IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

XP VEHICLES, *et. al.*,	)	
Plaintiff	)	Civil Action No. 1:13-cv-00037 (KBJ)
v.	)	
UNITED STATES DEPARTMENT OF ENERGY *et. al*.	)	
Defendant	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO INDIVIDUAL CAPACITY DEFENDANTS' MOTION TO DISMISS

SUMMARY

This is a case about two small companies damaged by the Individual Federal Defendants' cronyism. Congress authorized Defendants Chu and Seward to hand out tens of billions of American taxpayer dollars and charged them to run honest and fair loan programs that would free the United States from dependence on foreign oil and help support American technology and manufacturing companies.[1] Instead, they treated taxpayer funds as a piggy bank for the politically connected and powerful. Ver. Compl. ¶¶ 83, 85-89, 112-118. Due to these defendants' decisions, directions and actions, the Department of Energy's ("DOE") Advanced Technology

[1] *See* Energy Independence and Security Act, Pub. L. 110-140, 121 Stat. 1492 (2007) (declaring the purpose to be: "To move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government").

Vehicle Manufacturing Loan Program ("ATVM") and the Section 1703 Loan Guarantee Program ("LGP") were fatally tainted by political favoritism. Ver. Compl. ¶¶ 4, 7, 54-63, 84-109, 113, 118; *see also* Ex. 1, STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 112TH CONG., REP. ON THE DEPARTMENT OF ENERGY'S DISASTROUS MANAGEMENT OF LOAN GUARANTEE PROGRAMS 2-5, 8-10 (2012), *available at* http://oversight.house.gov/wp-content/uploads/2012/03/final-doe-loan-guarantees-report.pdf (the "Staff Report") (citations omitted).[2]

Defendants' wrongdoing drove Plaintiff XP Vehicles, Inc. ("XPV") out of business and has hamstrung Plaintiff Limnia, Inc. ("Limnia"). Yet the defendants now argue that there is no remedy for cronyism, and no relief for a crooked program. *See* Individual Fed. Defs.' Mot. to Dismiss at 1-2, ECF No. 13; *see also* Official Capacity Defs.' Mot. to Dismiss at 13-16, 21-22, ECF No. 14 (no standing); Def's Mot. to Dismiss, *XP Tech. v. United States*, No. 12-cv-00774-MMS (Fed. Cl. Apr. 19, 2013), ECF No. 21 (government does not have a contractual obligation to run a fair program). Defendants' claims that XPV and Limnia have no judicial recourse and their assertions that these companies were lawfully denied a level playing field and properly

[2]According to Government Accountability Office ("GAO") Chairman Frank Rusco, answering questions posed by the Subcommittees on Oversight and Energy of the House Committee on Science, Space & Technology, as of January 29, 2013, DOE received 144 applications, granted 5 and considered 7 inactive. All of the rest were rejected or withdrawn. *See Assessing the Efficiency and Effectiveness of Wind Energy Incentives: Hearing Before the H. Comm. on Science, Space, and Technology, Subcomm. on Oversight and Subcomm. on Energy*, 113th Cong. (2013) (statement of Dr. Frank Rusco, Government Accountability Office), *available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/Rusco%20QFR%20Response.pdf (last visited July 29, 2013). Through these five loans, DOE funneled billions to politically powerful insiders. Ver. Compl. ¶¶ 90-109; *see* Ex. 1, Staff Report, 9-10 (citations omitted). Rusco also confirmed that no more ATVM loans would be made, *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 13-331R, STATUS OF DOE LOAN PROGRAMS 30 (2013), thereby ensuring (among other things) that the politically-connected "winners" previously given funds would be protected from competition.

deprived of due process are contrary to the controlling authorities. Consequently, the motion to dismiss should be denied.

STANDARD OF REVIEW

Defendants' Rule 12(b)(6) motion to dismiss must be denied unless it appears beyond doubt that there is no set of facts that the Plaintiffs can prove that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maljack Prods. Inc. v. Motion Picture Ass'n of Am., Inc.*, 52 F.3d 373, 375 (D.C. Cir. 1995). The Court must accept as true all facts pled in the complaint and give Plaintiffs the benefit of all reasonable inferences therefrom. *Id.* (citations omitted). Their claim must be "plausible on its face," meaning that the facts pled must allow the court to draw the reasonable inference that the Defendants here are liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 667-68 (2009). Discovery is proper if additional facts are needed to resolve Defendants' immunity claim. *Kartseva v. Dep't of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1995).

FACTS

Statutory Framework

Congress created the ATVM loan program in section 136 of Public Law 110-140 ("EISA"). There, it 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." EISA § 136(d)(1). [3]

[3] In fact, the statutory language creating the program's language that "the Secretary *shall* carry out a program to provide a total of not more than $25,000,000,000 in loans to eligible individuals and entities," could be read to require that DOE continue to allocate funds to the extent that eligible applicants exist. 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'") (citation omitted).

Congress did not give DOE unfettered discretion to determine borrower qualifications or to choose between qualified applicants using an unpublished and standard less "merit review." Nor did it authorize DOE to arbitrarily cease making loans to qualified applicants, as DOE has done. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 13-331R, STATUS OF DOE LOAN PROGRAMS 3 (2013). Instead, Congress mandated borrower qualifications, including financial viability without the receipt of additional Federal funding associated with the proposed project, a demonstration that "the qualified investment is expended efficiently and effectively" and compliance with such "other criteria as may be established *and published by*" DOE, and provide funds to "eligible individuals." EISA §136(d)(3) (emphasis added).

Congress also set clear limits on DOE's discretion to grant or deny Section 1703 program guarantees, defining eligible projects and setting loan and repayment terms. *See* 22 U.S.C. §§ 16511 *et seq*. DOE subsequently promulgated rules clarifying these requirements. DOE, *Loan Guarantees for Projects That Employ Innovative Technologies*, 74 Fed. Reg. 63,544 (Dec. 4, 2009). DOE has clear criteria for applicants and promises to consider applications by using a "competitive process." 10 C.F.R. § 609.7(a).

XPV and Limnia's Odyssey

Plaintiff XPV was an advanced technology vehicle company and an ATVM Loan applicant. Ver. Compl. ¶¶ 1, 14-19. Responding to a DOE solicitation, XPV applied and offered over $100 million in collateral to secure its request for a $40 million loan to mass produce an advanced, family-friendly electric SUV-style vehicle using polymer plastics and foam pressure membranes wrapped around a lightweight alloy frame. Ver. Compl. ¶¶ 14, 17. XPV expected to be able to sell a base model of this SUV for around $20,000.00. Ver. Compl. ¶ 14.

Plaintiff Limnia is an advanced technology "green energy" company that has since 2002 worked with DOE's own Sandia National Laboratory on an advanced energy storage system for electric cars with DOE providing grant, technical support and validation services. Ver. Compl. ¶ 12. Limnia applied for a section1703 Loan Guarantee and for $15 million in ATVM Loan funds to build its system (with Sandia as a key subcontractor). Ver. Compl. ¶¶ 68, 77.

XPV's ATVM Loan application was deemed "substantially complete" on December 31, 2008. At all times relevant, XPV qualified for a loan under DOE's published criteria and it was deemed a "qualified applicant" by DOE staff. In fact, DOE's Excel comparison matrices in December, 2008 and March, 2009 placed XPV in the top five percent of all applicants. *See* Ver. Compl. ¶¶ 21-23.

XPV's understanding from DOE was that 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, setting aside XPV's application in favor of applications from politically-favored cronies and campaign contributors. Ver. Compl. ¶¶ 24-26. At the end of April, 2009, XPV was notified that it had been assigned a technical eligibility and merit review team. Ver. Compl. ¶ 27. About a month later, XPV was told by DOE that it had passed technical review and that "everything looked good." *Id.* ¶ 28. Shortly thereafter, XPV discovered that two applicants, both with very close ties to the government, were receiving special assistance from DOE with their applications. *Id.* ¶¶ 30, 90-109. XPV requested similar treatment, but was denied same ostensibly because its application was so good that special assistance was unnecessary. *Id.* ¶ 31. On June 15, 2009, XPV advised DOE staff that XPV had been listed among "America's Most Promising Companies" by Forbes Magazine. *Id.* ¶ 32.

On June 29, 2009, five days after DOE announced $8 billion in loans to three companies, all of which had close government ties, XPV wrote asking for a status update. Over the next seven weeks, XPV was given repeated assurances by DOE ATVM program staff that everything was on track and that XPV met every loan requirement. XPV's repeated offers to provide additional technical information, and to make its business team available for interviews with DOE underwriters, were repeatedly denied over a period of months. *Id.* ¶ 25.

On August 21, 2009, XPV received a letter from Defendant Seward denying its application. Seward said that although DOE deemed XPV "eligible" for a loan under the written criteria, XPV had failed a "merit review." Seward did not disclose the criteria for this "review," and they remain a secret to this day. *See id.* ¶¶ 37-38. XPV immediately contacted DOE staff asking for the merit review documents and requesting an explanation for DOE's determination in light of the fact that it had determined XPV to be eligible for a loan but refused over a period of ten months to work with XPV's engineers and business staff for even one percent of the time devoted to the politically-connected companies given loan funds. *Id.* ¶ 40.

XPV then called DOE staff and was told in a phone call some of the reasons in the loan file for its "merit review" failure. Staff said the memo in the file failed XPV because the electric SUV did not use E85 gasoline, because XPV did not plan for government fleet sales, although the business plan given to DOE did in fact do so, and because XPV's advanced technology was too advanced, among other things. *Id.* ¶ 42-44. However, the conversation was cut short when Seward discovered that the call was taking place. *Id.* ¶ 52.

XPV heard nothing from DOE thereafter. Therefore, it sent defendant Chu a letter requesting reconsideration of the denial because the bases therefor were inaccurate. It asked him to explain why DOE staff had given XPV repeated assurances of approval, rejected offers of

additional information on the project, to describe the merit review criteria. It also asked him to justify why government cronies that applied for ATVM Loan funds after XPV's application had been submitted were reviewed first, given access to DOE staff to help draft the applications, and then awarded funds when XPV was denied. Chu did not answer. *Id.* ¶¶ 53-54.

Weeks later, Seward responded for Chu in writing but without addressing XPV's arguments or concerns. Instead, he gave new pretexts for the denial. *Id.* ¶¶ 55-61. He did not say, however, that XPV offered inadequate security for the loan, that it had failed to demonstrate a reasonable prospect of repayment, that it had failed to demonstrate its capability to build, distribute or sell the electric SUV, or that it had failed to demonstrate "financial viability without the loan" as required by law. *Id.* ¶ 64. Nevertheless, the ATVM Loan program dried up other sources of investment capital, and Defendants' wrongful conduct led XPV to collapse. *See id.* ¶ 9.

To benefit and protect the government cronies, bundlers and contributors who had a stake in companies that were seeking ATVM Loan funds, Defendants denied XPV a fair shake. *Id.* ¶¶ 32, 89-93, 99-109, 114-119. Defendants Chu and Seward used an opaque "merit criteria" process to steer taxpayer funds to government cronies. *Id.* ¶ 83.

Limnia received similar treatment. Although Limnia's product was a battery system for an electric vehicle, Seward initially denied its ATVM Loan application because its battery system was not "designed for installation in an advanced technology vehicle…." *Id.* ¶¶ 68-69. Limnia responded, advising Seward that the relevant patents stated that Limnia's product was meant for use specifically in advanced technology vehicles. Seward again denied the application because the technology was not "installed in an advanced technology vehicle." Limnia then advised him that the components in question had to be installed in an advanced technology

vehicle to operate and were designed for this purpose. Defendants never responded. *Id.* ¶¶ 70-74.[4]

Chu and Seward were responsible for the cronyism and abuse of the ATVM and LGP programs. Ver. Compl. ¶¶ 112-113, 116, 118. GAO found that they gave away billions without engaging "the engineering expertise needed for technical oversight" and without having performance measures in place to ensure taxpayers were protected. *Id.* ¶¶ 86-87. It also found they treated applicants inconsistently, favoring some over others, ignored their own underwriting standards and failed to properly document reviews, thus reducing the "assurance that [DOE] has treated applicants fairly and equitably." *Id.* ¶ 111. Because of Chu and Seward, Plaintiffs and the other applicants who brought only good ideas to the table, but not relationships with former politicians or big political "bundlers" or the current Senate majority leader, never had a fair or level chance to qualify for an ATVM loan or Section 1703 guarantee.

ARGUMENT

The government claims that the Plaintiffs have sued Chu and Seward for damages because DOE ("their employing agency") denied loan applications. This is inaccurate. Plaintiffs sued Chu and Seward because these defendants denied them fair treatment and an honest opportunity to compete for government loan funds to build advanced technology vehicles and their components.

This is not a "respondeat superior" case. DOE staff repeatedly told XPV that its ATVM loan application was "good to go." Ver. Compl. ¶¶ 22, 27, 29, 31, 36. Similarly, DOE staff repeatedly advised XPV that more supporting information for its application was unnecessary. *Id.* Yet, the criteria-less merit review referenced in Seward's letter of August 21, 2009, and his

[4] Limnia's efforts to participate in the 1703 Loan Guarantee Program were frustrated as well. *See* Ver. Compl. ¶¶ 76-82.

frankly inexplicable denials of Limnia's ATVM Loan application, were nothing more than veils to cover the purposeful abuse by Chu and Seward of Plaintiffs' rights to fair and level treatment and of the diversion of public funds to government and political cronies. Ver. Compl. Ex. 2 (Dec. 31, 2008 letter to XPV), Ex. 3 (Aug. 21, 2009 rejection letter to XPV), Ex. 5 (Oct. 23, 2009 letter to XPV confirming rejection), Ex. 6 (Apr. 10, 2009 letter to Limnia).

The government's argument is that there is no remedy for cronyism, and that those who run a crooked program cannot be liable to those to whom they deny equal treatment. Individual Fed. Defs.' Mot. to Dismiss, ECF No. 13; Official Capacity Defs.' Mot. to Dismiss, ECF No. 14; Def's Mot. to Dismiss, *XP Tech. v. United States*, No. 12-cv-00774-MMS (Fed. Cl. Apr. 19, 2013), ECF No. 21. The law, however, is otherwise. Their motion to dismiss should be denied.

I. DEFENDANTS' MISCONDUCT SUPPORTS A *BIVENS* ACTION

Defendants argue that there is no private right of action under *Bivens* against government officials who favor political cronies and deny others due process in order to serve the politically powerful and connected.[5] Individual Fed. Defs.' Mot. to Dismiss at 15. First, they assert that either the Administrative Procedure Act ("APA") or the Tucker Act are each a "comprehensive remedial scheme" that ought to immunize them from suit. *Id.* at 17-22. Second, they claim "special factors" ought to provide an additional layer of immunity, asserting that Plaintiffs' suit is in reality a damages claim for agency action. *Id.* at 25 (citations omitted); *see generally Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).[6] These arguments, however, should fail, for cronyism is

[5] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

[6] In *Wilkie* the Court explained the two-step analysis that applies to *Bivens* claims. First, a court examines "whether any alternative, existing process for protecting the [plaintiff's constitutionally protected] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Second, even if the court finds no equally effective alternative process the court must "make the kind of remedial determination

actionable under *Bivens*. Neither the APA nor the Tucker Act are "comprehensive remedial schemes," and the "special factors" cited as grounds for immunity in other cases simply do not obtain here.

A. Cronyism Is Actionable.

Bivens is a cause of action designed to prevent government officials from abusing their power or employing it as an instrument of oppression. *Brown v. Nationsbank Corp.,* 188 F.3d 579, 591 (5th Cir. 1999). It remedies the harm committed by federal officials in depriving a citizen of constitutional rights through an action for damages against those officials in their individual capacities. *Id.* at 590. "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 U.S. at 392, 395; *Davis v. Passman*, 442 U.S. 228 (1979) (personal liability for violations of the Fifth Amendment's Equal Protection Clause).[7]

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that is appropriate for a common-law tribunal, paying particular heed to any special factors counseling hesitation before authorizing a new kind of federal litigation." 551 U.S. at 550.

[7] In *Davis*, plaintiff alleged that she had been denied a job on Congressman Otto Passman's staff because of her sex. The Court found that Davis could state a claim of discrimination directly under the Fifth Amendment, and, if successful, obtain damages from Passman as compensation for her injuries. It held:

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. "The very essence of civil liberty," wrote Mr. Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Traditionally, therefore, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution…." Indeed, this Court has already settled that cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right

The touchstone of federal due process is protection of the individual against arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992). Therefore, executive branch abuses of power that shock the conscience, violate the decencies of civilized conduct or interfere with rights implicit in the concept of ordered liberty have long been subject to judicial review, check and correction. *Rochin v. California*, 342 U.S. 165, 169-170 (1952).

Pervasive government cronyism and political favoritism with respect to the distribution of billions of taxpayer dollars in federal loans does all of these things; it ought to be self-evident that no government official has the authority to dispense federal funds in a manner that serves his own political interests.[8] As the Fifth Circuit noted almost fifty years ago:

> If one applicant…is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has a right to expect its officers to observe prescribed standards and to make [determinations] on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process: absolute and uncontrolled discretion invites abuse.

Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964). Government cronyism, and the due process violations that inevitably trail in its wake, ought to be presumptively actionable under *Bivens*.

Davis, 442 U.S. at 246-47 (citations omitted).

[8] Through DOE's Credit Review Board, Defendant Chu controlled access to the loan guarantee and ATVM loan program funding and could delegate final approval authority to the Director of the Loan Guarantee Program, Lachlan Seward. *See* Ex. 2, "DOE's Credit Review Board Charter, § 4 'Functions.'" Although the law required DOE to award funds on a first-in, first-out basis until all funds are exhausted, neither statute nor regulation provide a method for overseeing the process and ensuring Secretary Chu and his delegates are not abusing their limited authority. *See* Ver. Compl. Ex. 13; "DOE Loan Guarantees: Further Actions Are Needed to Improve Tracking and Review of Applications," GAO-12-157 (Mar. 2012); Ver. Compl. ¶ 111. Secretary Chu colluded with Lachlan Seward to abuse this authority by directing DOE loan funds to politically favored applicants and to the detriment of qualified applicants who lacked political connections, including Plaintiffs.

B. Plaintiffs Pass *Wilkie* Review.

The Supreme Court, on the assumption that a federal employee has offended a constitutional right, directs courts to decide whether a *Bivens* remedy is proper based on a two-step test and review. Step one asks whether there is "any alternative, existing process for protecting the interest that amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Step two explores whether there are "'special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush v. Lucas*, 462 U.S 367, 378 (1983)). Plaintiffs' claims pass the test.

1. *Wilkie* step one.

Defendants claim that both the APA and the Tucker Act are "comprehensive remedial schemes" that immunize Defendants from liability for violating Plaintiffs' due process rights under *Wilkie* step one. Individual Defs.' Mot. to Dismiss 17, 20-24. The relevant authorities, however, hold otherwise. When the Supreme Court precludes a *Bivens* claim, it is because there is a remedial scheme, carefully designed by Congress, to provide relief for the constitutional violation that had been alleged. Neither the APA nor the Tucker Act were designed to remedy the due process harms caused by the misuse of political power over taxpayer-funded loans to benefit powerful and connected crony companies and therefore Plaintiffs' *Bivens* claim should stand. *See Carlson v. Green*, 446 U.S. 14, 19 (1980); *Wilkie*, 551 U.S. at 553; *Davis*, 442 U.S. at 24 ("unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no

effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights"). [9]

In *Carlson*, the Court allowed a *Bivens* claim for personal injuries suffered by an inmate alleging Eighth Amendment violations against federal prison officials, and denied the argument that relief was limited to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), which waived sovereign immunity for certain tort claims against the United States. 446 U.S. at 19. It held, "Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.*

In *Wilkie*, a landowner sought a *Bivens* remedy to challenge the cumulative effect of various types of pressure applied by Federal agents to get him to grant an easement. *Wilkie*, 551 U.S. at 541-50. The Court noted that the plaintiff "has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." *Id.* at 553. However:

> This state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it…the forums of defense and redress open to Robbins are a patchwork, an assemblage of…administrative and judicial benches applying regulations, statutes and common law rules. It would be hard to infer that Congress intended the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim. *Compare Bush.*..(refusing to create a *Bivens* remedy when faced with an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"); and *Schweiker*…("Congress chose specific forms and levels of protection for the rights of persons affected") with *Bivens*…(finding "no explicit congressional declaration that persons injured [in this way] may not recover money damages from the agents but must instead be remitted to another remedy, equally effective in the view of Congress")….This, then, is a case for *Bivens* step

[9]Neither the APA nor the Tucker Act were explicitly declared by Congress "to be. . . *substitute[s]* for recovery directly under the Constitution and viewed as equally effective," as required by *Carlson*, 446 U.S. at 18-19. However, even if no explicit Congressional language is needed to create the "alternative process" that precludes a *Bivens* claim, neither the APA nor the Tucker Act would operate as a bar. *See infra at* 13-16.

> two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done.

Id. at 554 (citing *Bush v. Lucas*, 462 U.S. 367 (1983);[10] *Schweiker v. Chilicky*, 487 U.S. 412 (1988);[11] and *Bivens*, 403 U.S. at 397).

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[10] In *Bush*, the Court addressed claims by a NASA employee that he was demoted for making public statements critical of his employer. Bush administratively challenged his discipline where he had the opportunity to raise his claim that his punishment was in violation of the First Amendment. He prevailed, securing a reversal of demotion, retroactive restoration of his former position and grade and full back pay. *Id.* He then sued the responsible NASA officials under *Bivens*. Although ultimately ruling against Bush, the Court did not retreat from *Bivens*. Rather, it spoke of the need for caution when dealing with a complex scheme like the relationship between the federal government and its employees, which "gives rise to policy questions of great import," and which has "presented a myriad of problems with which the Congress over the years has dealt." *Bush*, 462 U.S. at 379. Of particular significance was the fact that Congress had already addressed the balance between federal employee free speech and the concerns of federal agencies as employers, in a comprehensive remedial scheme. Given the procedures that Congress had "constructed step by step, with careful attention to conflicting policy considerations," the court found it inappropriate to augment that remedial scheme "by the creation of a new judicial remedy for the constitutional violations at issue." *Id.* at 388. It stated:

> In the ensuing years, repeated consideration of the conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal work force gave rise to additional legislation, various Executive Orders, and the promulgation of detailed regulations by the Civil Service Commission. Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures - administrative and judicial - by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system. As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer, but it *provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies*.

Id. at 385-86 (emphasis added).

[11] In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), as in *Bush*, Congress had already constructed an elaborate remedial scheme governing the process for the award or denial of benefits, which the claimants had already successfully utilized. *Schweiker*, 487 U.S. at 417. And as in *Bush*, the Court held that the existence of this comprehensive remedial scheme precluded a separate *Bivens* cause of action: "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 423.

Here, Plaintiffs allege violations of the Fifth Amendment's due process clause, claims long recognized to be squarely within *Biven*'s ambit. *Davis*, 442 U.S. at 247. Defendants cite "no explicit congressional declaration" that persons in Plaintiffs' position who are injured by government cronyism and political favoritism are barred from recovering money damages from those responsible for the injury. *See, e.g.*, *id.* (citing *Bivens*, *supra*, at 397). And, unlike *Bush* and *Schweiker*, this case does not intrude upon a comprehensive remedial scheme carefully created by Congress.

(a) The APA does not bar *Bivens* relief.

In this Circuit, the rule is that where the conduct underlying the plaintiff's claim is already governed by comprehensive procedural and substantive provisions created by Congress which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective, then it would be "inappropriate . . . to supplement that regulatory scheme with a new judicial remedy." *Bush*, 462 U.S. at 368; *see also Carlson*, 446 U.S. at 18-19; *Navab-Safavi v. Broad. Bd.*, 650 F. Supp. 2d 40, 66 (D.D.C. 2009), *affirmed*, 637 F.3d. 311 (D.C. Cir. 2011). The APA, however fails this test.

To begin with, a comprehensive remedial scheme must provide both "substantive rights and administrative procedures for adjudicating those rights." *Navab-Safavi*, 650 F. Supp. 2d at 71; *c.f. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 n.10 (1989). The APA provides only a set of uniform *procedures* for agencies to employ when administering *substantive* rights established by other statutes. *Navab-Safavi*, 650 F. Supp. 2d at 71.[12] It does not itself create or "confer a substantive right to be free from arbitrary agency action." *Id.* (quoting *Furlong v.*

[12]For example in *Davis v. Billington*, 681 F.3d 377, 387 (D.C. Cir. 2012), the D.C. Circuit found that the Civil Servant Reform Act was a sufficiently comprehensive remedial scheme because it provided procedural protections and a right to appeal the underlying actions challenged by plaintiff.

Shala, 156 F.3d 384, 394 (2d Cir. 1998)); *see Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 n.14 (5th Cir. 1998) ("[T]he provisions of the APA do not declare self-actuating substantive rights.") (citations omitted). Therefore, the APA *standing alone* "is not a comprehensive system for administering public rights that would constitute a 'special factor' counseling against recognition of plaintiffs' *Bivens* claims." *Navab-Safavi*, 650 F. Supp. 2d at 73; *Munsell v. Dep't of Agric.*, 509 F.3d 572, 591-92 (D.C. Cir. 2007) (assuming without deciding that the APA alone did not preclude a *Bivens* action). Instead, the APA is "merely a procedural vehicle for review of agency action." *Furlong*, 156 F.3d at 394.

This is not to say that the APA, operating together with another statutory scheme that confers substantive rights, might not potentially operate as the sort of remedial scheme that would preclude a *Bivens* action.[13] *See Sloan v. Dep't of Hous. & Urban Dev.*, 231 F.3d 10, 19 (D.C. Cir. 2000) ("[A] *Bivens* action may be foreclosed where the possibility of judicial review under the APA, *along with* other 'statutes, executive orders and regulations,' provides a

[13] The cases cited by defendants for the proposition that the "APA is, alone, sufficient to preclude . . . a Bivens action" are not to the contrary. *See* Individual Defs' Mot. to Dismiss at 19. All but one of these cases involve government employment disputes where a substantive right undergirds the procedural remedy available through the APA. *See also Miller v. U.S. Dep't of Agric. Farm Serv. Agency*, 143 F.3d 1413, 1414, 1416 (11th Cir. 1998) (employee could challenge his removal under agency regulations); *Moore v. Glickman*, 113 F.3d 988, 993-94 (9th Cir. 1997) (employee could challenge agency action under same regulations as in *Miller*); *Berry v. Hollander*, 925 F.2d 311, 315 (9th Cir. 1991) (plaintiff had remedies available under the agency's regulations and the Civil Service Reform Act); *Franks v. Nimmo*, 796 F.2d 1230, 1239-40 (10th Cir. 1986) (employee had statutory review process consisting of two peer review boards and an opportunity to be heard before being separated from the service); *Maxey v. Kadrovach*, 890 F.2d 73, 75-76 (8th Cir. 1989) (employee had remedies under 38 U.S.C. § 4106); *Sloan v. Dep't of Housing & Urban Dev.*, 231 F.3d 10, 14-15 (D.C. Cir. 2000) (contractor could seek administrative review under 24 C.F.R. § 24.313). The final case, *W. Radio Co. v. U.S. Forest Serv.* arose in the context of an established administrative review process that was judicially reviewable through the APA. 2008 U.S. Dist. LEXIS 11203, *13-14 (D. Or. Feb. 12, 2008), *aff'd* 578 F.3d 1116 (9th Cir. 2009) (finding that plaintiffs "present[ed] no evidence to suggest retaliation, malice, or conspiratorial acts on the part of individual defendants," nor were they able "to describe the activities of [their] competitors that evince favorable treatment" from the government).

meaningful remedy.") (emphasis added); *but see Wilkie*, 551 U.S. at 554 (noting that "the forums of defense and redress open to Robbins are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules" but holding these did not "plainly answer no to the question of whether" a plaintiff should have a *Bivens* remedy).[14] But not in this case.

Here, thanks to the Defendants' wrongdoing, one of the Plaintiffs is out of business and therefore (the government claims) without any APA remedy. *Compare* Ver. Compl. ¶¶ 1, 25-26, 37-67, 119 *with* Official Capacity Defs.' Mot. to Dismiss at 11-24, ECF No. 14. The other is stuck in a bureaucratic limbo in which it supposedly is having its new application "considered" by an agency that has already determined (according to GAO) that no additional loans will be made. *See* Ver. Compl. ¶¶ 54, 70, 72, 82; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 13-331R, STATUS OF DOE LOAN PROGRAMS 3 (2013). As Judge Edwards has pointed out:

> Even assuming, arguendo, that the existence of APA review might factor into a determination as to whether a *Bivens* remedy is available, its relevance would be minimal in a case involving claimants who are ineligible for relief under the APA. Because appellants such as Munsell/MQF are no longer subject to USDA oversight, their claims under the APA are moot. The only viable relief for appellants like Munsell/MQF, who allegedly have been driven from business by the retaliatory actions of agency officials, would be backward-looking damages claims….Thus, in a case of this sort, were the possibility of APA review deemed sufficient to foreclose a *Bivens* remedy, the very success of the unconstitutional conduct in removing Munsell/MQF from the regulated arena would make APA review unavailable and insulate the conduct entirely from judicial review. That would make little sense.

Munsell, 509 F.3d at 590; *Bivens*, 403 U.S. at 410 ("For the people in Bivens' shoes it is damages or nothing").

[14] Indeed, there is nothing unique about plaintiffs' claims which would relegate them to the APA, while leaving other constitutional guarantees outside of its broad sweep. Were the APA alone to preempt the field for challenging constitutional conduct, as defendants urge, this would bar virtually all *Bivens* claims of any sort, under any provision of the constitution, and a court would not need to look to any other remedial scheme or special factors to preempt such claims.

(b) The Tucker Act does not bar *Bivens* relief.

The Defendants also rely on the Tucker Act to bar Plaintiffs' *Bivens* claim, but it too is no bar at all. First, to the extent the Tucker Act does confer a substantive cause of action for implied-in-fact contracts, such cause of action cannot constitute a meaningful remedy here where the government claims that, *as a matter of law*, no implied-in-fact contract arises in the context of a loan guarantee program. Defs.' Mot. to Dismiss, *XP Tech. v. United States*, No. 12-cv-00774-MMS (Fed. Cl. Apr. 19, 2013), ECF No. 21; *Bivens*, 403 U.S. at 410 ("For the people in Bivens' shoes it is damages or nothing"); *Navab-Safavi*, 650 F. Supp. 2d at 73-74. Second, a cause of action for an implied-in-fact contract would only provide relief for contract-related claims, not constitutional harms, and therefore is not the type of relief needed for Defendants to claim immunity from a *Bivens* action. *See, e.g., id.* at 67-70. The Tucker Act merely contains a waiver of sovereign immunity for claims invoking another "money-mandating" statute as a source of substantive rights; therefore, like the APA, it does not bar a *Bivens* action in this case. *Fisher v. United States*, 364 F.3d 1372, 1376-77 (Fed. Cir. 2004); *Navab-Safavi*, 650 F. Supp. 2d at 71.

2. *Wilkie* step two.

This, then, is a case for *Wilkie* step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done. *Wilkie*, 551 U.S. at 554. Defendants' *Wilkie* step two analysis is entirely as follows: Plaintiffs' *Bivens* claim is simply a back door claim against individual officers for what is essentially agency action. This would create an enormous financial burden on the federal government and authorize every unsuccessful loan applicant to have an individual cause of action against the head of an agency.

Therefore, the Plaintiffs' *Bivens* claim should be barred. *See* Defs.' Mot. to Dismiss at 25-26 citing *FDIC v. Meyer*, 510 U.S. 471, 474-75 (1994).

The Defendants' parade of horribles, however, bears no relation to the facts of this case. Plaintiffs' claims against Chu and Seward arise from their decisions and their actions in steering taxpayer funds away from qualified loan applicants toward political cronies and companies with campaign bundlers embeded in the bureaucracy. ¶¶ 83-119. As Defendants point out, the government is the grantor of innumerable loans to thousands of applicants every year. But, due to the decisions and actions of Chu and Seward, the DOE loan programs were infected with an appalling and (hopefully) highly unusual degree of cronyism and political favoritism. DOE staff repeatedly told Plaintiffs that they were qualified for federal loans. But it was Chu and Seward who made the final determination, denying XPV's loan based on a secret "merit review," the criteria for which have never been disclosed, and rejecting Limnia's application based on utterly fallacious grounds, and then "backfilling" these rejections using "reasons" that were blindingly and obviously false. Ver. Compl. ¶¶ 40-44, 54-55, 65, 83-84, 118.

Furthermore, though Defendants cite *Meyer* as authority for dismissal, it actually stands as strong authority and justification for Plaintiffs' *Bivens* action. According to the Court:

> Meyer's real complaint is that Pattullo, like many *Bivens* defendants, invoked the protection of qualified immunity. But *Bivens* clearly contemplated that official immunity would be raised. More importantly, Meyer's proposed "solution" -- essentially the circumvention of qualified immunity -- would mean the evisceration of the *Bivens* remedy, rather than its extension. It must be remembered that the purpose of *Bivens* is to deter *the officer*. If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under Meyer's regime, the deterrent effects of the *Bivens* remedy would be lost.

Meyers, 510 U.S. at 474.

No government official has authority to dispense federal funds in a manner that serves his own political interests. *Hornsby*, 326 F.2d at 609-10. Yet, defendants took control of these

massive DOE loan programs, funded by billions of taxpayer dollars, ignored their Congressional charge to reduce U.S. energy dependency and promote domestic manufacturing and economic growth, and infused them with politics.[15] Insiders benefited, but those without power and connections, no matter how qualified, were shut out. Ver. Compl. ¶¶ 26, 46, 57, 61, 63, 114-119.[16]

The public has a right to expect its officers to play fair with taxpayer money and to award loans based on merit, not political connections. *Accord Hornsby,* 326 F.2d at 610. Allowing a *Bivens* action against Chu and Seward would not trigger a flood of lawsuits for damages, willy-nilly, against any individual agency official for a mere loan denial, as Defendants (without any empirical substantiation) claim. Chu and Seward were exceptional in their politicization of the federal programs under their charge. However, denying a *Bivens* remedy against these individuals, each of whom abused his power and the public interest, would corrode *Bivens*' deterrent effect and undermine the accountability of powerful government officials. Plaintiffs' *Bivens* claim should stand.

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[15] To be crystal clear, under the authority of the Department of Energy's Credit Review Board, Defendant Chu controlled access to the loan guarantee and ATVM loan program funding, and could delegate final approval authority to Director of the Loan Guarantee Program, Lachlan Seward. *See* Ex. 2, "DOE's Credit Review Board Charter, § 4 'Functions'".

[16] For example, the Government Accountability Office annually reviews the DOE loan programs, and in 2012 it found that the Department of Energy treated applicants inconsistently by ignoring its own standards during the review process. Ver. Compl. ¶ 111, Ex. 13. Shortly after the GAO released its 2012 report, Congress released emails showing that under the direction of Chu and Seward, DOE bent its own rules for political favorites. Ver. Compl. ¶¶ 112-113. Defendants Chu and Seward thus acted in their individual capacities and abused their limited but unchecked authority to redirect loan and loan guarantee funds away from qualified applicants and toward political allies. Ver. Compl. ¶ 118.

II. DEFENDANTS DO NOT HAVE QUALIFIED IMMUNITY IN THIS CASE.

Defendants claim the shelter of qualified immunity,[17] arguing first that Plaintiffs have failed to allege cognizable violations of their due process rights by Chu and Seward and then that Plaintiffs have no rights at all. Both claims fail.

A. Plaintiffs' Claims Are Plausible.

To determine whether a complaint meets the pleading standard, the court must undertake a three step analysis. First, it must outline the elements a plaintiff must plead to a state a claim for relief. Then, it must peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth. Finally, it must look for well-pled factual allegations, assume their veracity, and then "determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. This last step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Chu and Seward ran the ATVM and Section 1703 Loan programs. They made the final calls with respect to loan determinations. Defendant Chu controlled access to the loan guarantee and ATVM loan program funding, and could and did delegate final approval authority to Director of the Loan Guarantee Program, Defendant Seward. *See* Ex. 2, "DOE's Credit Review Board Charter, § 4 'Functions'". Chu and Seward exercised strong control over funding decisions. *See* Ver. Compl. ¶¶ 110, 112 Ex. 17, 118(a)-(e), 118(g), 118(i)-(k). And, the Plaintiffs

[17] "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). An official loses his qualified immunity when he "could be expected to know that certain conduct would violate statutory or constitutional rights." *Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998).

allege that it was Chu and Seward who elevated political contributions and influence over merit as factors in granting and funding DOE loans, denying same to Plaintiffs notwithstanding their admitted qualifications. Ver. Compl. ¶¶ 128, 130-32; *see also* Ver. Compl. ¶¶ 37-39, 54-67.

Defendants cite *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012) for the proposition that these detailed allegations are legally inadequate. Defs.' Mot. to Dismiss 30. In *Bistrian*, the court held that an inmate stated a plausible failure-to-protect claim primarily because Bistrian plausibly alleged that other inmates knew that he was cooperating with prison officials and, having plausibly pled that other inmates knew of his cooperation, Bistrian also plausibly pled that that they were likely to retaliate violently if placed in the same locked recreation cage. *Id.* at 369.

Here, Plaintiffs' allegations, buttressed by independent GAO investigations, e-mails released by House investigators and media reports documenting the extent of political cronyism and the insider connections of successful ATVM and Section 1703 Loan Program "winners" demonstrate that political factors, patronage and power, not merit, were the decisive metrics for loan funds. Among other things, the juxtaposition of Seward's written admission that XPV was qualified for ATVM funds but that it was denied the same because of a failed, criteria-less "merit review," and DOE's award of billions to politically connected companies, is telling. *See* Ver. Compl. ¶¶ 27-30, 33-38, 55-64, 83-113, 116-18. Given the highly politicized nature of the DOE loan programs at issue in this case, and given the information made publicly available by House investigators demonstrating the extent to which political factors and political relationships drove loan decisions, *see* Ver. Compl. ¶¶112-13, judicial experience and common sense strongly support the plausibility of Plaintiffs' claims. There is ample evidence suggesting that Chu and Seward decided who was to be funded and why, and they should be held accountable

accordingly. *Id.; see also Aref v. Holder*, 2013 U.S. Dist. LEXIS 97510, No. 10-539, at *30-31 (D.D.C. July 12, 2013) ("[E]ven if his convicted offense explains Jayyousi's initial placement in the CMU, it fails to explain his continued designation in the unit despite prison officials' recommendation that he be removed. Granting Jayyousi 'the benefit of all inferences that can be derived from the facts alleged,'….[t]he BOP's continued holding of Jayyousi in the CMU…provides enough by way of factual content to "nudge" his claim of [retaliation]' across the line from conceivable to plausible'") (alteration in original) (citations omitted); *Gray v. LaHood*, 2013 U.S. Dist. LEXIS 7669, No. 11-2188, at *21 (D.D.C. Jan. 18, 2013).[18]

B. Plaintiffs' Due Process Rights Are Real.

Defendants claim Plaintiffs have no right either to a fair review of their loan applications or to ATVM and/or Section 1703 loan funds. Defs.' Mot. to Dismiss at 32. In other words, Defendants argue that the courthouse doors are closed to Plaintiffs, who may not be heard to complain about the damages that they suffered due to the Defendants' cronyism and political favoritism for the politically powerful insiders who were given taxpayer monies. Defendants err.

[18]According to the court:

> Gray alleges that "she was subjected to intimidation, ridicule, and insulted because of her gender, resulting in a severely hostile and abusive work environment that adversely affected the terms and conditions of her work place." Although this statement alone would be plainly inadequate, other portions of Gray's complaint (incorporated into Count II), make factual allegations that take this claim beyond mere "labels and conclusions." For instance, Gray alleges that another female employee "found the work environment so gender hostile" that she filed a gender discrimination complaint that Gray "was not treated professionally as an equal," that "her input and comments were largely ignored," that her supervisor "yelled at Gray, belittled, mocked, and otherwise criticized her competence," leading to "mental anguish" that required medical treatment, that several other women "were victims" of one of the agency officials' "denigrating comments," that Gray "was treated with disdain, snubbed, and excluded from meetings," and that she was subject to critical and inaccurate memoranda by her supervisors. Together these allegations suffice—although barely—to state a plausible claim of a workplace "permeated" with gender discrimination.

Gray, 2013 U.S. Dist. LEXIS 7669, at *20-21 (citations omitted).

Plaintiffs may bring a due process claim to protect a constitutional right or "entitlement" that the government impairs or takes away without adequate procedure. *Propert v. Dist. of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). A plaintiff can establish a constitutionally protected interest by proving he has a "legitimate claim to entitlement" in a property or liberty interest. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). A "legitimate claim to entitlement" can also arise in an application for a government benefit or loan where there are clear eligibility guidelines, even if there is room for agency discretion. *See George Wash. Univ. v. Dist. of Columbia*, 318 F.3d 203, 207-08 (D.C. Cir. 2003) cert. denied, 540 U.S. 824 (2003); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 62, 63 (1999) (Ginsberg, J., concurring) ("I do not doubt ... that due process requires fair procedures for the adjudication of respondents' claims" for government benefits"), (Stevens, J., concurring in part and dissenting in part); *Logan v. Zimmerman Brush Co.*, 455 U.S 422 (1982) (a statute creating a right to use adjudicatory procedures found in an employment law was a protected property interest).

Congress set very clear limits on DOE's discretion to award or deny ATVM loans. In EISA § 136(d)(1), 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." Congress dictated the criteria for making loans, including financial viability without the receipt of additional Federal funding associated with the proposed project, a demonstration that "the

qualified investment is expended efficiently and effectively" and compliance with such "other criteria *as may be established and published by*" DOE. EISA § 136(d)(3).[19]

Congress certainly did not give DOE unfettered discretion to create qualification criteria out of whole cloth, to make up bases for choosing between qualified applicants, to deny qualified applicants a loan using an unpublished, criteria-less "merit review," or to arbitrarily cease making loans to qualified applicants, as DOE has done.[20] Therefore, XPV and Limnia, as qualified applicants, have a protectable due process entitlement. *See* Ver. Compl. ¶ 38 ("XPV's application was 'determined to be eligible'"), ¶¶ 120-123.[21]

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[19] DOE subsequently published regulations under 10 C.F.R. Part 611 that set forth three stages of review for ATVM loan applicants. First, DOE screens the applicant for eligibility. To pass this phase, the applicant must be either a manufacturer of automobiles or of qualifying components, 10 C.F.R. §§ 611.100(a)(i)-(ii); *see also* 42 U.S.C. § 17013(b), and financially viable, 10 C.F.R. § 611.100(c) (setting forth eight factors DOE considers in assessing the applicant's financial viability); *see also* 42 U.S.C. § 17013(d)(3)(B). Second, DOE screens the application for eligibility, assessing whether the application contains all information required by regulation and whether the proposed loan complies with other statutes and regulations. 10 C.F.R. § 611.103(a). During this second phase of review, DOE is not given authority to reject an applicant for any reason, but rather it can "reject an application, in whole or in part, *that does not meet these requirements*." *Id.* (emphasis added). Third, DOE conducts a substantive review of the application, evaluating it for the technical merit of the proposal; the technical program factors including "economic development and diversity in technology, company, risk, and geographic location," whether the proposed provisions will financially protect the Government; and priority is given to manufacturers that have been operational for the longest amount of time. 10 C.F.R. § 611.103(b); *c.f.* 42 U.S.C. § 17013(g) ("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.").

[20] In fact, the statutory language creating the program's language that "the Secretary *shall* carry out a program to provide a total of not more than $25,000,000,000 in loans to eligible individuals and entities," could be read to require that DOE continue to allocate funds to the extent that eligible applicants exist. 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'") (citation omitted).

[21] Although XPV met the financial viability criteria at the time of its application, Defendants wrongdoing have driven it out of business. Ver. Compl. ¶¶ 1, 64, 67, 119, 123. Although XPV does not meet the financial eligibility criteria at this time, federal regulations would allow it to

Congress also set clear limits on DOE's discretion to grant or deny Section 1703 program guarantees, defining eligible projects and setting loan and repayment terms. *See* 22 U.S.C. §§ 16511 *et seq*. DOE subsequently promulgated rules clarifying these requirements. DOE, *Loan Guarantees for Projects That Employ Innovative Technologies*, 74 Fed. Reg. 63,544 (Dec. 4, 2009). DOE has criteria for LGP applicants and promises to consider applications by using a "competitive process." 10 C.F.R. § 609.7(a).

Defendants here claim because DOE had some discretion there can be no entitlement. Defs.' Mot. to Dismiss at 33. This is not the law. If an agency has unfettered discretion, then lower court cases generally hold that a plaintiff has no constitutionally protected interest. *See generally Wash. Legal Clinic for Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997). However, where, as here, there are substantial limitations on that discretion, a qualified applicant can have a protected constitutional interest. *George Washington*, 318 F.3d at 207-08 (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462-63 (1989)).[22]

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assign its interest in its loan to another eligible party with "prior written approval by DOE and the Federal Financing Bank" *See* 10 C.F.R. § 611.110(b). In any event, Defendants do not dispute that XPV was an Eligible Applicant in 2009 as defined by the statute. Ver. Compl. ¶¶ 38, 64. Had Defendants conducted a fair and level review of its application in 2009, XPV would have been able to borrow funds and it would be operating today. Ver. Compl. ¶¶ 9, 19, 35, 117, 119.

[22] *See, e.g., Mallette v. Arlington Cnty Emps' Supplemental Ret. Sys. II*, 91 F.3d 630, 635 (4th Cir. 1996) (finding that a county ordinance stating that "qualifying members" shall receive benefits created a "legitimate claim of entitlement" in the application for the benefit); *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583,588 n.7 (9th Cir. 1992) ("[T]he district court correctly concluded that both applicants for and recipients of SCDD benefits possess a constitutionally protected interest in those benefits.") (citations omitted); *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (concluding that an entitlement interest exists in the right to apply for Special Agricultural Worker status because Congress promulgated rules that restricted the discretion of decision makers to grant benefits under the system); *Daniels v. Woodbury County*, 742 F.2d 1128, 1132 (8th Cir. 1984) ("[T]he authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements") (citations omitted) (internal quotations omitted); *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982)

Oddly, defendants cite *Childress v. Small Bus. Admin.*, 825 F.2d 1550, 1551-54 (11th Cir. 1987) for the proposition that Plaintiffs lack a constitutionally cognizable interest in the ATVM and Section 1703 programs. *Childress*, however, has nothing to do with this case. In *Childress* the government denied the plaintiffs a loan because they had wrongfully misused the proceeds of a crop sale. The court in a footnote dismissed plaintiffs' substantive due process and Equal Protection Clause claims because "the evidence presented can give rise to no claim that appellants have engaged in the type of egregious conduct which would be deemed a denial of substantive due process or equal protection." *Id.* (citations omitted). In other words, the plaintiffs were not qualified for the loan. Here, however, although there is ample evidence of "egregious" conduct by Chu and Seward there is absolutely no evidence that Plaintiffs were anything but qualified for ATVM loan funds. On these facts, Plaintiffs' due process claim is well-pled.

1. Substantive due process.

Substantive due process limits what the government may do in its executive capacities. *Cnty of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992). In *Collins*, the Supreme Court found that substantive due process was intended

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(finding that applicants for federal rent subsidies have a property interest in the application for those subsidies because "the authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements…" (citing *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979); *Holbrook v. Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) ("Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause") (citations omitted); *Charry v. Hall*, 709 F.2d 139, 145 (2d. Cir. 1983) (applicant qualifying to take a professional examination entitled to due process); *Pence v. Kleppe*, 529 F.2d 135, 140-41 (9th Cir. 1976) (applicants for land grants under the Alaska Native Allotment Act entitled to due process protections). Furthermore, although the enabling statute and respective regulations use permissive language, the agency's discretion is limited because it subjects applications to a competitive process. *See, e.g.*, *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 909 (Fed. Cir. 1988) (an agency's discretion is limited when it subjects applications to "open and fair competition"). Therefore, an entitlement also arises to the extent applicants meet program criteria.

to prevent government official "from abusing [its] power, or employing it as an instrument of oppression." *Collins*, 503 U.S. at 126 (citations omitted) (internal quotations omitted). Government officials who act with deliberate indifference to constitutional rights "shock the conscience." *Rochin*, 342 U.S. at 172-73.

Here, defendants Chu and Seward intentionally and deliberately abused their power for the benefit of politically connected and powerful companies and individuals. Ver. Compl. ¶¶ 83, 85-89, 112-118. As a result, XPV and Limnia were denied loans for which, as DOE acknowledges, they were otherwise qualified to receive. *Id.* at ¶38. Given that Plaintiffs' interests in a fair review and in the loan proceeds are both constitutionally protected, their due process claims should stand.[23]

2. Procedural due process.

As Defendants point out, procedural due process is a flexible concept that ensures a citizen is not deprived of a liberty or property right without appropriate procedural protections. *Atherton v. Dist. of Columbia*, 567 F.3d 672, 689-90 (D.C. Cir. 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The right to a hearing is a "basic aspect of the duty of government to follow a fair process of decision making" with respect to a constitutionally protected interest. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The purpose of this requirement is not only to ensure

[23]Defendants claim without authority that Plaintiffs' merit, and their compliance with statutory and regulatory requirements and borrowing predicates do not matter, and that the fact that the ATVM and §1703 programs were fixed for the benefit of political insiders and fundraising bundlers is of no constitutional moment. Plaintiffs also attempt to avoid the effect of the oral representations made to Plaintiffs by citing a regulation, 10 C.F.R. § 609.10(b) that was promulgated *after* the plaintiffs applications were rejected. *Compare* 10 C.F.R. § 609.10(b) (promulgated Dec. 4, 2009) *with* Ver. Compl. ¶¶ 37, 69, 81 (XPV's ATVM loan application denied Aug. 21, 2009, Limnia's ATVM loan application denied April 10, 2009, Limnia's LGP application denied Apr. 9, 2009). In fact, merit does matter, the integrity of the DOE loan programs is a matter of constitutional concern, and DOE's oral representations are meaningful, especially to the extent that they demonstrate Chu's and Seward's personal responsibility for DOE's actions against Plaintiffs.

abstract fair play to the individual. Its purpose, more particularly, is to protect his [constitutionally protected interest] from arbitrary encroachment …" *Id.* at 80-81.

An impartial decision maker is an essential right. *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). Here, Defendants Chu and Seward were the ultimate decision makers who rejected Plaintiffs' applications, but at the same time, they were responsible for infecting the ATVM and Section 1703 programs with politics, and ensuring that insider power, not merit, drove loan determinations. Ver. Compl. ¶¶ 111, 116-19, 127-29. If the government is correct, and XPV lacks any APA remedy, then it ought to be able to sue Defendants Chu and Seward for violating its constitutional due process rights. *Accord Munsell*, 509 F.3d at 591 (Defendants' success in using the unconstitutional conduct to remove XPV from the regulated arena, and making APA review thus unavailable, has the effect of insulating its conduct entirely from judicial review. This makes "little sense").

C. Plaintiffs' Rights To A Level Playing Field Were "Clearly Established."

Defendants claim that Plaintiffs cannot adequately allege violation of a clearly established constitutional right because Chu and Seward were not on notice that denial of a loan application rises to the level of a constitutional violation. Defs.' Mot. to Dismiss at 37. It is, of course, true that denying a loan is generally not a constitutional violation in a normal case. But this is not the normal case.

Here, Defendants tilted the playing field to ensure taxpayer dollars flowed by the billions to politically connected companies, fundraising bundlers and government cronies. Ver. Compl. ¶¶ 89-113, 116-118, 121-132. The Government Accountability Office took apart their performance for giving away billions without having the "expertise needed for technical oversight" or "performance measures" to determine if program goals were met, and using

methods that treated applicants "inconsistently." Ver. Compl. ¶¶ 86, 87, 111. Defendants cannot claim that they somehow were unaware that it was unreasonable and wrong to infuse a federal loan program with politics, channel federal funds toward their own ends and for the benefit of favored insiders, and use a secret merit-review system with undisclosed criteria to deny otherwise qualified applicants loan funds to benefit government cronies, all as they did in this case.

And, in fairness, Defendants do not make any such claim. Instead, to obscure their own wrongdoing, they must miscast Plaintiffs' claims and transform this action, which is at bottom about the arrogant abuse of power on behalf of insiders at the expense of the public good, government transparency and fundamental fairness into nothing more than a simple loan denial. Defendants' efforts to do so should be rejected. They should be held accountable for their actions.

CONCLUSION

For the reasons set forth herein, Defendants' motion to dismiss should be denied.

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Respectfully submitted,

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