IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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INTRODUCTION

Plaintiffs XP Vehicles, Inc. (XPV) and Limnia, Inc. (Limnia) oppose the motion to dismiss filed by the individual capacity defendants, former Department of Energy (DOE) Secretary Steven Chu (Chu) and former DOE loan administrator, Mr. Lachlan Seward (Seward).

The actions personally taken by Chu and Seward when they led DOE severely harmed XPV and Limnia, two budding technology companies. Rather than oversee an above-board and level loan program, like Government officials routinely do, Chu and Seward doled out taxpayer dollars to political favorites. They rejected loan applications that qualified for funding under the applicable statutory criteria, instead personally picking winners and losers based on political connections and crony contacts without regard for Congressional purpose. The American public's faith in government integrity was damaged by Chu's and Seward's wrongful conduct and XPV and Limnia were particularly harmed.

Since leaving DOE, Chu has publicly acknowledged his personal involvement in putting taxpayer money into the wrong hands. In his own words, he had an intimate, personal role in funding the politically connected, and acknowledged that he controlled the loan programs: He signed off on all of the loans and, as time went on, he "got personally involved, more and more" into the minute details of each decision.[1]

Not surprisingly, *Congress did not intend this* when it created the loan programs Chu and Seward personally managed. Congress charged these men with running open, honest, and fair loan programs which would ultimately free our nation from its dependence upon foreign oil and enable emerging American technology and manufacturing companies to succeed. Instead, Chu and Seward treated the taxpayer funds entrusted to them as a piggybank for the politically connected and powerful. Chu and Seward manipulated these programs to advance a personal political agenda.

Both the General Accountability Office (GAO) and two Congressional committees (the House Energy and Commerce Committee and the House Oversight and Government Reform Committee) have concluded that the loan programs run by these men had run afoul of basic lending principles. Their findings and determinations lead to one inescapable conclusion: Chu and Seward transformed DOE into a crony lending house which was: (1) unbalanced and unfair; (2) arbitrary and capricious; and (3) politically infected. By their actions, Chu and Seward put XPV out of business and hamstrung Limnia.

In the Government's view, neither Chu nor Seward is responsible for any part of XPV's or Limnia's hardship, and they have no remedy for the fact that these men favored politically-connected companies, ignored the clear statutory lending criteria and infected

[1] Ex. 1 (Stephen Lacey, *Chu Says He Got Personally Involved in Solyndra, Fisker Loans*, GreentechMedia.com (Jun. 10, 2013)).

DOE's loan review cronyism. The Government's viewpoint, as heard through the three motions to dismiss it has deployed against XPV and Limnia, is that Executive Branch officials may disregard clear Congressional standards and give taxpayer monies to political cronies and corporate "pay to play" insiders free from *any* judicial review. *See, e.g.*, Indiv. Mot. Dismiss at 2, ECF No. 27; *see also* Official Mot. Dismiss at 1–2, 15–30, ECF No. 28; Mot. Dismiss at 15, 30, *XP Tech. v. United States*, No. 12-cv-00774- MMS (Fed. Cl. Apr. 19, 2013), ECF No. 21 (DOE does not have an obligation to run a fair program).

In these motions, the Government has adopted many different positions all at once: we are too late, we are too early, and we do not belong here. Specifically, the Government's papers collectively assert that: (1) it is too late to decide this matter for statute of limitations purposes; (2) it is too early because there has yet been no final agency action and no contract has been formed; and (3) this case does not belong in this Court, but rather in the U.S. Court of Federal Claims, where it should be promptly dismissed for lack of jurisdiction.

This Court should reject the Government's arguments that XPV and Limnia possess no avenue of judicial recourse. Specifically, the Court should dismiss the flawed contentions of Chu and Seward that: (1) the statute of limitations bars this action; (2) there exists "no private right of action" for either XPV or Limnia; (3) these men somehow merit qualified immunity for their personal actions; and (4) that plaintiffs have not properly pled constitutional due process and equal protection violations. This case, however, precisely illustrates why judicial review to ensure individual accountability for those who use Government office is necessary.

FACTS

I. The Statutory and Regulatory Framework

Congress created the Advanced Technology Vehicles Manufacturing (ATVM) loan program in section 136 of the Energy Independence and Security Act of 2007 (EISA), Public Law 110-140, which was subsequently codified at 42 U.S.C. § 17013. Congress's purpose was to support the manufacture of advanced technology vehicles in the United States and to reduce our dependence upon foreign oil. Am. Ver. Compl. ¶ 8. When it enacted the program, Congress mandated 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).[2] Presently, DOE has $16.6 billion of unused lending authority. Am. Ver. Compl. ¶¶ 8, 120.

Congress did not give DOE unfettered discretion to determine borrower qualifications or to use unpublished and standard-less "merit review" criteria to choose between qualified applicants. Nor did Congress authorize DOE to arbitrarily cease making loans to qualified applicants, as Chu and Seward ultimately did. *See* Ex. 2 (U.S. Gov't Accountability Office, GAO 13-331R, Status of DOE Loan Programs 3 (2013)). Rather, Congress mandated certain borrower qualifications, including an applicant's: (1) continued financial viability, absent the receipt of additional federal funding; (2) demonstration that "the qualified investment is expended efficiently and effectively;" (3) compliance with such "other criteria as may be established *and published by*" DOE; and (4) certification that funds were being provided to "eligible individuals." EISA §136(d)(3) (emphasis added).

[2] A "shall" in the statutory language may be read to require that DOE continue to allocate appropriated 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'") (citation omitted).

Well into the loan award process, DOE ultimately decided to publish regulations in 10 C.F.R. Part 611, which set forth a three-stage review for ATVM loan applicants. First, DOE said it would screen the *applicant* for eligibility. To pass the initial phase, the applicant was required to 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); *see also* 42 U.S.C. § 17013(d)(3). Second, DOE said it would screen the *application* for eligibility, assessing whether the application contained all the information required by regulation and whether the proposed loan complied with the agency's other statutes and regulations. 10 C.F.R. § 611.103(a). During this second phase of review, DOE was not provided the authority to reject an application for any reason; rather, it could only "reject an application, in whole or in part, *that does not meet these requirements*." *Id.* (emphasis added). Third, DOE said it would then, as a final step, conduct a substantive review of the application, evaluating it based on the technical merit of the proposal. The technical program factors include "economic development and diversity in technology, company, risk, and geographic location," and whether the proposed provisions would financially protect the government, with priority given to manufacturers that had been operating for longer periods of time. 10 C.F.R. § 611.103(b); 42 U.S.C. § 17013(g).

Congress also set clear limits on DOE's discretion to grant or deny applications under the Loan Guarantee Program (LGP). The LGP's purpose was to support innovative and path-breaking clean-energy technologies unable to obtain conventional private financing. Am. Ver. Compl. ¶ 11. Congress defined eligible projects and set 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 set the requirements and evaluation criteria for applicants and promised to consider applications by using a "competitive process."[3] 10 C.F.R. § 609.7(a). At present, DOE still possesses $34 billion of unused lending authority for the LGP. Am. Ver. Compl. ¶ 11.

II. XPV and Limnia's Odyssey

XPV was an advanced technology vehicle company and an ATVM Loan applicant. *Id.* ¶¶ 1, 14. In response to a DOE solicitation, XPV submitted an application that offered over $100 million in collateral to secure its request for a $40 million loan. *Id.* ¶¶ 14, 17. XPV planned to mass produce an advanced, family-friendly, electric, SUV-style vehicle, which used polymer plastics and foam pressure membranes wrapped around a lightweight alloy frame. *Id.* XPV designed the SUV to be affordable for the American public, and its technical team projected that the base model would sell for $20,000. *Id.* ¶ 16. XPV's ATVM loan application was deemed "substantially complete" on December 31, 2008. *Id.* ¶ 22.

Limnia is a separate advanced technology—"green energy"—company. Limnia has worked closely with DOE's Sandia National Laboratory (Sandia) on an advanced energy storage system for electric cars since 2002, providing grant, technical support, and validation services to Sandia. *Id.* ¶12. In February 2009, Limnia applied for a Section 1703 loan guarantee and for $15 million in ATVM loan funds to build an energy storage system, with Sandia working as a key subcontractor. *Id.* ¶¶ 68, 77. Limnia applied for the loan with the specific understanding that DOE would waive the LGP application fee because the process would otherwise be too burdensome for Limnia. *Id.* ¶ 77.[4] Through Chu, DOE agreed to do so. Specifically, during a

[3] Some of the evaluation criteria included: (1) the extent to which the project avoids, reduces, or sequesters greenhouse gas emissions or air pollutants; (2) the likelihood that the project will be ready for full commercial operation in the proposed time frame; (3) the project's feasibility; and (4) the applicant expertise. 10 C.F.R. § 609.7(a).

teleconference on February 1, 2009, Chu said that the application fee had been waived. Call participants included John Podesta, former President for the Center for American Progress, as well as co-chairman of the Obama-Biden transition project, Chu, Department of the Interior Secretary Kenneth Salazar, and Limnia. *Id.* ¶ 76.

With respect to XPV, at all times relevant to this litigation, it qualified for a loan under DOE's published criteria. DOE staff deemed XPV to be a "qualified applicant." Indeed, DOE's Excel comparison matrices in December of 2008 and March of 2009 placed XPV in the top five percent of all loan applicants. *See Id.* ¶ 23. DOE advised XPV that its underwriting review would be consistent with normal industry standards, which XPV interpreted to mean that it would only take a matter of weeks to determine XPV's eligibility and funding. *Id.* ¶ 24. By the end of April of 2009, XPV was finally notified by Mr. Jason Gerbsen, a member of Chu and Seward's staff, that XPV had been assigned to a technical eligibility and merit review team. *Id.* ¶ 27. Approximately a month later, Mr. Gerbsen requested that XPV fly to California to meet with him. XPV acceded to the request and upon arrival, Mr. Gerbsen told XPV that the company had passed the technical review phase and that "everything looked good." *Id.* ¶ 29. DOE did not keep its word. Unbeknownst to XPV, Chu and Seward set aside its application in favor of applications from politically-favored cronies and campaign contributors. *Id.* ¶ 26.

Shortly after the meeting in California, XPV learned that two other applicants, Tesla Motors, Inc. and Fisker Motors, Inc.—both of which had very close ties to the Government—received special assistance from DOE headquarters staff with respect their loan applications. *Id.*

[4] Secretary Chu himself recently admitted to being very heavily involved in a hands-on, direct way in the loan decision-making process. *See* Ex. 1 (Chu is quoted as saying that he "got much more personally involved . . . [b]ecause in the end, I signed off on all the loans. So I got personally involved, more and more, on when to pull the plug and when not to pull the plug.")

¶¶ 30, 90–109. XPV requested similar treatment, but its request was denied, because, according to DOE staff, XPV's application was so good that assistance was unnecessary. *Id.* ¶ 31.

In late June of 2009, XPV spoke with a corporate executive from another company which also sought DOE funds. *Id.* ¶¶ 32–34. The executive informed XPV that he had been "screwed over" by DOE and wanted to know if XPV had experienced similar treatment. He explained that his company had some bad dealings with Matt Rogers, a Government "stimulus advisor" to Mr. Chu from McKinsey & Company, and Steven Spinner, a DOE loan program office official. *Id.* Mr. Spinner was an accomplished campaign-contribution "bundler," who had raised millions of dollars for the White House and was given this position at DOE in exchange for his fundraising. *Id.* ¶¶ 32, 92. Additionally, Mr. Spinner previously worked at McKinsey & Company and, according to his posted biography for the Center for American Progress, he was a Tesla advisor and investor. *Id.* ¶ 32. In the executive's view, Mr. Rogers and Mr. Spinner were playing favorites with government money through their close connections with Mr. Chu. *Id.* The executive provided XPV with Mr. Spinner's personal cell-phone number and told XPV to call him to inquire into why XPV's ATVM loan program application was stalled. *Id.* ¶ 33. XPV texted Spinner and then decided to call him. *Id.* Mr. Spinner answered the phone and stated words to the effect of: "[d]o not ever call me again. The awards have already been decided." *Id.*

On June 29, 2009, five days after DOE announced eight billion dollars in loans to Ford Motor Company (Ford), Nissan North America, Inc. (Nissan) and Tesla, all of which had close government ties, XPV again requested a status update by letter. *Id.* ¶ 35. DOE awarded Tesla $465 million of taxpayer money at an interest rate of 1.6%, well below market terms, for manufacturing expensive electric cars, which would turn out to be targeted primarily to rich actors, journalists, and businessmen. *Id.* ¶ 36. Over the next seven weeks, ATVM Program staff

repeatedly assured XPV that everything was on track and that XPV had met every one of its loan requirements. *Id.* While XPV stood by waiting for months, its executives continued to offer DOE staff additional technical information and to make its business team available for interviews with DOE underwriters.[5] DOE repeatedly denied XPV's offers. *Id.* ¶ 25.

On August 21, 2009, XPV received a letter from Mr. Seward denying XPV's application. *Id.* ¶ 37. Mr. Seward said that, although DOE deemed XPV "eligible" for a loan under the

[5] XPV was not the only ATVM applicant to be strung along by DOE. In a February, 2012 letter to DOE withdrawing its ATVM application, Bright Automotive wrote as follows.

> 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.

Pls.' Opp'n to Official Capacity Defs.' Mot Dismiss, Ex. 3 at 21–23.

written criteria, it had failed a "merit review." *Id.* ¶ 38. Mr. Seward did not disclose the criteria for this "merit review," and they remain a secret to this day. *See id.* ¶¶ 37–38. In light of the fact that DOE determined XPV to be eligible for a loan and declined for ten months to work with its engineers and business staff for even one percent of the time devoted to politically-connected awardees, XPV immediately contacted DOE requesting documents pertaining to the merit review and an explanation for DOE's denial. *Id.* ¶¶ 39–40. To XPV, Mr. Seward's letter made no sense—it had supplied DOE with detailed and copious technical and financial information, and it looked like no one at DOE had taken the time to read it. *Id.* ¶¶ 37–64; *see also* Ex 4 at 4 (XPV's request for reconsideration with a full-page listing the information given to DOE).

XPV then called DOE staff and was told some of the reasons contained in the loan file for XPV's "merit review" failure. *Id.* ¶¶ 40–52. XPV was told it failed because: (1) the electric SUV did not use E85 gasoline;[6] (2) XPV did not plan for Government fleet sales;[7] and (3) XPV's advanced technology was "too futuristic," among other things. *Id.* ¶ 42–44. However, the conversation was cut short when Mr. Seward discovered that the call was taking place, and stopped it from going any further. *Id.* ¶ 52. XPV heard nothing more from DOE in response.

Accordingly, in September of 2009, XPV sent Chu a letter requesting reconsideration of DOE's denial, because the bases therefore were inaccurate. XPV also asked Chu to describe the merit review criteria and to explain why DOE staff had given XPV repeated assurances of approval and rejected its offers of additional information on the technical aspects of the project. XPV asked Mr. Chu to justify why Government cronies that applied for ATVM Loan funds after XPV did were: (1) reviewed first; (2) given access to DOE staff to help draft their applications;

[6] None of the politically-connected ATVM Loan Program winners used E85 gasoline in all-electric vehicles. Am. Ver. Compl. ¶ 46.

[7] The XPV business plan given to DOE clearly stated that planned for Government fleet sales.

and (3) awarded program funds while XPV was denied. *Id.* ¶ 52. Furthermore, XPV requested answers to:

- Why DOE had deemed it significant that XPV did not use E85 gasoline when none of the politically-connected awardees used E85 gasoline in their all-electric vehicles;
- Why DOE had favored much higher-priced vehicles, rather than those affordable by everyday Americans, when it denied XPV's proposal for a mass-produced vehicle which could be quickly assembled from commonly available parts using existing commercial sources for a base price of only $20,000;
- Why DOE had misread—or not read—XPV's business plan, which specifically provided for large government and fleet sales and erroneously stated that XPV did not plan to sell its vehicles to the Government;
- Why DOE had found XPV's SUVs to be too "futuristic" in its electric motor and battery configuration when these systems had been in continuous commercial and government use for decades;
- Why DOE did not know that XPV's SUV was an electric, and not a hydrogen-fueled, vehicle; and
- Why DOE had thought XPV's estimates for "metal body fabrication" were too low, when the XPV SUV used "no metal fabrication in [the] body."

Id. at 46–51. Mr. Chu failed to reply. *Id*. ¶¶ 53–54.

Weeks later, Seward responded for Chu in writing, yet failed to address XPV's concerns. Instead, Seward provided new pretexts for the denial, raising novel issues DOE had not mentioned to XPV in ten months of "review." *Id.* ¶¶ 55–63; *see* Ex 5. Mr. 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. *See id.* Notably, Mr. Seward did *not* say that XPV had failed to satisfy some legal requirement for the ATVM program by: (1) offering inadequate security for the loan; (2) failing to demonstrate a reasonable prospect of

repayment; (3) not possessing the capability to build, distribute, or sell the electric SUV; or (4) lacking "financial viability without the loan," as required by law. *Id.* ¶ 64.

This denial had a fatal impact. The Government's proffered interest rate and repayment terms, with which no venture capital or institutional lender could compete, had dried up other sources of investment capital.[8] *Id.* ¶ 9. To benefit and protect Government cronies and campaign bundlers who had personal stakes in companies that were seeking ATVM loan funds, Chu and Seward denied XPV a fair shake. *Id.* ¶¶ 32, 89–93, 99–109, 114–19. They used opaque and still-unexplained "merit criteria" to steer taxpayer funds to politically-affiliated companies. *Id.* ¶¶ 65, 83. Since DOE was the only game in town, offering financial terms only the Government could, its wrongful conduct and pretextual denials led XPV to collapse.

Limnia received similar treatment. Although Limnia's product was an advanced technology vehicle energy storage system, *i.e.*, a battery for an electric vehicle, Mr. Seward initially denied Limnia's ATVM Loan application because Limnia's *advanced technology vehicle* energy storage system was purportedly not "designed for installation in an advanced technology vehicle[.]" *Id.* ¶¶ 68–69. Limnia responded and advised Mr. Seward that its patents stated that Limnia's product was *specifically* meant for use in advanced technology vehicles. Mr. Seward again denied the application because the technology was not "installed in an advanced technology vehicle." Limnia then told him that the components in question *had to be installed in an advanced technology vehicle* to operate and were *designed* for this purpose. Neither Mr. Chu nor Mr. Seward responded. *Id.* ¶¶ 70–74.

[8] DOE offered very favorable terms such as interest rates between one and three percent and up to 35 year repayment schedules. *Id.* at ¶ 9.

III. XPV and Limnia Discovered Chu's and Seward's Malfeasance in September of 2011

During the loan application process, XPV and Limnia began to suspect that agency officials were mistreating them. Mere suspicions, however, did not warrant their pursing any action other than completing the application process. Only in 2012 did XPV's and Limnia's suspicions begin to be confirmed—after GAO published multiple reports about the DOE loan application mess, two House Committees issued reports regarding the same subject, Congress released condemning emails, and Tesla and Fisker failed to honor their loan obligations to DOE.

GAO scrutiny of the ATVM and LG programs revealed that the loan programs were ripe for abuse by Government cronies and that they lacked the sort of fundamental internal checks and controls, which are needed to administer loan programs fairly and impartially. GAO first reported that DOE's loan program lacked oversight in February 2011, concluding that DOE lacked objective performance metrics like financial measures for program borrowers. *Id.* ¶¶ 85–87; *id.* Ex. 11. The GAO report also concluded that DOE loan program officials, managed by former Secretary Chu, had awarded billions of dollars in taxpayer-funded loans without engaging "the engineering expertise needed for technical oversight." *Id*. ¶ 86; *id.* Ex. 11 at 2, 11, 25, 26, 30. Indeed, DOE admitted as much by arguing to GAO that technical expertise was not necessary, even though DOE's stated program procedures prescribed "heightened technical monitoring" and "independent engineering expertise" in such situations given the lack of technical capacity of DOE staff. *Id*. Ex. 11 at 2, 25, 26, 39, 30. This lack of objectivity left a wide gap, in which political-favoritism and cronyism took place and infected the loan programs, all under Chu's and Seward's noses.

However, it was not until September 29, 2011, with the publication of credible, sourced media stories tying ATVM Loan Program funding decisions to political campaign "bundlers"

including Westly, Spinner and Doerr, that XPV and Limnia discovered that political influence and campaign contributions had impermissibly infected DOE's decision making and that these considerations had likely caused DOE to deny XPV's and Limnia's ATVM Loan Program applications to protect the government's political cronies. *Id.* ¶¶ 32, 91, 92, 135; *Id.* Ex. 21. Thereafter, a March 2012 GAO report on DOE's loan program determined that DOE had treated applicants inconsistently by: (1) favoring some over others; (2) ignoring their own underwriting standards; and (3) failing to properly document reviews, among other things. *Id.* ¶¶ 110–11. In the eyes of GAO, this reduced the "assurance that [DOE] has treated applicants fairly and equitably." *Id.* ¶ 111. Political friends and favorites had been set free to take full advantage of the absence of any real agency standards.

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 and rules being bent for high-profile politicians and government favorites. *Id.* ¶¶ 112, 113. 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. 3 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. 4 (Memorandum from the H.

Comm. on Oversight & Gov. Reform (Oct. 31, 2012)). Congress released emails in connection with the Oversight Committee's report that confirmed Chu and Seward had politically infected DOE's loan program. An internal email conveyed an order to loan program staffers from then Secretary 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, 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 "[s]hort term considerations may be more important than long term considerations and what's a billion anyhow?").

In November of 2012, it became public knowledge that Tesla and Fisker had failed to honor their promises to DOE and to the American people. *Id.* ¶¶ 96–109. Tesla reported delivering a mere 256 vehicles on November 7, 2012, and a week later Tesla acknowledged to the SEC that it had misspent taxpayer funds. *Id.* ¶¶ 96–97. By October 2012, Fisker had spent $170 million in taxpayer funds. By that time DOE had frozen Fisker's line of credit; the company did not produce the prototyped car it had advertised, and it reported that mass production of that car would likely be delayed until 2014 despite promises that it would begin in 2012. *Id.* ¶¶ 105–09.

As a result of Chu's and Seward's actions, XPV, Limnia, and other applicants who brought only good ideas to the table, but not relationships with former politicians, 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. *Id.* ¶¶ 32, 91–92, 114–20.

STANDARD OF REVIEW

In evaluating a motion to dismiss under either Rule 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). In any case in federal court, the plaintiff must establish jurisdiction by a preponderance of the evidence. *See* Fed. R. Civ. P. 12(b)(1); *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). When evaluating a motion to dismiss under Rule 12(b)(1), 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 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). Determining whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its [judicial] experience and common sense." *Id.* at 679. A claim is facially plausible when the pleaded factual content "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). Guided by this presumption, the D.C. Circuit has held that the long-standing

fundamentals of notice pleading remain intact, and the Court must deny a motion to dismiss for failure to state a claim when 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)) (rejecting that *Twombly* created a heightened pleading standard because "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim").[9]

ARGUMENT

The Government asserts that XPV and Limnia have sued Chu and Seward for damages because DOE, their former employing agency, denied some loan applications. This is inaccurate and fails to address the harms these men inflicted. Plaintiffs sued Chu and Seward in their individual capacities because they corrupted DOE's lending programs and denied XPV and Limnia fair treatment and the honest opportunity to compete for Government loan funds to build advanced technology vehicles and components. Accordingly, XPV and Limnia are challenging the actions taken by these specific individuals and *not* "what, in essence, amounts to agency action," as the Government claims. Indiv. Mot. Dismiss at 19.

The Government argues that the statute of limitations bars this action; that there exists no private right of action against Chu and Seward; and that Chu and Seward are protected from suit under the doctrine of qualified immunity. The Government is mistaken on all three counts and its motion to dismiss should be denied because it misstates the accrual date for statute of limitations purposes; *Bivens* relief is available under the circumstances present in this case and Chu and Seward do not merit any qualified immunity.

[9] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

I. The Statute of Limitations Does Not Bar XPV's Claims Because Its Cause of Action Did Not Accrue Until September of 2011 at the Very Earliest

The Government argues that XPV's ATVM claim accrued between June 2009 and October 2009 when DOE rejected XPV's request for reconsideration. Indiv. Mot Dismiss at 18. The Government also argues that Limnia's LGP claim accrued no later than April 2009, when DOE denied Limnia's request for reconsideration. *Id.* at 19. The Government does not state when it believes Limnia's ATVM claim accrued.[10] *Id.* The Government is mistaken and XPV's and Limnia's claims accrued no earlier than September of 2011.

Under the discovery rule, the statute of limitations begins when a plaintiff knew or *should have known* of the violations he alleges. *Connors v. Hallmark & Sun Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1984). Although XPV's and Limnia's loan applications and requests for reconsideration were denied in 2009, neither Plaintiff is suing merely because DOE denied their applications. Instead, the Plaintiffs are suing because they were harmed by Chu's and Seward's corrupt, politics-infested loan program.

While both plaintiffs speculated that they had been mistreated when DOE denied their loan applications, their suspicions did not rise above a speculative level until, at the earliest, September of 2011, with the publication of credible, sourced media stories tying ATVM Loan Program funding decisions to political campaign "bundlers" including Westly, Spinner and Doerr, that XPV and Limnia discovered that political influence and campaign contributions had impermissibly infected DOE's decision making and that these considerations had likely caused

[10] Presumably, the Government does not argue that Limnia has already been injured in connection with its ATVM application, because such an argument would be incongruous with the Government's assertion that there has been no final agency action with respect to thereto. In any event, Limnia's position is that its ATVM claim accrued at the same time as XPV's—no earlier than September of 2011 when GAO publicly reported on the corruption in DOE's programs.

DOE to deny XPV's and Limnia's ATVM Loan Program applications to protect the government's political cronies. Am. Ver. Compl. ¶ 135 & Ex. 21; *see also id.* ¶ 85 (Feb. 2011: GAO reported lack of oversight in DOE's loan program); *id.* ¶ 110 (Mar. 2012: GAO reported on corruption within DOE's loan program); *id.* ¶¶ 112–13 (Oct. 2012: Congress released emails confirming politics had infected DOE's loan programs). Even exercising a great degree of diligence, XPV and Limnia could not have learned the facts published by the media (and later GAO) regarding the corruption in DOE that are essential to their claim before then. Therefore Plaintiffs' claims against Chu and Seward could not have accrued until September of 2011, at the earliest, and they brought this suit well within the three-year period for residual actions provided by District of Columbia law, and this case is not barred by limitations.

II. The Misconduct Involved Here Warrants a *Bivens* Remedy

The Government essentially argues that there can exist no *Bivens* relief when its officials use taxpayer-funded loan programs to steer favors to the politically-connected and, in the meantime, deny due process and equal treatment to other qualified applicants. *See* Indiv. Mot. Dismiss 19–28. Fortunately, the Supreme Court acknowledged a remedy for egregious, unconstitutional behavior by federal officers. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392–95 (1971). Courts apply a two-step process when determining whether *Bivens* applies. First, a court examines whether there are any existing, alternative processes for protecting the constitutional interest at issue. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Second, even if the court finds no equally effective alternative process, it must then determine whether there are any special factors that counsel for the hesitation of creating a *Bivens* remedy. *Id.*

Here, the Government's attorneys argue that the Administrative Procedure Act ("APA") and the Tucker Act each provide a "comprehensive remedial scheme," that immunize Chu and Seward from suit. *See* Indiv. Mot. Dismiss 23–28. Next, they claim that "special factors" ought

to provide Chu and Seward with an additional layer of immunity and that this litigation is really a damages claim based on agency action. *Id.* at 28–31. The Government's arguments fail because the arbitrary award of government benefits, based primarily upon political affiliation or campaign contributions, is exactly the type of conduct for which *Bivens* provides a remedy. Government benefits should be awarded solely based upon merit and demonstrated need—not cronyism. Neither the APA nor the Tucker Act are "comprehensive remedial schemes" to ward off the disease inflicted by political favoritism. Further, the "special factors" cited as grounds for immunity by the Government for Mr. Chu and Mr. Seward simply do not apply here.

A. Common Sense Dictates that Cronyism Is Actionable.

Bivens actions were designed to prevent government officials from abusing their power or employing their power as an instrument of oppression. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 591 (5th Cir. 1999). *Bivens* provides a remedy when federal officials violate citizens' constitutional rights by allowing such citizens to recover damages from those officials in their individual capacities.[11] *Id.* at 590. Specifically here, Chu and Seward violated XPV's and Limnia's constitutional rights to due process and equal protection.

The touchstone of federal due process is the protection of the individual against arbitrary government action. *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: (1) shock the conscience; (2) violate the decencies of civilized conduct; or (3) interfere with rights implicit in the concept of ordered liberty have long been subject to judicial review, check and

[11] "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; *see also Davis v. Passman*, 442 U.S. 228, 245, 246–47 (1979) (personal liability for violations of the Fifth Amendment's Equal Protection Clause because plaintiff's constitutional rights were violated and she had no effective means to enforce those rights other than *Bivens*).

correction. *Rochin v. California*, 342 U.S. 165, 169–70 (1952) (Government officials who act with deliberate indifference to constitutional rights "shock[ ] the conscience," act arbitrarily and capriciously). Similarly, the "purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citing *Sioux City Bridge Co v. Dakota County*, 260 U.S. 441 (1923)). Accordingly, both constitutional clauses are directed toward permitting the judiciary to reign in arbitrary executive action.

Government cronyism and political favoritism with respect to the distribution of billions of taxpayer dollars via federal loans does all of these things. It ought to be self-evident that no government official possesses the authority to dispense federal funds motivated solely by his own political interests. Here, through DOE's Credit Review Board and by his own admissions, Mr. Chu controlled access to the loan guarantee and ATVM loan program funding, and he delegated some of his final approval authority to the Director of the Loan Guarantee Program, Mr. Seward. *See* Ex. 5 ("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 were exhausted, neither statute nor regulation adequately provided a check to oversee the process or ensure that Mr. Chu and his delegees would not abuse their limited scope of authority. *See* Am. Ver. Compl. Ex. 13 (U.S. Gov't Accountability Office, GAO 12-157, DOE Loan Guarantees: Further Actions Are Needed to Improve Tracking and Review of Applications (2012)); Am. Ver. Compl. ¶ 111. Chu and Seward abused their authority by awarding DOE loan funds to politically-favored applicants rather than otherwise qualified applicants, who lacked political connections, *i.e.*, XPV and Limnia. As the Fifth Circuit noted almost fifty years ago:

> If one applicant for a license 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 actionable under *Bivens*.

XPV and Limnia have suffered as a result of the egregious conduct of Chu and Seward and they should be allowed to vindicate their constitutional rights through *Bivens*. It is abundantly clear that Seward supervised the loan review teams and that: (1) XPV's and Limnia's ATVM applications were not fairly reviewed before they were rejected; (2) Limnia's LGP application was rejected due to a ministerial requirement, even though Mr. Chu *personally* told Limnia that this very same requirement—a filing fee—would be waived; and (3) DOE failed to address the legitimate problems XPV and Limnia raised regarding the agency's decision-making. Indeed, Mr. Seward's letter in response confirms that DOE did not address XPV and Limnia's questions but rather manufactured completely new reasons for rejecting their applications.

Quite clearly, DOE's actions revealed that it was inventing excuses to deny XPV and Limnia a fair shake. Rather than seriously consider and respond to the alarming questions XPV and Limnia raised, Chu and Seward saw to it that legitimate concerns would not be answered at all. No real answers were provided and no reasoned form of agency review occurred. Instead, loan program funds were arbitrarily subverted to applicants who happened to be politically connected. These are the hallmarks of violations of both due process and equal protection. Accordingly, the pursuit of a *Bivens* action is warranted.

B. There Are No Alternative and Existing Processes Available to XPV or Limnia for Their Claims Against Chu and Seward

1. The APA Does Not Bar *Bivens* Relief

When Congress has created a comprehensive procedural *and* substantive mechanism that will redress a government official's abuse of authority, and Congress has explicitly declared that remedy to be an equally effective *substitute* for direct recovery under the Constitution, 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), *aff'd*, 637 F.3d. 311 (D.C. Cir. 2011). [12] The APA fails this test.

Any comprehensive remedial scheme must provide both "substantive rights and administrative procedures for adjudicating those rights." *Navab-Safavi*, 650 F. Supp. 2d at 71; *cf. 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.[13] The APA does not itself create or "confer a substantive right to be free from arbitrary agency action." *Id.* (quoting *Furlong v. Shalala*, 156 F.3d 384, 394 (2d Cir. 1998)); *see also Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 n.14 (5th Cir. 1998) ("the 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

[12] For the same reasons that the APA and the Tucker Act are not alternative and existing processes, they are not special factors counseling hesitation in creating a *Bivens* remedy here.

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

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).

Contrary to the Government's argument, the APA is "merely a procedural vehicle for review of agency action." *Furlong*, 156 F.3d at 394; *see* Indiv. Mot. Dismiss 23–26. The availability of APA review does not, as a matter of law, preclude a *Bivens* action. The APA can only preclude a *Bivens* action when it operates in conjunction with another statutory scheme that confers substantive rights. *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 meaningful remedy") (emphasis added).

The Government cites a string of cases for the proposition that the "APA is, alone, sufficient to preclude . . . a *Bivens* action." *See* Indiv. Mot. Dismiss 23. To the contrary, all but one of the cases involve government employment disputes where a substantive right buttresses the procedural remedy available through the APA.[14] The final case upon which Defendants rely, *Western Radio Co. v. U.S. Forest Service*, is also inapposite because it arose from a substantive right to administrative review, with judicial review available through the APA. 2008 U.S. Dist. LEXIS 11203, No. 04-1346-AA, *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

[14] *See, e.g.*, *Miller v. U.S. Dep't of Agric. Farm Serv. Agency*, 143 F.3d 1413, 1414–16 (11th Cir. 1998) (employee had substantive right under agency regulations); *Moore v. Glickman*, 113 F.3d 988, 993–94 (9th Cir. 1997) (same); *Berry v. Hollander*, 925 F.2d 311, 315 (9th Cir. 1991) (plaintiff had substantive right under the agency regulations and the CSRA); *Franks v. Nimmo*, 796 F.2d 1230, 1239–40 (10th Cir. 1986) (employee had statutory substantive right to a review by way of two peer review boards and had 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 substantive remedies under 38 U.S.C. § 4106); *Sloan v. Dep't of Hous. & Urban Dev.*, 231 F.3d 10, 14–15 (D.C. Cir. 2000) (contractor had substantive remedies under 24 C.F.R. § 24.313).

conspiratorial acts on the part of individual defendants," nor were they able "to describe the activities of [their] competitors that evidence favorable treatment" from the government). Accordingly, *none* of the cases cited by the Government on this particular point hold that the availability of APA review necessarily precludes a *Bivens* action.

Thanks to the wrongdoing of Chu and Seward, XPV is out of business. The Government, however, has the temerity to argue that this business posture, by itself, leaves XPV without a right to seek APA review. *Compare* Am. Ver. Compl. ¶¶ 1, 25–26, 37–67, 119 *with* Official Mot. Dismiss 12–30, ECF No. 28. Additionally, the Government asserts that Limnia is stuck indefinitely in a bureaucratic limbo as DOE "considers" its new application in perpetuity, even when DOE was more than willing to tell the GAO that it will not make any additional loans, *i.e.*, that there exists no hope for Limnia to ever get a loan. *See* Am. Ver. Compl. ¶¶ 54, 70, 72, 82; Ex. 2 at 3 (GAO 13-331R).

As recently pointed out by the D.C. Circuit:

> 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 . . . are no longer subject to [agency] oversight, their claims under the APA are moot. The only viable relief for appellants . . . , 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 [the appellants] 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 (emphasis added); *Bivens*, 403 U.S. at 410 ("[f]or the people in Bivens' shoes, it is damages or nothing"). It would make little sense to conclude, as the Government argues, that XPV and Limnia have no substantive remedy when a federal official violates their

constitutional rights. If, as the Government argues, XPV and Limnia have no substantive remedy, then they certainly cannot obtain APA review. The APA, therefore, does not bar plaintiffs' case, and a *Bivens* remedy should be permitted by the Court. [15]

2. The Tucker Act Does Not Bar *Bivens* Relief

The Government erroneously asserts that the Tucker Act precludes *Bivens* relief, arguing that XPV's and Limnia's claims "are capable of being redressed in the Court of Federal Claims." Indiv. Mot. Dismiss 26, 28. The Government's position, however, is substantially undermined by the argument it has put forth in parallel litigation in the Court of Federal Claims that, *as a matter of law*, neither XPV nor Limnia can avail themselves of that court's contract jurisdiction. Def.'s Reply, *XP Tech. v. United States*, No. 12-cv-00774-MMS (Fed. Cl. Sept. 17, 2013), ECF No. 31. The Government cannot have it both ways.

Additionally, in the context of its Tucker Act discussion, the Government erroneously relies on cases that address the availability of *Bivens* relief in the context of the Contract Disputes Act of 1978, 41 U.S.C. § 7101 (CDA). Indiv. Mot. Dismiss 26-27. Rather than squarely addressing the availability of relief under the Tucker Act, the Government's cases merely hold that the availability of relief under the CDA forecloses a *Bivens* cause of action. Considering that the CDA provides the procedures for negotiating and litigating government contract disputes, and neither Limnia nor XPV purport to be government contractors, the CDA and the Government's cited authorities are inapplicable.

[15] 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.

In fact, the D.C. Circuit has *never* held that the Tucker Act precludes *Bivens* relief.[16] To the contrary, the issue remains an open question. In *Kizas v. Webster*, the court explained that "[r]esolution of this question would involve an analysis whether (a) the Tucker Act is an equally effective remedy, and (b) Congress intended the Tucker Act to supplant other remedies." 707 F.2d 524, 534 n.42 (D.C. Cir. 1983). In this case, the Tucker Act fails to address the constitutional violations committed by Chu and Seward. The Tucker Act is limited to contractual claims or claims based on another "money-mandating" statute. *Fisher v. United States*, 364 F.3d 1372, 1376–77 (Fed. Cir. 2004). Thus, the Tucker Act does not provide a meaningful remedy against Chu and Seward and should not preclude Plaintiffs' *Bivens* claim.

C. There Are No Special Factors Counseling Hesitation Against Creating a *Bivens* Remedy for Plaintiffs

This case calls for the application of *Wilkie* step two, *i.e.*, weighing reasons for and against a *Bivens* action. *Wilkie*, 551 U.S. at 554. Mr. Chu and Mr. Seward cling to the notion that, even in the absence of an alternative remedial scheme, special factors counsel against allowing a *Bivens* action in this case. Indiv. Mot. Dismiss 28–31. The Government, relying upon *FDIC v. Meyer*, 510 U.S. 471 (1994), implores the Court to refrain from allowing a *Bivens* remedy against individual officers for what they characterize as "essentially agency action." Indiv. Mot. Dismiss 29. The Government argues that the inevitable result would be a parade of horribles, including what they describe as a new individual cause of action by "every unsuccessful loan applicant" against loan program officers and cabinet-level heads of agencies. *Id.* at 30. By their account, the *Bivens* remedy would be "worse than the disease." *Id*.

[16] The Ninth Circuit has held that the Tucker Act is "inadequate to foreclose a *Bivens* action." *Seguin v. Eide*, 645 F.2d 804, 811 (9th Cir. 1981); *Weiss v. Lehman*, 642 F.2d 265, 267–68 (9th Cir. 1981) (holding that *Bivens* is superior to the Tucker Act because it provides for a jury trial and deters unconstitutional acts by government officials).

The Government's hyperbole bears no relation to the facts of this case. The claims XPV and Limnia assert against Chu and Seward arise from their decision to steer taxpayer funds away from qualified loan applicants and toward political cronies and companies that brought campaign bundlers to the table. Am. Ver. Compl. ¶¶ 83–119. Indeed, as the Government itself points out, it is the grantor of innumerable loans to thousands of applicants every year, and these loans were presumably issued through an objective, fair process. Such was not the case here.

Chu and Seward allowed the DOE loan programs to become infected with an appalling degree of cronyism and political favoritism. For example, internal DOE emails show that politics drove loan award decisions. Here, an internal DOE email conveyed an order to loan program staffers from then Secretary 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; 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 & 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?").

Seward and his DOE staff repeatedly told XPV that the company was qualified for federal loan funding, and Chu personally enticed Limnia to file its application after promising to waive the filing fee. *Id.* ¶¶ 27–29, 36, 76–8. Moreover, it was Chu and Seward who made the final determinations to denyXPV's loan based on a secret "merit review," the criteria for which have never been disclosed, and to reject Limnia's application based upon utterly fallacious

grounds. They then backfilled those rejections with *post hoc* rationalizations which were blindingly false. *Id.* ¶¶ 40–55, 65, 83–84, 118. These men have properly been named as defendants.

In its brief, the Government cites *Meyer* as authority for dismissal, but it actually stands as strong authority and justification for a *Bivens* action here. According to the Supreme Court:

> [The] real complaint is that [the defendant], like many *Bivens* defendants, invoked the protection of qualified immunity. But *Bivens* clearly contemplated that official immunity would be raised. . . . More importantly, [the] 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 [such a] regime, the deterrent effects of the *Bivens* remedy would be lost.

Meyer, 510 U.S. at 474 (citations omitted).

No government official possesses the authority to dispense federal funds in a manner that serves his own political interests. *Hornsby*, 326 F.2d at 609–10. Yet, Chu and Seward 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.[17] Insiders benefited, but

[17] For example, GAO annually reviews DOE loan programs, and in 2012 it found that DOE treated applicants inconsistently by ignoring its own standards during the review process. Am. Ver. Compl. ¶ 111, Ex. 13. Shortly after 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. *Id.* ¶¶ 112–13. 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. *Id.* ¶ 118.

those without power and connections, no matter how qualified, were shut out. Am. Ver. Compl. ¶¶ 26, 46, 57, 61, 63, 114–19. This should not stand.[18]

The public has the 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. Moving forward with a *Bivens* action against Chu and Seward would not willy-nilly trigger a flood of lawsuits for damages against any and all individual agency officials for mere loan denials, as the Government now suggests without reference to *any* empirical data. Chu and Seward were exceptional in their politicization of the federal programs under their charge. Denying a *Bivens* remedy would corrode *Bivens*'s deterrent effect and would undermine the accountability of powerful government officials. Plaintiffs' *Bivens* claim should be permitted.

III. Qualified Immunity Does Not Obtain

Chu and Seward argue that they are sheltered by qualified immunity, asserting that XPV and Limnia do not plausibly establish that Chu and Seward personally violated plaintiffs' constitutional rights, and that these rights were not clearly established. Indiv. Mot. Dismiss 31–33. They are wrong.

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[18] Moreover, the assertion that a *Bivens* remedy against Chu and Seward individually might create an "enormous financial burden for the Federal Government" should not counsel hesitation. *See* Indiv. Mot. Dismiss 29. In its brief, the Government quotes *Meyer* for the conclusion that "decisions involving 'federal fiscal policy' are not [the court's] to make." *Id.* (quoting *Meyer*, 510 U.S. at 486). Yet, the Government recognizes that Chu and Seward "would have to pay any judgment from their own personal resources." Indiv. Mot. Dismiss 30 n.27. While it is true that some scholars have gone so far as to claim that, in practice, *Bivens* is an individual liability fiction, *see* Cornelia T. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 Geo. L.J. 65-104 (1999), the Supreme Court has taken the view that indemnification by the government, even when foreseeable, is neither certain nor counsels hesitation against a *Bivens* remedy. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987). In *Meyer*, the Supreme Court concluded that "federal fiscal policy" counseled hesitation against creating a new *Bivens* action against a federal agency itself—not against the federal officers in their individual capacities. *Meyer*, 510 U.S. at 486.

A. XPV and Limnia Have Established that Chu and Seward Personally Violated Their Rights

To determine whether a complaint meets the relevant pleading standard, the Court 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.*

XPV and Limnia's complaint establishes that Chu and Seward corrupted the LG and ATVM programs and made the final calls with respect to loan applications. Am. Ver. Compl. ¶¶ 110, 112, 118. In fact, Mr. Chu was deeply involved with the important events of each application, and acknowledged that he approved each loan. Ex. 1 (Lacey Article). In his own words, Mr. Chu "signed off on all the loans," and he acknowledged that he "got *personally involved* . . . [b]ecause it was on me." *Id.* (emphasis added).[19] The Government does not challenge that Chu controlled access to funding under either the LG or ATVM programs, or that he could—and did—delegate approval authority to the LGP's Director, Seward, whenever he deemed fit. *See* Ex. 5 ("DOE's Credit Review Board Charter, § 4 'Functions'").

Here, XPV and Limnia's complaint—buttressed by the factual findings made independently by GAO investigations, e-mails released by House investigators, and media reports documenting the extent to which naked political cronyism and insider connections impacted the loan programs—establishes that political factors, patronage, and power were the decisive metrics for getting loan funds. The juxtaposition of Mr. Seward's written admission that XPV was qualified for ATVM funds and his subsequent decision to deny XPV for a loan

[19] Notwithstanding Mr. Chu's public statements to the contrary, his attorneys boldly allege that "[i]t is implausible that Secretary Chu . . . would be intimately involved in the loan process of a single applicant." Indiv. Mot. Dismiss 35.

based upon an unpublished and criteria-less "merit review" is telling. Am. Ver. Compl. ¶¶ 23, 37–54 & Exs. 3–5. Mr. Seward did not tell XPV that the company was in any way not financially qualified, just that others would get the loans first and that the money had now run out. *Id.* This all gives the appearance that the program was rigged from the start, and that Seward and Chu took XPV and Limnia on a ride to nowhere *See id.* ¶¶ 27–30, 33–38, 55–64, 83–113, 116–18. Given the highly politicized nature of the DOE loan programs and the information made publicly available by House investigators, it is clear that political factors and political relationships drove the loan decisions, *see id.* ¶¶ 112–13, and not merit.

Here, there exists ample evidence that Chu and Seward decided: (1) what was to be funded; (2) which advisers would help them make those decisions, including consultants; and (3) ultimately, which companies would be the rewarded winners. Based on all of this, XPV's and Limnia's allegations that Chu and Seward were personally involved in the LGP and ATVM program, and that they elevated political contributions and influence over merit in granting and funding DOE loan funds to others and denying the same to plaintiffs, are beyond the standard of plausibility required at this stage of the litigation. *Id.* ¶¶ 37–39, 54–67, 128, 130–32; *Aref v. Holder*, 2013 U.S. Dist. LEXIS 97510, No. 10-539, at *31 (D.D.C. July 12, 2013) ("Granting Jayyousi 'the benefit of all inferences that can be derived from the facts alleged,'. . . . [t]he [agency]'s continued holding of Jayyousi in the [Communication Management Unit] . . . provides enough by way of factual content to "nudge" his claim of [retaliation]' across the line from conceivable to plausible'") (citations and internal quotations omitted); *Gray v. LaHood*, 917 F. Supp 2d 120, 129 (D.D.C. 2013).[20]

[20]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

B. XPV's and Limnia's Due Process Rights Are Real

On behalf of Chu and Seward, the Government argues that neither XPV nor Limnia have a right either to a fair review of their loan applications or to any ATVM or Section 1703 loan funds. Indiv. Mot. Dismiss 33. Stated differently, the Government is arguing that the courthouse doors are sealed shut to XPV and Limnia, and that they should not be heard to complain about the damages they suffered as the result of Defendants' bias for politically powerful insiders. However, the Government is mistaken.

XPV and Limnia are fully within their rights to assert a due process claim to protect constitutionally guaranteed rights or "entitlements" that the Government has impaired or taken 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 successfully establishes a claim for a constitutionally protected interest by proving that he has a "legitimate claim to entitlement" in a property or liberty interest. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). This "legitimate claim to entitlement" can arise in the context of an application for a statutory benefit where there are clear eligibility guidelines, even if there is room for agency discretion. *See, e.g., Geo. Wash. Univ. v. Dist. of Columbia*, 318 F.3d 203, 207–211 (D.C. Cir. 2003*) cert.*

> 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, 917 F. Supp. 2d at 129 (citations omitted).

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"); *id.* at 63–65 (Stevens, J., concurring in part and dissenting in part); *see also Logan v. Zimmerman Brush Co.*, 455 U.S 422, 429–430 (1982) (a statute creating a right to use adjudicatory procedures 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).[21]

Congress certainly did not give Chu or Seward the unfettered discretion they exercised here to: (1) create qualification criteria out of whole cloth; (2) make up bases for choosing between qualified applicants; (3) deny loans to qualified applicants by use of an unpublished, criteria-less "merit review;" (4) arbitrarily decide to cease making loans to qualified applicants;

[21] 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* 42 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).

and (5) issue *post hoc* rationalizations to paper over pretextual loan denials.[22] Congress *did not* tell Mr. Chu or Mr. Seward to "*make it up as you go along*," but they did.[23] Plaintiffs, therefore, possessed a protectable due process entitlement.[24] *See* Am. Ver. Compl. ¶ 38 ("XPV's application was 'determined to be eligible'").

Chu and Seward argue that, because DOE had some discretion, neither XPV nor Limnia can have a protected entitlement. Indiv. Mot. Dismiss at 38–39. This is not so. Stated properly, if Congress gives an agency unfettered discretion, then lower court cases generally hold that a plaintiff has no constitutionally protected interest. *See, e.g, Wash. Legal Clinic for Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997). However, where, as here, Congress substantially limits Executive Branch discretion, a qualified applicant can have a protected

[22] 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 appropriated funds to the extent that eligible applicants exist. EISA § 136(d)(1) (codified in 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).

[23] Here, there exists no reason to believe that XPV's and Limnia's applications were even reviewed because, on at least two occasions, Mr. Chu's office claimed that they had lost XPV's paperwork in its entirety. *See* Am. Ver. Compl. Ex. 4 at 4 ("[Mr. Chu's] office stated that they 'lost our documents' twice"). Moreover, even a cursory look at the DOE's October 2009 loan reconsideration denial, issued by Mr. Seward in a letter, reveals that the dreamt up bases were simply copied, clicked and dragged in from another source—quite potentially from a one-time bundler's email. *See id.* ¶¶ 55-64; *see also id.* Ex. 5 at 1 (oddly different-sized font drawn from a bulleted list).

[24] Federal regulations permit XPV to assign its interest in its loan to another eligible party with approval from DOE and the Federal Financing Bank. *See* 10 C.F.R. § 611.110(b). Although XPV met the financial viability criteria at the time of its application, Defendants' wrongdoing has driven it out of business. Am. Ver. Compl. ¶¶ 1, 64, 67, 119, 123. Defendants do not dispute that XPV was an Eligible Applicant in 2009 as defined by the statute. Am. 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. *Id.* ¶¶ 9, 19, 35, 117, 119.

constitutional interest. *Geo. Wash. Univ.*, 318 F.3d at 207–08 (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462–63 (1989)). [25] Such was the case here. Congress did not intend for Chu and Seward to run DOE loan programs in any way they saw fit. Accordingly, their argument that they had boundless discretion should be rejected and none of the cases they cite demonstrates otherwise.[26]

Moreover, the Government has not even attempted to impugn the motives of XPV and Limnia, companies that attempted to foster advances in energy technology. To the contrary,

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[25] *See also Mallette v. Arlington Cty. Emps.*, 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); *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 Cty.*, 742 F.2d 1128, 1132 (8th Cir. 1984) ("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") (citations and internal quotations omitted); *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982) (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"); *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). Further, although the enabling statute and respective regulations use permissive language, the agency's discretion is limited because DOE must subject 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.

[26] *See e.g. Childress v. Small Bus. Admin.*, 825 F.2d 1550, 1551–54 (11th Cir. 1987) (dismissing substantive due process and Equal Protection Clause claims in connection with a loan denial by government officials). The court held that there was a lack of egregious conduct in denying the loan application where the denial was based on the fact that the applicants used the proceeds from a previous loan for unauthorized purposes. The court concluded that the past loan history provided "ample justification" for the loan denial. *Id*. at 1551.

those with dirty hands were working for DOE—namely Chu and Seward who gave away taxpayer money in a politicized fashion. There is no evidence or allegation that either XPV or Limnia deserved the unjustified rejection of their applications. To the contrary, their offers to assist DOE staff repeatedly fell on deaf ears, and they spent countless hours and resources in vain. Am. Ver. Compl. ¶¶ 25, 54, 63, 67, 72, 81, 118(c)

1. Substantive Due Process

Substantive due process limits what the Government may do in its executive capacities. *Cty of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Collins v. Harker Hts.*, 503 U.S. 115, 129 (1992). In *Collins*, the Supreme Court determined that substantive due process was intended to prevent Government officials "from abusing [their] power, or employing [the Government] as an instrument of oppression." *Collins*, 503 U.S. at 126. A government official who acts with deliberate indifference to constitutional rights "shocks the conscience." *Rochin*, 342 U.S. at 172. Here, Chu and Seward acted in a manner that shocks the conscience. They intentionally and deliberately abused their power by treating taxpayer funds as a piggy bank for politically connected and powerful companies and individuals. Am. Ver. Compl. ¶¶ 83, 85–89, 110–18. They put XPV out of business and have hamstrung Limnia, *id*., and so plaintiffs' claims against them should stand.

In response, Chu and Seward trot out the tired old proposition that "a mere expectancy that loans will be granted does not constitute 'property' within the meaning of the Due Process Clause." Indiv. Mot. Dismiss 37. Here, however, XPV and Limnia did not have a "mere expectancy" because they were actually *bona fide* applicants who, in the agency's own view, met the loan eligibility criteria. *See supra* at 32 n.17 & 18. Chu and Seward's reliance on *Beutler v. Block*, 831 F.2d 293 (6th Cir. 1987), for the proposition that plaintiffs only have a

"mere expectancy" in loan funds is unfounded because the so-called "mere expectancy" in that case was unreasonable. There, plaintiffs had received loan money from the Farmers Home Administration (FmHA), a now-defunct agency once under the auspices of the Department of Agriculture. *Id.* at *2. Under the FmHA loan program, the Beutlers were obligated to use their government money to build their house. *Id.* Despite this obligation, plaintiffs "refused to use a check they received from the FmHA to pay the builder" of their home. *Id.* at *5. The FmHA later "declined to lend the plaintiffs any more money," and for this refusal, the plaintiffs sued the FmHA alleging the agency denied plaintiffs their "property interest in future FmHA loans." *Id.* at *5–6. This led the Sixth Circuit to state that "a mere expectancy that loans will be granted does not constitute property within the meaning of the Due Process Clause." *Id.* at *6.

This case is not like *Beutlers*. Here, XPV and Limnia were financially viable and otherwise qualified applicants. Am. Ver. Compl. ¶¶ 23, 55, 66, 74. Further, unlike the Beutlers, neither XPV nor Limnia have abused funds they previously received from DOE. Finally, XPV and Limnia are not like the Beutlers because they submitted applications for program in which they had never before participated. According to DOE, plaintiffs had more than a "mere expectancy," but despite their entitlement, they never received loans and, according to the Government, no one is accountable.[27]

[27] Defendants seem to believe that Plaintiffs' compliance with statutory and regulatory requirements and DOE borrowing predicates do not matter, and that the fact that the ATVM and Section 1703 programs were fixed for the benefit of political insiders and fundraising bundlers is of no constitutional moment. They 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* Am. 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

2. Procedural Due Process

As Chu and Seward readily acknowledge, procedural due process is a flexible concept that ensures citizens are not deprived of liberty or property rights without appropriate procedural protections. *See* Indiv. Mot. Dismiss 41; *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 abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of [constitutionally protected interests] from arbitrary encroachment." *Id.* at 80–81. Here, Seward and Chu did not give XPV and Limnia fair notice, or an opportunity for a written appeal process, to discuss the rubber-stamped denial of their applications, much less a meaningful hearing.

Likewise, an impartial decision maker is an essential part of procedural due process. *See Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973); *see also Air Transp. Ass'n v. Nat'l Mediation Bd*, 663 F.3d 476, 487 (D.C. Cir. 2011) ("Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments") (citations omitted); *Lead Indus. Ass'n v. Envtl. Prot. Agency*, 647 F.2d 1130, 1179 (D.C. Cir. 1980). Here, Chu and Seward were the ultimate decision makers who rejected XPV's and Limnia's applications, but for political reasons, their minds were closed. *See, e.g.*, Am. Ver. Compl. ¶ 112 (Mr. Chu ordered his staffers to complete a loan transaction quickly: he was "adamant that this transaction is going to

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that they demonstrate Chu's and Seward's personal responsibility for DOE's actions against Plaintiffs.

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," likely because "pressure is on real heavy due to interest from VP"). They corrupted the loan programs with politics and ensured that political connections—and not technical merit or financial soundness—drove DOE's loan decisions. Am. Ver. Compl. ¶¶ 111–13, 116–19. Indeed, the fact that pre-textual—and likely copied and pasted—reasons were the ultimate outcome of this politicized decision-making process in compelling evidence of a due process violation. Am. Ver. Compl. Ex. 5 (Seward reconsideration denial).[28]

C. XPV and Limnia Have Valid Equal Protection Claims

XPV and Limnia both have actionable equal protection claims. "The purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or *by its improper execution through duly constituted agents*." *Willowbrook,* 528 U.S. at 564 (citing *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923) (emphasis added)). No membership in a suspect class is needed. *See id.* Courts have long recognized "class of one" equal protection claims where plaintiffs allege that they were intentionally treated differently than others similarly situated. *Id*. The only requirement for such a claim is that the plaintiff was "*intentionally treated differently from others* similarly situated and that there is no rational basis for the difference in treatment." *Id.* (emphasis added). That is exactly what happened here.

With regard to the ATVM Loan Program, Chu and Seward failed to treat XPV's and Limnia's applications in the same manner as the applications of companies with political pull

[28] If the government is correct, and plaintiffs lack any APA remedy, then they ought to be able to sue Chu and Seward for violating their constitutional due process rights. *Accord Munsell*, 509 F.3d at 591 (Defendants' success in using the unconstitutional conduct to remove plaintiff 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").

and influence. The favored crony companies received perks like having: (1) their applications reviewed first; (2) their applications scrubbed by DOE staff; and (3) their hands held through the entirety of the application process. Indeed, Tesla was fortunate enough to have a member of its own management team, Mr. Spinner, as one of Mr. Chu's loan program advisors. Am. Ver. Compl. ¶¶ 32, 92. Moreover, Tesla and Fisker received favorable loan terms and subsequently were able to renegotiate their loans. All the while, Chu and Seward held up XPV's and Limnia's applications for months, and then rejected them on manufactured and false grounds. *Id.* ¶¶ 89–113, 116–18. There is no lawful or rational basis for this type of behavior.[29]

Chu and Seward next argue that their behavior satisfies rational basis review because they provided explanations to justify rejecting XPV's and Limnia's applications. Indiv. Mot Dismiss at 43. To the contrary, Defendants' explanations cannot satisfy rational basis review since they are nothing more than *post hoc* rationalizations. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *Ace Motor Freight, Inc. v. Interstate Comm. Comm'n*, 557 F.2d 859, 864 (D.C. Cir. 1977) ("*[p]ost hoc* rationalizations by imaginative government counsel [did] not suffice" and were irrelevant to the court's inquiry).

Chu and Seward attempt to justify rejecting XPV's and Limnia's application by claiming now that their applications were inadequate. Indiv. Mot Dismiss at 44. Even if this were true,

[29] Although "not every divergence in the application of a law gives rise to an equal protection claim," as Chu and Seward agree in their brief, Indiv. Mot. Dismiss at 42 (quoting *Brandon v. D.C. Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987)), the discriminatory loan award process makes this case about much more than a mere divergence from a hyper-meticulous application of the law, as the Government would have the Court believe. In order for an equal protection action to survive rational basis review, "there must be some *rational* basis for the classification, which must serve *legitimate* state ends." *Newman Marchive P'ship. v. Hightower*, 349 Fed. App'x. 963, 965 (5th Cir. 2009) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (emphasis added)). "In other words, there must be some rational basis for the government to treat an individual or group differently from others similarly situated." *Id.* Here, Chu and Seward have failed to put forth an articulable rational basis for the systematic and disparate treatment or offer any explanation of a legitimate state interest furthered thereby.

neither man said this information during the application process. Am. Ver. Compl. ¶¶ 38, 40–52, 43, 65; *id.* Ex. 4. Instead, the grounds given for XPV's denial was DOE's alleged inability to fund all qualified applicants, an odd claim to make given the agency's $16 billion in authorized but unused lending authority. These rationalizations are *post hoc*, offered only after the application cycle closed and litigation had commenced; they are baseless because they fail to address the actual merits of either plaintiff's applications.[30] *See id.* ¶¶ 40–52. Therefore, Chu and Seward's argument must fail rational basis review. *Id.* ¶¶ 69–73.

D. XPV's and Limnia's Rights to a Level Playing Field Were Clearly Established

Chu and Seward argue that XPV and Limnia cannot adequately allege a violation of a clearly established constitutional right because Chu and Seward were not on notice that a denial of a loan application rises to the level of a constitutional violation.[31] Indiv. Mot. Dismiss at 37. It is, of course, true that denying a loan is generally not a constitutional violation in the normal case, but this is not the normal case. Here, Chu and Seward tilted the playing field to ensure taxpayer dollars flowed by the billions to politically connected companies, fundraising bundlers, and government cronies. Am. Ver. Compl. ¶¶ 89–113, 116–18. Yet Chu and Seward

[30] To the extent Defendants offered Plaintiffs an explanation during the application process, those explanations were pre-textual and nonsensical in light of the information contained in Plaintiffs' applications. Further, DOE failed to respond or reconsider its decision when XPV and Limnia explained that DOE's rationalizations were patently flawed. Remarkably, Chu and Seward offer those same flawed explanations here as evidence of a rational basis for their decisions; notably absent is the rational provided by Mr. Foster during the earlier August 2009 telephone call, that XPV was "not planning on government sales." Am. Ver. Compl. ¶¶ 42–52.

[31] In *Harlow*, the Supreme Court held that "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). However, 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).

seem to argue that they somehow were unaware that it was unreasonable and wrong to infuse federal loan programs with politics, channel federal funds toward their own partisan ends, and to do so for the benefit of favored insiders, by use of a secret merit-review system with undisclosed criteria.[32]

Chu and Seward do not make this argument with a straight face. Rather, to obscure their own wrongdoing, they miscast XPV's and Limnia's claims to transform this action into something that it is not. At bottom, this case is about the arrogant abuse of power on behalf of insiders at the expense of the public good, government transparency, and fundamental fairness. This case is *not* about a simple loan denial down at the corner bank. The bank here was the American taxpayer, and little was done to protect their interests when billions of dollars flew out the door without reference to clear legal standards or to common reason. Mr. Chu's and Mr. Seward's efforts hide under the cloak of qualified immunity should be rejected.[33] These men should be held accountable for their actions.

[32] The Government Accountability Office took apart Chu and Seward's 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." Am. Ver. Compl. ¶¶ 86, 87, 111.

[33] In its brief, the Government misapplies the *Childress* case again to apply to this case. It notes that the *Childress* court ruled that some officials were entitled to qualified immunity in a challenge made to a denial of loans for some farmers. *See Childress v. Small Bus. Admin.*, 825 F.2d 1550, 1551 (11th Cir. 1987). In cancelling a new loan, the officials in *Childress* neglected to provide the plaintiffs with written notice of the cancellation or of the plaintiffs' right to appeal their administrative decision. *Id*. Such a minor paperwork error does not remotely match the pattern of pervasive and unjustified behavior by Chu and Seward in this case.

CONCLUSION

For the forgoing reasons, the Court should deny the Government's motions to dismiss.

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Respectfully submitted,

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