.* ¶ 23.

In late June 2009, DOE officials announced it was awarding eight billion dollars in loans to three companies, all of which had (and have) close government ties. Five days later, on June 29, 2009, XPV wrote DOE review staff and asked for a status update. *Id.* ¶¶ 34–35. Over the next seven weeks, DOE ATVM program staff repeatedly assured XPV that everything was on track and that XPV had met every loan criterion.[3] *Id.* ¶ 36.

On August 21, 2009, XPV received a letter from the Director of the ATVM Program, Mr.

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[3] XPV and Limnia were not alone in their experience. The story of Bright Automotive, Inc. is instructive. In a February 2012 letter to DOE withdrawing its ATVM application it wrote as follows. *See* Ex. 3 at 21–23.

> Today Bright Automotive, Inc. . . . [has] been forced to say "uncle". . . . In good faith we entered the ATVM process . . . in December of 2008. . . . At that time, our application was deemed "substantially complete." As of today, we have been in the "due diligence" process for more than 1175 days. . . . We were told by the DOE in August of 2010 that Bright would get the ATVM loan "within weeks, not months" after we formed a strategic partnership with General Motors [a government crony company] as the DOE had urged us to do. . . . Each time your team asked for another new requirement, we delivered with speed and excellence.
>
> Then, we waited and waited; staying in this process for as long as we could after repeated, yet unmet promises by government bureaucrats. We continued to play by the rules, even as you and your team were changing those rules constantly—seemingly on a whim. . . . Because of ATVM's distortion of U.S. private equity markets, the only opportunities for 100 percent private equity markets are abroad. We made it clear we were an American company, with American workers developing advanced, deliverable and clean American technology. . . [the ATVM] program "lacked integrity"; that is, it did not have a consistent process and rules against which private enterprises could rationally evaluate their chances and intelligently allocate time and resources against that process. There can be no greater failing of government than to not have integrity when dealing with its taxpaying citizens.
>
> It does not give us any solace that we are not alone in the debacle of the ATVM process . . . . countless hours, efforts and millions of dollars have been put forth by a multitude of strong entrepreneurial teams and some of the largest players in the industry to advance your articulated goal of advancing the technical strength and clean energy breakthroughs of the American automotive industry. . . . These collective efforts have been in vain as the program failed to finance both large existing companies and younger emerging ones alike.

Ex. 3 at 21–23.

Lachlan Seward, denying its application. Seward said that, although DOE deemed XPV "eligible" for a loan, DOE could not lend to all eligible applicants and that XPV had failed the agency's "merit review." Seward did not disclose the criteria for this "review," and they remain a secret to this day. *See* Am. Ver. Compl. ¶¶ 37–38. XPV immediately contacted DOE again and requested the merit review documents. XPV also requested an explanation for DOE's determination, since DOE had previously determined XPV to be eligible for a loan, and had, over a ten-month period of time, refused XPV's offers to work with its engineers and business staff.[4] *Id.* ¶¶ 25, 54, 63, 67, 72, 81, 118(c).

XPV then called a DOE staff member, Chris Foster, who recounted verbatim the reasons in the loan file for XPV's "merit review" failure. *Id.* ¶¶ 43–44. DOE staff said that the reasons included that: (1) XPV's electric SUV did not use E85 gasoline; (2) XPV did not plan for government fleet sales; and (3) XPV's advanced technology was "too futuristic." *Id.* ¶¶ 42–44. XPV was surprised by this explanation because (1) its SUV was purely powered by electricity and did not use *any* gasoline; (2) its business plan explicitly stated that it contemplated government fleet sales; and (3) Congress's stated intent in the ATVM program was to seek *new* solutions in order to reduce dependence on foreign oil. *Id.* at ¶¶ 46–52. Seward then walked in and abruptly terminated the conversation. *Id.* ¶ 52.

XPV heard nothing further from DOE. *Id.* ¶ 53. Accordingly, the company sent then-Secretary Chu a letter requesting reconsideration of the agency's decision, because the reasons DOE offered for its denial appeared inaccurate. *Id.* ¶ 54. XPV asked Chu to explain why DOE staff had given XPV repeated assurances of approval, while rejecting XPV's offers to provide additional information on the project. XPV also asked DOE to describe how XPV failed to

[4] DOE staff had failed to work with XPV for even one-percent of the time they had devoted to the politically-connected companies given loan funds. *Id.* ¶ 40.

satisfy the merit review criteria. Finally, XPV asked Chu to explain why politically-connected government contractors, like Tesla, Fisker, Ford and Nissan , which had applied for ATVM Loan funds *after* XPV's application had been submitted, had been: (1) given priority during the agency's application review process; (2) given access to DOE staff to help them draft their loan applications; and (3) awarded loans when XPV had been denied pursuant to unknown merit criteria. *Id.* ¶¶ 53–54; *see id.* ¶ 40. Chu declined to answer. *Id.* ¶¶ 54–55.

Many weeks passed, and Seward ultimately responded to XPV's letter to Chu. Seward's letter, ostensibly an attempt to put an end to this matter, only raised more questions. To begin with, Seward again failed to directly answer XPV's questions instead offering new "cut and paste" pretexts for denial.[5] *Id.* ¶¶ 55–61. Seward did *not* say that XPV failed to meet the statutory or regulatory eligibility requirements. Specifically, he did *not* say that XPV failed to offer adequate security for the loan; failed to demonstrate a reasonable prospect of repayment; failed to demonstrate its capability to build, distribute, or sell the electric SUV; or failed to demonstrate its financial viability without the loan. *Id.* ¶ 64. And as to the "reasons" given for denial, DOE did not in any way prior to this letter raise them to XPV, although nearly a year of financial and technical underwriting had passed; neither did DOE ask XPV's management and engineers for discussion, clarification or explanation. *Id.* ¶¶ 38–65. While benefitting and protecting companies connected to government cronies, bundlers, and campaign contributors, DOE officials denied XPV a fair shake. *Id.* ¶¶ 32, 89–93, 99–109, 114–19. Chu and Seward deployed opaque merit-review criteria to steer taxpayer funds to politically favored cronies. *Id.* ¶ 83. Given that the ATVM loan program had distorted the private equity market and dried up

[5] Seward's missive appeared to be a boilerplate denial, into which he copied and pasted a list from some other source without even changing the font size to match the rest of the letter. Am. Ver. Compl. ¶¶ 55–63; *see id.* Ex. 5.

other sources of investment venture capital, DOE's wrongful loan denial cut off XPV from private funding and led the company to collapse. *See id.* ¶ 9.

Limnia did not fare any better than XPV. Although Limnia made a battery system for electric advanced-technology vehicles, Seward initially denied the company's ATVM loan application because the battery system was not "designed for installation in an advanced technology vehicle." *Id.* ¶¶ 68–69. Limnia responded, advising Seward that the relevant patents showed the system was specifically developed for advanced technology vehicles. Seward again denied the application because the technology was not "installed" in such a vehicle. *Id.* ¶¶ 70–71. Limnia responded that the system in question *had to be* installed in an advanced technology vehicle to operate. DOE did not respond. *Id.* ¶¶ 70–74.

DOE and its officials are responsible for the cronyism and abuse of the ATVM and LG loan programs. *Id.* ¶¶ 112–13, 116, 118. Following an in depth review of the agency's loan programs, GAO determined that DOE had given away billions of taxpayer dollars without engaging "the engineering expertise needed for technical oversight," or having adequate performance measures in place to ensure that the taxpayers were financially protected. *Id.* ¶¶ 86–87; *id.* Ex. 11. GAO also found that the agency had treated applicants inconsistently, favoring some over others and ignoring its own underwriting standards by failing to properly document reviews. GAO concluded that DOE's actions reduced the "assurance that [the agency had] treated applicants fairly and equitably." *Id.* ¶ 111.

Both the House Energy and Commerce Committee and the House Oversight and Government Reform Committee wound up investigating DOE's loan program administration and found more problems, including a pattern of political pressure in DOE's loan programs where DOE bent the rules for high-profile politicians and government favorites. *Id.* ¶¶ 112–13. In

August of 2012, the House Energy and Commerce released a report finding that DOE ignored red flags about Solyndra's financial condition and failed to consult with the Department of the Treasury before awarding the company loan guarantee. Ex. 2 at 129–133 (Staff of H. Comm. on Energy & Commerce Comm., 112th Cong., Rep. on the Solyndra Failure). It is possible that DOE's failures resulted from the fact that Mr. Kaiser, a bundler for President Obama's 2008 campaign, was the primary investor in Solyndra. *See id.* at 5. In October of 2012, the House Oversight Committee issued a report, which concluded that one of DOE's loan programs was rife with failure, since three of its awardees had declared bankruptcy and several others were facing serious difficulties. Ex. 3 (Memorandum from the H. Comm. on Oversight & Gov. Reform (Oct. 31, 2012)). Congress released emails in connection with the Oversight Committee's report confirming that Chu and Seward had politically infected DOE's loan program. An internal email conveyed an order to loan program staffers from Chu, who was "adamant that this transaction is going to OMB by the end of the day Fri[day] if not sooner. [This is n]ot a way to do things but a direct order." Am. Ver. Compl. ¶ 112; *id.* Ex. 17. And another internal email said "DOE has made a political commitment to get Unistar through the approval process by 6/15." *Id.* ¶ 112; *id.* Ex. 16; *see also id.* ¶ 112 (internal DOE loan program emails explaining that the "pressure is on real heavy" and was "due to interest from VP"); *id.* ¶ 113 (Senator Harry Reid became "desperate," which led a DOE loan officer to email another saying that the "[White House] may want to help" and that "Short term considerations may be more important than long term considerations and what's a billion anyhow?").

Since leaving his position at DOE, Chu has spoken publicly about his time as Secretary of Energy, acknowledging that he "got personally involved, more and more, on when to pull the plug and when not to pull the plug" and that he made the final call on each and every loan that

was issued. Ex. 4 (Stephen Lacey, *Chu Says He Got Personally Involved in Solyndra, Fisker Loans*, GreentechMedia.com (June 10, 2013)). In this heavily politicized environment, DOE never gave a fair or level chance to XPV, Limnia, and several other loan applicants—who brought only good ideas to the table, but not relationships with big political "bundlers" or former politicians such as the current Senate majority leader. They eagerly waited, but a call never came. Their time, money, and efforts were all laid to waste. The game had been rigged before they had even started to play. They, and the American public, were the losers.

STANDARD OF REVIEW

In evaluating a motion to dismiss under either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), the Court must "treat the complaint's factual allegations as true and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). Under Rule 12(b)(1), the plaintiff is required to establish jurisdiction by a preponderance of the evidence, s*ee Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibly Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002), and the Court "may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

To defeat a motion to dismiss under Rule 12(b)(6), a claim must merely be "plausible on its face," meaning that the facts pled must allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 671–72 (2009). Determining whether a complaint states a plausible claim is "context-specific, requiring the reviewing court to draw on its experience and common sense." *Id.* at 679. A claim is

facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct." *Id.* at 678.

"The Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cotrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999). Thus, the D.C. Circuit has held that the long-standing fundamentals of notice pleading remain intact, even after *Iqbal*. Consequently, the Court ought to deny a 12(b)(6) motion if the complaint contains "a short plain statement of the claim showing that the pleader is entitled to relief." *Aktieselskabet v. Fame Jeans, Inc.*, 525 F.3d 8, 15–17 (D.C. Cir. 2008) (quoting Fed. R. Civ. P. 8(a)(2) and rejecting *Bell Atl. v .Twombly*, 550 U.S. 544 (2007), as creating a heightened pleading standard).

ARGUMENT

I. XPV Has Standing to Sue DOE and Its Claims Are Redressable

DOE argues that XPV lacks constitutional standing for all non-monetary (APA) claims. *See* Official Capacity Defs.' Mot. Dismiss 13, 16–19, 24–25; Individual Defs.' Mot. Dismiss 15 n.16. However, XPV has the capacity to sue and its non-monetary claims are redressable.[6] Therefore, its claims against DOE should stand.[7]

DOE argues that XPV's claims should be dismissed because XPV is a dissolved company and so lacks constitutional standing. Official Capacity Defs.' Mot. Dismiss 16–19. A

[6] In the parallel brief filed by the Government for Mr. Chu and Mr. Seward, the Government moved to dismiss the *Bivens* claims based upon the argument that the APA provides an equivalent and completely satisfactory statutory remedy. *See* Individual Defs.' Mot. Dismiss 21–26. Apparently, the Government sees things differently in the official capacity context, *i.e.,* from the agency's perspective, than it does in the individual context.

[7] The Government restricts the constitutional standing argument to XPV's non-monetary relief, but it also incorporates the argument into the individual capacity defendants' brief, even though plaintiffs' *Bivens* claims addressed therein seek only monetary relief. *See* Individual Defs.' Mot. Dismiss 15 n.16.

corporation's capacity to sue is contingent upon the law of the state where the corporation is organized, Fed. R. Civ. P. 17(b)(2), and XPV incorporated in California. *See* Am. Ver. Compl. ¶ 1. To support its argument, DOE quotes California's corporate dissolution statute:

> A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

Id. at 17 (quoting Cal. Corp. Code § 2010(a)). On its face, however, the statute does not preclude XPV's claims; rather, it authorizes XPV to pursue this action.

In California, "a corporation's dissolution is best understood not as its death, but merely as its retirement from active business." *Penasquitos, Inc. v. Superior Court*, 53 Cal. 3d 1180, 1190 (Cal. 1991) (citation omitted). DOE admits, as it must, that California state law allows a dissolved corporation to do "any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling and liquidating the affairs of the corporation." Official Capacity Defs.' Mot. Dismiss 17–18 (quoting Cal. Corp. Code § 2001(h) and referencing *Penasquitos*, 53 Cal. 3d at 1180).

Under California law, "winding up" includes suits to recover property, for monies due, and for injuries arising before dissolution. Cal. Corp. Code §§ 1903(c), 2001(e), 2010(a). A dissolved corporation can sue for pre-dissolution injuries at any time.[8] *See, e.g.*, *N. Am. Asbestos*

[8] The powers and duties of officers and directors concerning dissolution include, but are not limited to: (1) to elect officers and employ agents and attorneys to liquidate or wind up corporate affairs; (2) to continue conducting business insofar as necessary for disposing the corporation or winding it up; (3) to carry out and collect, compromise and settle debts and claims for the corporation; and (4) in general, to make contracts and to do any and all things in the name of the corporation, which might be proper or convenient for the purposes of winding up, settling up and liquidating the affairs of the corporation. *See generally* Cal. Corp. Code §§ 2001(a)–(h).

Corp. v. Superior Court, 179 Cal. Rptr. 889, 891–92 (Cal. Ct. App. 1982); *Abington Heights Sch. Dist. v. Speedspace Corp.*, 693 F.2d 284, 286 (3d Cir. 1982).

The injuries in this case are all the result of DOE's wrongful politicization of the ATVM loan program and refusal to lend, all of which occurred before XPV's dissolution.[9] Had DOE simply conducted a fair and level review of XPV's ATVM loan application using the established statutory and regulatory factors, then XPV would have been given a loan and would be in business today. *Id.* ¶¶ 9, 19, 65, 85, 111, 114, 117–18.

Even now, years after DOE forced XPV out of business, the company's APA and constitutional claims remain redressable, and it has Article III standing. DOE regulations provide that an ATVM borrower may assign its interest in a loan to another eligible party upon "prior written approval by DOE and the Federal Financing Bank." 10 C.F.R. § 611.110(b). Consequently, XPV should be given as part of its wind up what it was wrongfully denied in 2009—a loan award and the opportunity to assign its loan to an eligible party pursuant to 10 C.F.R. § 611.110.

II. Limnia's Claims for Relief Are Based on Final Agency Action

The Government's arguments for dismissing Limnia's claims are premised on its false assertion that DOE's never-ending reconsideration of Limnia's ATVM loan application renders Limnia's claims "incurably premature." Official Capacity Defs.' Mot. Dismiss 19.

To the contrary, GAO has revealed that DOE is no longer actively considering *any* ATVM loan applications, and that it does not expect to make any more ATVM loans in the future, contrary to EISA's mandate. GAO reported:

[9] The parties agree that XPV was an active corporation when it filed its ATVM application. Am. Ver. Compl. ¶¶ 15–17, 19, 23, 32, 67. At all times relevant, XPV had operations throughout the country and it was continuing to grow despite other industry players' bankruptcies and delays. *Id.* ¶ 15, 19, 32. It even earned recognition in June of 2009, as a semi-finalist for Forbes's "America's Most Promising Companies List." *Id.* ¶ 32.

> [A]s of January 29, 2013, DOE was not actively considering any applications for using the remaining $16.6 billion in loan authority or $4.2 billion in credit subsidy appropriations available under the ATVM loan program. DOE considered the seven ATVM loan program applications it has, requesting a total of $1.48 billion, to be inactive for reasons including insufficient equity or technology that is not ready. Most applicants and manufacturers we spoke with told us that, currently, the costs of participating outweigh the benefits. *Although the ATVM loan program is accepting applications on an ongoing basis, according to DOE officials, DOE is not likely to use the remaining ATVM loan program authority given the current eligibility requirements.*

Ex. 1 at 3 (emphasis added). Given this acknowledgement, the Government's prematurity arguments do not pass the red-face test.

DOE's statements to GAO were made at approximately the same time Limnia filed its initial complaint in this matter. Nevertheless, DOE relies upon an email sent roughly two months after the GAO report by agency official David Frantz to Limnia regarding Limnia's loan application. Official Capacity Defs.' Mot. Dismiss 19, Ex. 3. At this stage of the litigation, the discrepancy in DOE's position must be resolved in Limnia's favor. *See Iqbal,* 556 U.S. at 678–79. DOE's denial of Limnia's application is thus final and reviewable under the APA, and its claims for relief are ripe for judicial review and allege an injury in fact. Accordingly, the Government's motion should be denied.

A. DOE's Denial of Limnia's ATVM Application Is Final and Reviewable

Even assuming for the sake of argument that DOE *did not* tell its lawyers one thing and then tell GAO another, DOE's denial of Limnia's ATVM loan application is final and reviewable. As an initial matter, DOE's refusal to carry out its clear statutory duties and make ATVM loans to Limnia and other qualified applicants—and to do so without regard for the borrower's political connections and influence—constitutes a final agency action that is subject to APA review. 5 U.S.C. § 706; *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987).

Additionally, Limnia is not required to allege finality because the company has made a verified factual allegation that DOE deprived it of an important statutory right. Further, Limnia need not wait for DOE to complete its Potemkin review of Limnia's ATVM loan application because any such review is purely futile, and all of the evidence points to the inevitable conclusion that DOE has already denied the application by exercising a pocket-veto. Finally, because DOE has departed from EISA's requirements for objectivity, DOE's action is also subject to *ultra vires* review. This Court should review Limnia's claims today.

1. DOE's Denial of Limnia's ATVM Application Is Final

Contrary to EISA's mandate, DOE says that it is not actively considering any ATVM loan applications and will not be making any more ATVM loans. DOE nevertheless maintains that Limnia's claims are premature and that APA review is unavailable. Official Capacity Defs.' Mot. Dismiss 19. This is not so. Finality exists with respect to Limnia's application, and the Court should review DOE's denial of Limnia's ATVM application.

An action is final where the agency has: (1) acted definitively; and (2) "had a 'direct and immediate effect' on [the plaintiff's] business." *John Doe Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 566–67 (D.C. Cir. 2007); *Ciba-Geigy Corp. v. U.S. Envtl. Prot. Agency*, 801 F.2d 430, 436 (D.C. Cir. 1986). The D.C. Circuit applies the finality requirement "in a 'flexible' and 'pragmatic' way … look[ing] primarily to whether the agency's position is 'definitive' and whether it has a 'direct and immediate . . . effect on the day-to-day business' of the parties challenging the action." *Id.* at 435–36 (citation omitted and alteration in original).

In *John Doe*, the D.C. Circuit held that an agency's affirmative denial of an import permit application constituted final agency action because it: (1) "was not merely tentative, but rather definitive"; and (2) "had a 'direct and immediate effect' on [the plaintiff's] business by stopping

in its tracks" plans to further develop the medical drug imported.[10] *John Doe Inc.*, 484 F.3d at 566–67.

In *Ciba-Geigy Corp.*, the D.C. Circuit held that an agency's interpretation of its own governing statute was final action fit for review because the interpretation unequivocally stated the agency's position and gave no indication it was subject to further consideration or modification. 801 F.2d at 435–38. Finality existed under these circumstances, in part, because there was "not the slightest danger that judicial review [would] disrupt the orderly process of administrative decision-making." *Id.*

Here, DOE acted definitively by denying Limnia's application and refusing to actively consider any new applications.[11] DOE's action has directly and immediately affected Limnia's business because it cannot proceed with its plans to manufacture car parts. *See* Am. Ver. Compl. ¶¶ 19, 68–72. Just like in *Ciba-Geigy*, DOE unequivocally stated its position that it denied the loan. *Compare id*. ¶¶ 69, 71 *with id*. Ex. 1 at 3. The agency further affirmed its position when it told GAO that it was not actively considering any applicants to the program. *Id.* Ex. 1 at 3. DOE cannot avoid this result by pointing to a letter written after it spoke with GAO, in which an Acting Executive Director from the agency merely parrots words that DOE would "evaluate the application's merit and the project's eligibility" after Limnia "submitted a substantially complete application." Official Capacity Defs.' Mot. Dismiss, Ex. C. DOE's decision-making has thus ceased and, therefore, judicial review is appropriate.

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[10] *Doe* involved a statute that mandated finality as a jurisdictional requirement, but the appellate court indicated that the finality analysis mirrored that under the APA. *Doe,* 484 F.3d 561, 555, 566 n.4 (D.C. Cir. 2007) ("We see no reason, however, that the word 'final' in § 877 should be interpreted differently than the word 'final' in the APA."); *see* Lawson, Federal Administrative Law at 923–24 (5th ed. 2009).

[11] Indeed, Limnia construed DOE's October 23, 2012 letter as a final denial. *See* Ex. 5 (DOE "will take no further action. . . ")

2. DOE's Refusal to Act upon Limnia's Application Is Reviewable

DOE's drawn-out reconsideration of Limnia's ATVM application constitutes a failure to act. It should not be allowed to evade judicial review of Limnia's claims by administrative foot-dragging and purposeful, protracted review, without any intention of fairly considering—much less granting—Limnia's application. It is well-established that "agency inaction may represent effectively final agency action that the agency has not frankly acknowledged." *Sierra Club*, 828 F.2d at 793. An agency cannot "preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Id.*[12] An agency's refusal to act also becomes final action when "exigent circumstances render it equivalent to a final denial of petitioners' request." *Pub. Citizen Health Research Grp v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984) (citing *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970)).[13]

DOE's refusal to act on Limnia's ATVM application is final because its reasons for doing

[12] For example, in *U.S. Gypsum Co. v. Muszynski*, the EPA withdrew its concurrence to the plaintiff's application for a dumping permit. The Army Corps of Engineers then denied the permit and failed to conduct any meaningful reassessment of the decision. 161 F. Supp. 2d 289, 290–92 (S.D.N.Y. 2001) (applying exclusively D.C. Circuit case law). The EPA's decision, "coupled to the [Corps'] failure to undertake any meaningful reassessment . . . [made it] obvious that the [Corps] ha[d] effectively already determined that further reviews [would] not change that result and that [its] inaction now represent[ed] 'effectively final agency action that the agency ha[d] not frankly acknowledged.'" *Id.* at 292–93 (citations omitted).

[13] In *Hardin*, the D.C. Circuit held that exigent circumstances (and thus both ripeness and final action) existed where the plaintiffs asked the Secretary of Agriculture to cancel (and in the meantime suspend) registration of DDT for interstate sale. The Secretary initiated cancellation procedures, but did not suspend registration; instead it "indicated that he was considering further compliance … [but] has neither granted nor denied much of the relief requested." 428 F.2d at 1096, 1098. The Court determined that this inaction should be treated as final action because the immediate risk of further harm meant that "[n]o subsequent action [could] sharpen the controversy" from the Secretary's decision not to act to suspend registration of DDT. *Id.* at 1098. In other words, the Secretary's decision to not grant the suspension functioned like a decision to deny.

nothing necessarily mean that inaction is the final position. This is true regardless of whether DOE acted for the reasons XPV and Limnia alleged or for the reasons DOE revealed to GAO. The circumstances of DOE's initial denial of Limnia's application, its failure to provide any meaningful reassessment, and the agency's general conduct towards and treatment of the ATVM loan program make it obvious that DOE has "effectively already determined that further reviews will not change [the] result." *See Muszynski*, 161 F. Supp. 2d at 290–93; Am. Ver. Compl. ¶¶ 68–74, 83–113.

DOE did not run an honest and fair program. As a result, the outcome of Limnia's application (along with XPV's and those of other not-politically-connected applicants, for that matter) was predetermined. Am. Ver. Compl. ¶¶ 83–113. Therefore, DOE's decision regarding Limnia's application is effectively final for judicial review, and the full effect of this final decision already has been felt. Therefore, "[n]o subsequent action [could] sharpen the controversy" and the Court has all of the facts that it needs to be able to decide this case. *See Hardin*, 428 F.2d at 1098.

Subsequent events only strengthen the conclusion that DOE acted with finality when it denied Limnia's loan application, even though that action has been "not frankly acknowledged." *Thomas*, 828 F.2d at 793. DOE's admission as of January 29, 2013, after it already had received Limnia's application, that it was not "actively considering any applications" ought to be dispositive. [14] The fact that DOE officially categorized Limnia's application as "inactive" belies

[14] Indeed, DOE has not entered into an ATVM loan agreement since March of 2011. *See* Ex. 1 at 14. DOE offered explanations to GAO for why it was not "actively" considering any of the ATVM applications before it. DOE claimed that all but two of the applications were not "substantially complete." *Id.* at 9, 17, 27. The two remaining applications, though deemed "substantially complete" were not ready to proceed for other reasons, which were not specified, although insufficient equity and technology readiness were suggested as examples for the unreadiness. *Id.* Here, DOE stated that it was not actively considering applications that, in its

its contention that this Court is precluded from reviewing Limnia's claims because DOE is still actively reviewing the application.[15]

3. DOE's Abdication of Its Statutory Duty Is Reviewable

DOE has abdicated its statutory responsibility to issue loans to applicants that meet certain eligibility requirements, rendering Limnia's claims reviewable. In the D.C. Circuit, agency inaction is grounds for review if it constitutes "agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility. Examples of such clear duties to act include provisions that require an agency to take specific action when certain preconditions have been met." *Sierra Club*, 828 F.2d at 793 (internal quotations omitted and alterations in original); *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593–95 (D.C. Cir. 1971). Here, DOE had a clear, statutory duty to lend funds to ATVM applicants, meeting the criteria set by Congress in 42 U.S.C. § 17013(d) and DOE in 10 C.F.R. Part 611. Limnia met these conditions and should have been issued an ATVM loan.

In reality, once the initial round of loans had been made to political cronies and insiders, DOE had no further intention of issuing any more loans. DOE's own Acting Director, as well as various DOE officials, admitted that DOE is unlikely to use the agency's remaining $16.6 billion in ATVM lending authority. Ex. 1 at 3; Ex. 1 at 30 (Letter from DOE Loan Program's Acting Executive Director to GAO Director (Mar. 11, 2013) stating that "[t]he draft report

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view, were not "substantially complete," meaning that DOE believed it needed further information to determine applicant eligibility. The reality is that no more loans will be forthcoming. *See id.*

[15] Here, the very email upon which the Government relies as evidence of reconsideration is further proof that DOE was not "actively" considering Limnia's application. Mr. Franz implied in his letter that he did not consider Limnia's application to be "substantially complete," and DOE only "actively" considers applications that it believes to be substantially complete. Official Capacity Defs.' Mot. Dismiss, Ex. C at 1. ("Once Limnia, Inc. submits a substantially complete application, the [agency] can evaluate the application's merits and the project's eligibility").

acknowledges our assessment that DOE is not likely to use the remaining [ATVM] loan program authority under the current eligibility requirements"). DOE's refusal to make ATVM loans to Limnia and other eligible applicants, up to the amount of its loan authority, constitutes APA-reviewable "inaction" and Limnia's request for relief should stand.[16]

4. Limnia Has Established That DOE Deprived It of an Important Statutory Right and Need Not Demonstrate Finality

DOE exceeded its statutory authority when it deprived Limnia of an important statutory right, and Limnia is entitled to judicial review irrespective of finality. The D.C. Circuit has held that finality "may be dispensed with" if "the agency has very clearly violated an important constitutional or statutory right." *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 169 (D.C. Cir. 1983); *see also Marchiano v. Nat'l Ass'n of Sec. Dealers*, 134 F. Supp. 2d 90, 94–95 (D.D.C. 2001) ("[F]inality requirement may be waived where the agency action 'has very clearly violated an important constitutional or statutory right'") (quoting *Peter Kiewit*, 714 F.2d 163 at 169).

In *Aera Energy*, the D.C. Circuit plainly recognized that "political pressure invalidates agency action" if that pressure "shapes, in whole or in part, the judgment of the ultimate agency decisionmaker." *Id.* The right to expect that the Government will treat all actors fairly and without the extreme favoritism alleged in this case is an important statutory right encoded into the Administrative Procedure Act. *Id.*; 5 U.S.C. § 706. By its very terms, a cause of action is established for agency conclusions that are "arbitrary, capricious, an abuse of discretion, or

[16] DOE has also abdicated its clear statutory duty under the APA to provide Limnia a fair review that has not been shaped by political pressure. *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011) ("[P]olitical pressure invalidates agency action" if that pressure "shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."). DOE has abdicated this duty by subjecting the loan process to the pressure to favor government cronies at the expense of other qualified applicants such as Limnia.

otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. *Id.*[17] Here, Limnia's claims are not merely based on bias in the agency process; instead, DOE has converted the ATVM program into funnel to divert congressionally-appropriated funds away from qualified applicants and toward government cronies. DOE has thus violated Limnia's important statutory right to have its application considered fairly, without outcome-determinative political pressure. *See* Am. Ver. Compl. ¶¶ 68–82, 83–120; *Aera Energy*, 642 F.3d at 220. Review under the APA is thus appropriate.

5. By Departing from the Energy Independence and Security Act's Requirements for Objectivity, DOE's Action Is Subject to *Ultra Vires* Review

It is well-established in this Circuit that this Court has the power of *ultra vires* review, which is distinct from its power to review final agency action. *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 42 (1st Cir. 2002) ("The basic premise behind non-statutory review is that, even after passage of the APA, some residuum of power remained with the district court to review agency action that is *ultra vires.*"). Simply stated, *ultra vires* review does not require final agency action and, instead, permits the Court to inquire whether the agency has exceeded its Congressional mandate, including congressional limits on agency discretion. *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003). Courts review *ultra vires* action "when an agency patently misconstrues a statute, disregards a specific and unambiguous statutory directive, or violates a specific command of a statute." *Hunted v. Fed. Energy Reg.*

[17] Agencies are increasingly attacking this right in general. *See* Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion In A Highly Partisan Age*, 61 Duke L.J. 1671, 1672 (2012) ("This Article suggests that in this era of deep divisions over the proper role of government in society, high-stakes rulemaking has become a 'blood sport' in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies.")

Comm'n, 569 F. Supp. 2d 12, 16 (D.D.C. 2008) (citations omitted). Under the APA, "[a]gency actions beyond delegated authority are *ultra vires* and should be invalidated." *Adirondack Med. Ctr. v. Sebelius*, 891 F. Supp. 2d 36, 43 (D.D.C. 2012).

Congress enacted Section 136 of EISA with language contemplating a fair, objective process for the ATVM Loan Program. EISA required the Secretary to select "eligible projects" and listed various requirements the agency *must* consider, including financial viability and a demonstration that the investment will be expended "efficiently and effectively." 42 U.S.C. § 17013(d)(3)(A)–(B). The Act also required DOE to use "established and published" criteria when evaluating applications. *Id.* at § 17013(d)(3)(C). Congress therefore expected DOE to follow its congressional mandate and to use transparent, merit-based criteria for reviewing applications. In order to carry out EISA's purpose of moving the United States "toward greater independence and energy security," DOE had to select applicants based *only* on their ability to manufacture the best advanced technology vehicles. EISA, Pub. L. No. 110-140, 121 Stat. 1492, 1492 (Dec. 19, 2007).

DOE and Secretary Chu failed to follow Congress's directives under EISA, and this failure warrants an *ultras vires* review. Chu fashioned and administered loan programs that in no way resembled the prescribed intentions of Congress. *See* Ex. 3 (Staff of H. Comm. on Oversight & Gov. Reform, 112th Cong. Rep. on The Department of Energy's Disastrous Management of Loan Guarantee Programs (Mar. 20, 2012)). DOE departed from EISA's requirement for objectivity by selecting applicants based on their political connections and contributions and not based on "established and published" criteria. Rather than ensuring that only applicants with the capacity to produce the most innovative technologies received government funding, like those proposed by XPV and Limnia, DOE focused its efforts on

extending loans to the politically connected. Additionally, the agency did so by employing a technical panel that was thoroughly unqualified and financial reviews that left taxpayers on the hook for bad risks, like Fisker. XPV and Limnia do not merely attack DOE's particular interpretation of the Act, but rather argue that DOE's *entire* decision-making process was invalid. *See Utah Power & Light Co. v. Envtl. Prot. Agency*, 553 F.2d 215, 218 (D.C. Cir. 1977).

Therefore, DOE's *ultra vires* action, which allowed an entire government program to become unfairly politicized, is subject to judicial review under 5 U.S.C. § 706(2)(C). *Chamber of Comm. of the U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). Because DOE's denials of XPV's and Limnia's loan applications were in clear excess of its statutory authority, this Court should set aside DOE's improper decisions under the *ultra vires* standard.

6. Further Agency Review Is Futile

Even if there were no effectively final agency action, any further review by DOE would be futile and, therefore, no final agency action should be required. Although the D.C. Circuit has yet to adopt the notion that futility is an exception to the APA's final agency action requirement, the Ninth Circuit has directly and unambiguously adopted the futility exception.[18] In the seminal

[18] The Fifth Circuit seems eager to adopt such an exception as well. In *DCP Farms v. Yeutter*, the Circuit Court referred to APA section 704, and found that there was an exception to what it referred to as "exhaustion" but likely intended to refer to final agency action (because it was hearing an APA section 704 issue). 957 F.2d 1183, 1188–89 (5th Cir. 1992). According to that court, the exception exists, "when the plaintiff demonstrates that it would be futile to comply with the administrative procedures because it is clear that the claim will be rejected." *Id.*at 1189 (internal quotations omitted) (it reversing the district court on the facts by finding that the plaintiff had failed to produce sufficient evidence of futility). To our knowledge, no Circuits other than the Fifth and the Ninth have decided the issue.

The D.C. Circuit has come close to considering whether futility should be an exception to final agency action. In *Independent Petroleum Association of America v. Babbitt*, 235 F.3d 588 (D.C. Cir. 2001), the Court reviewed a District Court decision to dismiss a complaint for lack of final agency action on the basis that futility was not an exception for finality. *Id.* at 593. While the Circuit Court affirmed the decision, it did so on the basis that the plaintiff had not properly challenged an agency *action*, and did not reach the issue of whether any action was *final* or

case of *Air One Helicopters*, the Ninth Circuit held that FAA letters containing the agency's position on a particular issue would be "treat[ed] … as final agency action" under the APA where "there [was] no question it would be futile . . . to attempt to persuade the [agency] to change the position it clearly sets forth in the letters." *Air One Helicopters, Inc. v. Fed. Aviation Admin*., 86 F.3d 880, 882 (9th Cir. 1996).

Such an exception makes perfect sense, since the requirements for final agency action and exhaustion are rooted in the same rationale. Both are concerned with not committing resources to deciding a case that may prove to be an unnecessary use of judicial resources. *See, e.g.*, *Bethlehem Steel Corp. v. Envtl. Prot. Agency*, 669 F.2d 903, 908 (3d Cir. 1982) ("finality and exhaustion serve the same interests"). The purpose of exhaustion is "protecting administrative agency authority," *Tesoro Ref. & Mktg. Co. v. Fed. Energy Reg. Comm'n*, 552 F.3d 868, 875 (D.C. Cir. 2009), and a parallel purpose of the APA's final agency action provision is to prevent premature judicial review that "improperly intrudes into the agency's decisionmaking process." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (citation omitted).

The D.C. Circuit's reasons for viewing finality as an exception to exhaustion lend further support to the notion that futility should also be an exception to final agency action. "Because the purposes undergirding the [exhaustion] doctrine are not furthered when 'following the administrative remedy would be futile because of the certainty of an adverse decision,'" the D.C. Circuit does not require exhaustion upon a showing of futility. *Comm. of Blind Vendors v. Dist. of Columbia*, 28 F.3d 130, 133 n.5 (D.C. Cir. 1994) (citing *Randolph-Sheppard Vendors of Am.*

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whether futility could serve as a replacement for finality. *Id.* at 593–95 ("[N]ot only does [the plaintiff] not challenge final agency action, it is not at all clear what agency action [the plaintiff] purports to challenge" given that the plaintiffs did not challenge a particular agency action but rather general "'efforts' [which] are not final agency actions fit for judicial review.")

v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986)). Similarly, the goals of the finality requirement (awaiting termination of agency proceedings and not interfering with agency decision-making) are not furthered, and finality is thus futile, when the agency is certain to reach an adverse outcome. A futility exception to final agency action does not usurp agency decision-making authority; nor does it use judicial resources on a case that may be rendered moot by a favorable decision for the plaintiff, since it applies only when an unfavorable outcome is certain. This Court should therefore adopt a futility exception in the finality context.

This is true notwithstanding other D.C. District Court decisions that have relied on flawed reasoning in refusing to acknowledge a futility exception to finality. For example, *Reliable Automatic Sprinkler Company*, held that a "prudential concern regarding futility" could not overcome the APA's finality requirement, but the reasons it gave in support of that statement were themselves largely prudential—specifically a concern with disrupting the administrative and judicial review processes established by Congress, and the administrative concern that determining futility becomes "a guessing game regarding agency intent." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n* 173 F. Supp. 2d 41, 52, 51 (D.D.C. 2001). However these are issues with which courts frequently grapple in the context of the futility exception to exhaustion, and these "prudential concerns" have not disrupted the balance of that review process.[19]

[19] The claim that futility cannot create finality made in *Indep. Petrol. Ass'n of Am. v. Babbitt* (*IPAA I*), 971 F. Supp. 19 (D.D.C. 1997), is baseless. There, the court held that through the APA's finality requirement "Congress gave agencies dominion to make rulings or adjudications free from judicial interference until there is final agency action." *Id.* at 29. However, just as in the exhaustion context, judicial review does not interfere with an agency's prerogative to make decisions because the court intercedes only where the outcome of the process is inevitably adverse. *See Comm. of Blind Vendors*, 28 F.3d at 133 n.5. The *IPAA I* court also incorrectly believed it would be inconsistent with D.C. Circuit case law to recognize the futility exception "because doctrinally speaking, finality, though it may often coincide with issues such as

Even if DOE is still "actively" considering Limnia's application, all of the evidence points to the unavoidable conclusion that DOE will deny Limnia's application. Therefore, it would be senseless and contrary to the more persuasive precedent to force Limnia to forego litigation until the agency reaches its inevitably unfavorable decision. *Air One Helicopters*, 86 F.3d at 882.

B. Limnia's Claim is Ripe for Review

1. DOE's Denial of Limnia's Claim Is Final and Ripe for Review

The Government argues that "that "DOE has not finalized a determination on Limnia's ATVM loan application" and that Limnia's claim is therefore "not fit for judicial review."

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exhaustion, is fundamentally distinct," and because futility could not satisfy the "finality prerequisite for jurisdiction" under the APA. 971 F. Supp. at 28–29. As the more recent and better reasoned cases have concluded, finality under the APA is not jurisdictional. *See Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) ("We think the proposition that the review provisions of the APA are not jurisdictional is now firmly established."); *Reliable Automatic Sprinkler*, 324 F.3d at 731 ("[Where] judicial review is sought under the APA rather than a particular statute prescribing judicial review, the requirement of final agency action is not jurisdictional…."). *IPAA I* thus misconceives D.C. Circuit law, and, as a result, draws a false distinction between finality and exhaustion, incorrectly believing the former was rigidly jurisdictional whereas the latter was not. Without that distinction, the logic of its decision falls away. Other district court cases are distinguishable or not on point. For example, *Shell Offshore v. Dep't of Interior* cited only *IPAA I*'s flawed opinion to justify its holding. 997 F. Supp. 23, 33 (D.D.C. 1998)). *Alaska Legislative Council v. Babbitt* was decided on the facts of that case, where the court held that "in light of the fact that the [challenged] regulations are still subject to agency review prior to implementation, and the fact that the agency is currently forbidden by statute from implementing them," there was no final agency action and no argument for a futility exception. 15 F. Supp. 2d 19, 26 (D.D.C. 1998). Unlike in *Alaska Legislative Council,* where the government was statutorily barred from implementing its challenged rule and thereby acting to harm the plaintiffs, here DOE has already harmed Limnia by its refusal to give Limnia the fair and politically-neutral review to which it is entitled. *John Doe, Inc. v. Gonzalez* considered the question and discussed the decision in *IPAA I* not to adopt a futility exception (although *IPAA I* relied on flawed reasoning and therefor is not suitable authority); however, this case was decided on other grounds. No. 06-966-CKK, 2006 U.S. Dist. LEXIS 44402, at *54 (D.D.C. June 29, 2006) (holding that "even assuming *arguendo* that federal jurisdiction over Plaintiff's claims is not barred under the APA's 'finality' mandate, it is clear that this Court lacks jurisdiction over Plaintiff's action" due to a statutory provision that gave jurisdiction over the claim to the appellate court rather than the district court.), *aff'd by, petition denied by John Doe, Inc. v. DEA,* 484 F.3d 561, 566–67 (D.C. Cir. 2007) (holding that the agency's denial of the import permit application was final agency action).

Official Capacity Defs.' Mot Dismiss 22. This is false. DOE has made a final decision, and even told GAO it will not be making any more ATVM loans. Ex. 1 at 3. The pervasive bias and cronyism that infected the ATVM loan program denied Limnia a fair shot, and DOE's "review" is only for show. Finally, as discussed above, DOE has acted with finalit.y with respect to Limnia's ATVM application. Limnia's claims are ripe. *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1011–12 (D.C. Cir. 2004) (relying on APA finality for ripeness analysis).

2. Limnia's Claim for Relief Raises a Purely Legal Question

The Government asserts that Limnia's claim is unfit for judicial review because Limnia "does not present a purely legal claim" and that consideration of the claim would therefore benefit "from a more concrete and final posture, particularly one in which DOE has made a final determination as to Limnia's ATVM loan application." Official Capacity Mot. Dismiss 22. They are mistaken.

"[F]itness of the issues for judicial decision" is more likely to be found where "the issue tendered is a purely legal one," *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), and the D.C. Circuit has held "that the question of whether an agency decision is arbitrary and capricious is a purely legal question." *Sprint Corp. v. Fed. Commc'ns. Comm'n*, 331 F.3d 952, 956 (D.C. Cir. 2003) (citations omitted). Specifically, in *Nevada v. Dep't of Energy*, the D.C. Circuit stated that a claim satisfies the "fitness" requirement "if the issue tendered is a purely legal one," and that "[w]hether an agency decision is arbitrary and capricious is a purely legal question." 457 F.3d 78, 85 (D.C. Cir. 2006) (citations and internal quotations omitted). Limnia claims that DOE acted in an arbitrary and capricious manner when rejecting its application and that DOE exceeded its statutory authority in doing so. These are both purely legal questions and fit for judicial review. 5 U.S.C. § 706; *Nevada v. Dep't of Energy*, 457 F.3d at 85.

3. Limnia's Claim Is Ripe Because Crystallization of DOE Policies Is Not Likely to Result from Further Review

One purpose of the ripeness requirement is to allow crystallization of the agency policy before it is subject to review:

> Under our case law, "the primary focus of the ripeness doctrine is to balance the petitioners' interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subject to review and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting."

Shays v. Fed. Election Comm'n, 414 F.3d 76, 95 (D.C. Cir. 2005) (quoting *AT&T Corp. v. Fed. Commc'ns Comm'n*, 349 F.3d 692, 699 (D.C. Cir. 2003)). In *Shays*, the D.C. Circuit held that a claim was fit for judicial review, reasoning that any further "crystallization" of the disputed agency policies was unlikely to occur. 414 F.3d at 95. Similarly here, DOE is unlikely to further crystallize its policies—it is a forgone conclusion that DOE will deny Limnia's application given DOE's bias and the political favoritism it has exercised to Limnia's detriment. *See* Am. Ver. Compl. ¶¶ 26, 68–74, 116–18. Moreover, DOE has admitted that it is unlikely to issue further loans under the ATVM program. Ex. 1 at 3. Therefore, DOE is not able to provide review in "a more concrete and final setting," and Limnia's claims are ripe for review.

4. DOE Remand Is Not Required

Defendants argue that Limnia's claim is unripe because the Court cannot order DOE to issue a loan to Limnia, but must instead remand DOE's denial of the application, relying principally on *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Official Capacity Defs.' Mot. Dismiss 23. That very authority, however, acknowledges limits to the general practice of remanding flawed agency action. *Lorion* describes scenarios in which remand is appropriate, and also states that remand may not be appropriate in some rare circumstances:

> If the record before the agency does not support the agency action,

> if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation.

Lorion, 470 U.S. at 744 (emphasis added).[20]

Limnia's claim does not fit into one of the scenarios appropriate for remand that the Supreme Court enumerated in *Lorion*. Rather, Limnia's claim sets out an example of "rare circumstances" where remand is inappropriate because DOE's review of Limnia's application is infected with bad faith and will inevitably result in denial. The D.C. Circuit has stated "[w]e do not remand where there is not the slightest uncertainty as to the outcome of an [agency] proceeding." *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1489 (D.C. Cir. 1995) (citations omitted) (alterations in original).[21] Further, this court has suggested that *Lorion*'s applicability may be limited in cases of "bad faith" or "improper behavior" by an agency. For example, in *Cape Hatteras*, the court cited *Lorion*, for the general proposition that "[g]oing beyond the

[20] Given the procedural posture of this case, the Government's reliance upon *Lorion* is troubling. In *Lorion*, the Supreme Court presaged the Government's explanation with an admonition that trial courts review agency actions based upon the *existing* administrative record, and not based upon some *post hoc* rationalization that the agency develops. 470 U.S. at 743–44. The "focal point" for all "judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Lorion*, 470 U.S. at 743–44 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). Here, by couching its arguments within a motion to dismiss, the Government is not only attempting to shield the Court from *any look* at the agency record, but it is also asking the Court's permission to develop *post hoc* rationalizations for rejecting Limnia's application. The Court should follow the Supreme Court's reasoning and reject both lines of argument.

[21] Similarly, this court noted a "small subset of administrative law cases" in which "remand to the agency is an unnecessary formality because it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time." *Berge v. United States*, No. 10-0373-RBW, 2013 U.S. Dist. LEXIS 78890 at *16–18 (D.D.C. June 5, 2013) (citing *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708–09 (D.C. Cir. 1996)).

administrative record presented by the deciding agency when reviewing its action is only done in exceptional cases." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114–16 (D.D.C. 2009). The court went on to note that the plaintiffs did not allege "that the agency acted in bad faith," that it "engaged in improper behavior," or that it "failed to explain [its] decision," implying that it would deem such acts "rare circumstances" meriting an exception to the remand requirement.[22] *Id.* at 116.

Here, given DOE's bad faith, represented in its bias and political favoritism, there is not the slightest uncertainty as to the outcome of Limnia's loan application process before DOE. Remand to DOE is therefore not required in this case.

5. The Case Is Not Moot

The Government contends that Limnia's claims are not fit for judicial review because they the "relief that Limnia seeks is reconsideration . . . . [and] DOE already has offered to reconsider the application . . ." Official Capacity Defs.' Mot. Dismiss 23. However, no such possibility exists here. As we established above, DOE has acknowledged that it is unlikely to issue any more ATVM loans. Further, its review of ATVM applications is so tainted by political bias that DOE awarding Limnia a loan is a practical impossibility. Any argument that DOE is reconsidering Limnia's application is therefore unfounded and should not prevent this Court from holding that Limnia's claims are ripe for review.[23]

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[22] In a related vein, the D.C. Circuit has held that "[t]he APA limits judicial review to the administrative record except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review.'" *Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (citations and internal quotation marks omitted).

[23] Moreover, DOE suggests that "Limnia is surely not burdened by DOE's voluntary provision of the very relief that Limnia seeks in the complaint." Official Capacity Defs.' Mot. Dismiss 23. The relief Limnia seeks is not that DOE "reconsider" the application under the same biased and

6. Past Harm Is Not a Requirement for Ripeness

Limnia has been directly harmed by the cronyism that infected DOE's loan programs. Am. Ver Compl. ¶¶ 118, 119. Even if there were no direct harm, Limnia's claims would still be ripe because past harm is not a requirement for ripeness. The hardship sought in the ripeness analysis is prospective, rather than retrospective: It is "measured by considering 'not whether [the parties] have suffered any direct hardship, but rather whether postponement will impose an undue burden on the claimant or would benefit the court.'" *Smith v. Harvey*, 541 F. Supp. 2d 8, 13 (D.D.C. 2008) (quoting *Nat'l Ass'n of Home Builders v U.S. Army Corps Eng'rs*, 440 F.3d 459, 464 (D.C. Cir. 2006)). Furthermore, as is the case here, when there exists "no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." *Nat'l Ass'n of Home Builders*, 440 F.3d at 465 (citations omitted) (alterations in original). Postponing judicial review of Limnia's application would not help the Court since, as demonstrated herein, it would only delay the inevitable denial. Such a meaningless delay would unduly burden Limnia.

III. Limnia's Claim for Relief Under the Section 1703 Loan Guarantee Program Should Not Be Dismissed Because DOE Acted Arbitrarily and Capriciously When It Failed to Honor Its Promise to Waive Limnia's Application Fee

In the complaint, Limnia established the basis for the company's claim that DOE's denial of the Limnia's LG application was arbitrary and capricious—specifically, the failure of Secretary Chu to honor his word to waive the application fee. Am. Ver. Compl. ¶¶ 68–82. In its brief, the Government points to regulations requiring an applicant to pay an application fee and argues that the regulations supply the definitive answer regarding Limnia's LG application claim. *See* Official Capacity Defs.' Mot. Dismiss 30. Of course, Limnia has raised no question

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politically motivated process which we have alleged. Rather, Limnia seeks remand to DOE for *unbiased* consideration by the agency. Limnia has not received the relief it seeks and will not likely receive that relief absent an order from this Court.

regarding the standard procedures for filing applications, as they exist in their present form for the payment of application fees. Had DOE followed standard procedures throughout the loan review process, Limnia would not have been placed in the position to rely upon Chu's words in the first instance. As we have established above, however, Chu personally operated this loan program on the fly, and the agency made up the rules as it moved through the loan award process. As we established in the other brief filed today, Chu's personal involvement in the loan award process alone was an unprecedented departure from the normal role a Federal agency head holds while administering a government loan program.

Here, however, the Government argues that Limnia's claim should be dismissed, because DOE is not bound by oral representations under 10 C.F.R. § 609.10(b), so oral statements made by the agency's representatives have no legal effect. Official Capacity Defs.' Mot Dismiss 7, 30 (referencing 10 C.F.R. § 609.10(b) ("DOE is not bound by oral representations made during the Pre-Application stage . . . or Application stage, or during any negotiation process")). This regulation does not apply. The regulation upon which DOE relies did not appear in the Federal Register until August of 2009 and did not become effective until December 4, 2009. *See* 74 Fed. Reg. 63,544 (proposed Aug. 7, 2009, effective December 4, 2009). While an earlier version of this regulation addressed oral representations, it did *not* concern the particular LG program to which Limnia applied. *Compare* 72 Fed. Reg. 60,116 (Oct. 23, 2007) *with* Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594, § 1702 (Aug. 8, 2005). "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not *in any manner* be required to resort to, or *be adversely affected by*, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552 (emphasis added).

Here, six months before DOE published this regulation and ten months before it went

into effect, Chu promised to waive Limnia's application fee—a promise upon which Limnia relied when applying for a loan guarantee. DOE cannot hold Limnia to a regulation that did not exist when it made the promise to Limnia. DOE sped the loan awards to decision without posting any speed limits along the administrative highway, and now DOE has the audacity to try to clean up its actions by holding Limnia to a regulatory requirement that was not yet in place when Chu was, by way of oral representations, inducing applicants to submit loan guarantee applications. Accordingly, the Government cannot avoid being bound by its words, and the motion to dismiss should be denied in its entirety.

IV. XPV and Limnia Sufficiently Alleged Due Process and Equal Protection Claims

Defendants allege that XPV and Limnia fail to state due process and equal protection claims. Official Capacity Defs.' Mot Dismiss 26. Defendants assert that XPV and Limnia "have no property interest in the ATVM loans for which they applied" because "DOE retains discretion as to the loan recipients." *Id.* at 27. Defendants further assert that XPV's and Limnia's "equal protection claims also fail" because "DOE did have legitimate reasons for its treatment of XPV['s] and Limnia's ATVM applications." *Id.* at 28.

Defendants err. For the reasons explained in XPV's and Limnia's Opposition to the Individual Capacity Defendants' Motion to Dismiss and incorporated herein, XPV and Limnia have cognizable equal protection and due process claims for DOE's violation of these constitutional rights. Pls.' Opp'n to Indiv. Cap. Defs.' Mot Dismiss at 3342. Therefore, XPV and Limnia have properly stated a claim against DOE for due process and equal protection violations, and Defendants' motion to dismiss on this ground must be denied.

Defendants also argue that XPV and Limnia have no standing to sue DOE for DOE's constitutional violations because XPV and Limnia have not "identif[ied] any statute that would

permit a damages claim against DOE." Official Capacity Defs.' Mot. Dismiss 16. Defendants are mistaken. The Constitution itself permits suits against the government for violating XPV's and Limnia's equal protection and due process rights. *See Ex parte Young*, 209 U.S. 123, 145–48 (1908) (finding injunctive relief implicit in the Due Process Clause); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). The Constitution's cases and controversies clause paired with the Declaratory Judgment Act also waives sovereign immunity for declaratory and injunctive relief when the government violates federal constitutional rights. 28 U.S.C. §§ 2201, 2202; *SEC v. Credit Bancorp, Ltd.*, 297 F.3d 127, 137 (2d Cir. 2002) ("the [Declaratory Judgment] Act waives the sovereign immunity of the United States . . ."). The Declaratory Judgment Act also contemplates monetary damages for the federal government's violation of plaintiffs' constitutional rights. 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment").

Further, the Supreme Court recently justified sovereign immunity's inapplicability by explaining that "the rigors of sovereign immunity are . . . 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'" *Alden v. Maine*, 527 U.S. 706, 755 (1999) (quoting *Great No. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

In this case, DOE wrongfully denied XPV's and Limnia's loan applications by manipulating federal funds to favor political insiders. XPV and Limnia seek injunctive and declaratory relief directing DOE to reconsider and/or approve the loans to remedy this harm. Am. Ver. Compl at 33. Any monetary damages awarded because of DOE's constitutional violations would be a consequence of the injunctive and declaratory relief, and would not be standalone damages remedies.

Therefore, because the Constitution and the Declaratory Judgment Act permit suits against the government for equal protection and due process claims, and because justice requires that the government be suable for violating XPV's and Limnia's constitutional rights by abusing their power to favor political insiders, DOE cannot invoke sovereign immunity as a shield. Sovereign immunity does not preclude XPV's and Limnia's constitutional claims.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny defendants' motion to dismiss.

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Respectfully Submitted,

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