IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLEAN AIR COUNCIL, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 2:17-cv-04977-PD

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Clean Air Council; S.B., through his Guardian Danecia Berrian; and B.B., through his Guardians Diane and Thomas Berman (collectively, "Plaintiffs"), submit this Sur-Reply in opposition to Defendants' Motion to Dismiss (ECF No. 18) and Supplemental Motion to Dismiss (ECF No. 31) to respectfully request that the Court deny the Motion because Plaintiffs' Amended Complaint states a clear claim for relief.

Dated: May 11, 2018

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In their Supplemental Motion to Dismiss, Defendants again attempt to reframe Plaintiffs' claims in a misleading manner. Plaintiffs are not asking this Court to "assess the causes and effects of climate change and develop possible measures to address them." Supp. Mot. (ECF No. 31) at 15. Rather, as stated in the Complaint, the Federal Government had unequivocally admitted that (1) humans contribute to climate change; (2) the United States is a leading contributor; (3) climate change poses a "monumental threat" to the health, safety, and property of U.S. citizens; and (4) the Government must—and did—affirmatively take action through regulations, rules, statues, and other policies to address climate change and its dangers. *See* Am. Compl. (ECF 16) at ¶ 2.

In the face of that accepted obligation, Plaintiffs respectfully ask this Court to carry out its constitutional role as a check on the Executive Branch, and declare that, in the absence of a credible or even plausible justification, Defendants cannot reverse laws, programs, policies, and regulations addressing climate change, thereby increasing the clear and present danger to the lives and property of American citizens, including Plaintiffs.

ARGUMENT

I. Plaintiffs Have Standing to Bring Their Claims.

Defendants' principal grounds for seeking dismissal rest on the incorrect

assertion that the Judiciary cannot "infringe on" the decisions of the Executive branch by declaring them unconstitutional. Supp. Mot. at 10-12. But since the time of this nation's founding, it has "emphatically" been "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), meaning that "when the President takes official action, the Court has the authority to determine whether he has acted within the law," *Clinton v. Jones*, 520 U.S. 681, 703 (1997). Defendants also misconstrue *Laird v. Tatum*, 408 U.S. 1 (1972), omitting the rest of the quote, which only states that courts should not monitor "the wisdom and soundness of Executive action . . . *absent actual present or immediately threatened injury resulting from unlawful governmental action*." *Id.* at 15 (emphasis added).[1] This is precisely what Plaintiffs allege, raising no separation of powers concerns under *Laird*.

Defendants' fundamental premise is based on a mischaracterization of Plaintiffs' claims. Defendants mistakenly assert that Plaintiffs are asking the Court to make certain fact-findings about the level of greenhouse gases that will increase the risks of climate change. To the contrary, the Government *already* made such a finding and set a course to bring U.S. emissions under that level. *See* Am. Compl. ¶ 2. Plaintiffs seek a declaration that the Rollbacks unjustifiably reverse the course

[1] *Laird* turned on the plaintiffs' inability to present evidence showing threatened injury. The Court found they were largely seeking an investigation into government activity, without sufficient evidence to justify such an investigation.

that was set, increasing the danger to Plaintiffs' lives, liberty, and property, with reckless indifference to science and in violation of Plaintiffs' due process rights.[2]

A. Particularized Harm. In arguing that Plaintiffs' harms are not particularized, Defendants ignore the line of cases Plaintiffs cited in their Response, which hold that "[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016). Rather than addressing these cases, Defendants cite decisions from outside this circuit, where plaintiffs did not allege direct impacts to health and property caused by the dangers of climate change, or where they focused on a narrow source of emissions, unlike the nationwide increased emissions that will result from the Rollbacks and worsen the dangers of climate change to U.S. citizens. *See* Am. Compl. ¶¶ 8-10, 63.

Defendants' attempt to distinguish *Massachusetts v. E.P.A.*, 549 U.S. 497, 522 (2007), is similarly unavailing. Defendants attempt to distinguish that case as relying upon a construction of the Clean Air Act, but Plaintiffs here need not rely on a specific statute, as they are pursuing due process rights explicitly protected by the Constitution. Similarly, the harms suffered by Plaintiffs are not different from

[2] Defendants' reliance upon *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), is unavailing. Plaintiffs do not challenge general inaction—they ask the Court to reverse specific affirmative government actions that are increasing danger to Plaintiffs without justification, thereby violating their due process rights.

the harms suffered in *Massachusetts*. Just as the Commonwealth of Massachusetts was losing land, Plaintiffs allege a variety of real harms they will suffer as a result of the Rollbacks, ranging from serious health hazards to land loss due to flooding. *See* Am. Compl. ¶¶ 8-10, 63; Minott Decl. (ECF No. 28-1). Such allegations were sufficient to establish particularized harm to Massachusetts, and they should be sufficient for Plaintiffs here.[3]

B. Causation. With regard to Plaintiffs' causation argument, Defendants again ignore the Court's ability to view government actions in the aggregate when determining whether they create a "substantial risk of serious harm." *See Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011) (internal quotation marks omitted). Furthermore, the Supreme Court was not discussing aggregated causation when it remarked upon "the right to complain of *one* administrative deficiency" as not "automatically confer[ing] the right to complain of *all* administrative deficiencies." *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Rather, the Court merely reiterated that a plaintiff "who has been subject to injurious conduct of one kind" does not have standing to challenge unrelated harms "to which he has not been subject." *Id.* In contrast, Defendants' Rollbacks as a whole aggravate the dangers posed by climate change and threaten numerous types of harm to Plaintiffs.

[3] If the Court finds that Plaintiffs here are different from Massachusetts, Plaintiffs request leave to amend their Complaint to add plaintiffs situated similarly to Massachusetts.

Contrary to Defendants' arguments, Plaintiffs have also alleged that the Rollbacks will have the specific effect of increasing the United States' emission of greenhouse gases, which Defendants themselves have acknowledged will cause the "array of negative effects" of climate change to "become more severe"—which will in turn cause harm to Plaintiffs. *See* Am. Compl. ¶¶ 2, 163. Studies show the Rollbacks reverse the downward trend of greenhouse gas emissions previously achieved by the Federal Government, and instead begin an upward trend in such emissions,[4] thereby increasing the harm to Plaintiffs from climate change.

C. Redressability. Defendants next contend that the requested relief would be ineffective in lessening the claimed dangers of "global climate change." Supp. Mot. at 11. Contrary to Defendants' unsupported assertion that the relief would not "move the needle" on climate change, *id.*, the data demonstrate that the Rollbacks will result in a significant increase in United States emissions, which will become an even larger share of worldwide emissions over time.[5] Plaintiffs seek relief from

[4] *See* Am. Compl. ¶ 127 n.137; Annie Sneed, *Trump Pulls Out of Paris: How Much Carbon Will His Policies Add to the Air?*, Scientific American (May 31, 2017), https://www.scientificamerican.com/article/trump-pulls-out-of-paris-how-much-carbon-will-his-policies-add-to-the-air/.

[5] The United States currently accounts for 15% of worldwide emissions, *see* E.P.A., *Global Greenhouse Gas Emissions Data*, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data, and United States emissions are increasing as other countries work to decrease their emissions, Am. Compl. ¶ 127 n.137.

further backwards movement[6]—that is, they seek to restore the needle to at least where the Federal Government determined it needed to be as of January 2017. *See Massachusetts*, 549 U.S. 524-25 (regulating only U.S. vehicle emissions was sufficient to redress plaintiffs' climate change-related injuries).

II. Plaintiffs' Constitutional and Public Trust Claims Are Ripe And Are Not Preempted by the APA.

Third Circuit law establishes that Plaintiffs' claims are ripe, and the procedural mandates of the APA do not impose limitations on them.[7] There is no merit in Defendants' discussion of *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382 (3d Cir. 2012). The claims discussed in the *Treasurer* opinion *did not arise under the APA*.[8] Indeed, in analyzing those plaintiffs' *state*

[6] For instance, within the United States, Defendants' failure to account for climate change in infrastructure planning will exacerbate harms to Plaintiffs from extreme weather. *See*, *e.g.*, Am. Comp. ¶ 141(l).

[7] Alternatively, if the Court finds that the APA framework applies to Plaintiffs' non-statutory claims, Defendants' deliberate failure to enforce the climate change policies that were in place as of January 2017 will constitute final action that is ripe for review, Opp. at 19 n.17, and Defendants' completed rollback of many climate change protections is ripe. *See* Nadja Popovich, et al., *67 Environmental Rules on the Way Out Under Trump*, N.Y. Times, Jan. 31, 2018, https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html.

[8] Just as Plaintiffs argue in the alternative that their claims are ripe under the APA, the *Treasurer* plaintiffs "contingently" asserted an APA claim "simply to forestall any assertion by defendants that the Escheat Decision is agency action that preempts the States' cause of action." *Id.* at 395 n.15. However, in contrast to Defendants here, the government did not even attempt to make such a baseless argument, instead focusing only on the waiver of sovereign immunity and addressing the merits of plaintiffs' claims. *Id.*

law claims, the Court considered whether the waiver of sovereign immunity in Section 702 should be limited to federal actions, and it found "no support for the distinction that the Government [made] between federal and state law in either the text or the history of section 702." *Id.* at 395, 400 n.19. Just as those plaintiffs' state law claims could be brought outside the confines of the APA, Plaintiffs here have a right to bring independent constitutional law claims.

Additionally, in their allusion to the Declaratory Judgment Act, Defendants fail to distinguish between jurisdiction and ripeness. As stated in the Amended Complaint, Plaintiffs' equitable claims arise out of the Constitution and not the APA. Therefore, the Court has jurisdiction to determine whether Defendants have violated Plaintiffs' due process rights, and it should evaluate ripeness under the controlling standard for declaratory judgment actions, which Plaintiffs' claims readily satisfy. Am. Compl. ¶ 5; *see also* Opp. at 16-19.

III. Plaintiffs Have Stated a Claim for Violation of Due Process.

In their Motion to Dismiss, Defendants failed to address two of Plaintiffs' three due process claims. Despite being allowed a second chance, they primarily rehashed previous arguments and declared in a conclusory fashion that a "disagree[ment] with environmental and energy policies" does not "shock the conscience." Supp. Mot. at 27. But as Plaintiffs pleaded, Defendants' actions in denial of the science demonstrating the monumental threat of catastrophic harm

posed by climate change amount to at least "deliberate indifference," and would thus "shock the conscience" of any reasonable person. *See Kneipp v. Tedder*, 95 F.3d 1199, 1208 n.21 (3d Cir. 1996).

Defendants also confusingly state that Plaintiffs' Complaint does not plead multiple due process theories, despite the fact that the Complaint asserts "the rights to life, liberty, and property" and a "life-sustaining climate system," and lays out the elements of a state-created danger claim. Am. Compl. ¶¶ 172-191. Defendants also ignore the foremost due process right listed in the Constitution—the right to life—in the context of both Plaintiffs' state-created-danger claim and Plaintiffs' "straight" due process claim.

A. State-Created Danger. Although the parties agree on the four elements of a state-created danger claim, Defendants misstate the law in applying these elements. First, Defendants suggest that Plaintiffs' state-created danger claim is "completely derivative" of their separate claim regarding a life-sustaining climate system. Supp. Mot. at 27. However, the dangers here are the life-threatening consequences that are being furthered by Defendants' deliberate indifference or reckless disregard for Plaintiffs' health and welfare. "It has been clearly established in this Circuit for nearly two decades that a state-created danger violates due process." *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 859 (3d Cir. 2014); *see also Kneipp*, 95 F.3d at 1211. State-created

danger claims concern broad substantive due process protection from affirmative government action that would increase danger to or vulnerability of a plaintiff's life or liberty. *See, e.g.*, *Kedra v. Schroeter*, 876 F.3d 424, 433 (3d Cir. 2017).

Defendants erroneously assert that a state-created danger claim "requires that [Plaintiffs] demonstrate a special relationship with the state." Supp. Mot. at 27 n.3. But the Third Circuit has clearly held that "[a] 'special relationship' is not required." *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 250 n.57 (3d Cir. 2016); *see also Perez ex rel. Estate of Perez v. City Of Philadelphia*, 701 F. Supp. 2d 658, 664 (E.D. Pa. 2010). Defendants' remaining arguments similarly misread the controlling standard, as illustrated by Defendants' failure to cite *any supporting case law*.

B. Violations of Rights to Life, Liberty, Bodily Integrity, Personal Security, and Property. Defendants argue that the Complaint does not assert "straight" due process claims—despite the express references to the right to life, liberty, and property, Am. Compl. ¶¶ 11, 173, 177, 187, and dangers to "life and life-sustaining resources" as separate concepts. The right to life is the first due process right listed in the Constitution, and the one most directly endangered by Defendants' conduct. However, Defendants simply omit the word "life" from the heading of the section of their brief addressing this claim. Defendants' violation of the right to bodily integrity is also amply pled—as the Complaint states, the

Rollbacks will result in a range of serious health problems for Plaintiffs.

Defendants spend several pages of their brief asserting that Plaintiffs have not stated a takings claim—a point that Plaintiffs do not dispute. But this is neither material nor a basis for dismissal. Plaintiffs simply provided a comparison to the law of takings when they explained the way in which Defendants' conduct will result in the loss of Plaintiffs' land, resulting in a violation of the due process right to property.

C. Violation of Right to Life-Sustaining Climate System. In attempting to dismiss Plaintiffs' claim for violation of the fundamental right to a life-sustaining climate system, Defendants rely heavily on *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir. 1980), *vacated sub nom. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981). However, that case devoted a single paragraph to addressing a claim related to certain limited types of pollutants, with no reference to climate change or its consequences, and the holding related only to a "pollution-free environment." *Id.* at 1238. Further, the pollutants at issue were sewage and toxic waste, which can affect aquatic life, but have little to no impact on climate change, unlike the greenhouse gas emissions at issue in this case.

Defendants next attempt to draw a false distinction between the right to a life-sustaining climate from other "intrinsically personal and individual"

fundamental rights, Supp. Mot. at 22. These rights—marriage, family, etc.—apply to everyone, just as the effects of climate change do. The effects of climate change on Plaintiffs' health and property are personal and individual in the same way.

Furthermore, it is of no consequence to the present action that legislation exists which affects contributors to climate change. Many fundamental rights are also affected by legislation. For instance, marriage is regulated, but there is a baseline fundamental due process right that governments cannot infringe. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The same is true of climate change—there may exist statutory and regulatory law, but there is also a level of protection below which the government cannot go without infringing Plaintiffs' due process rights.

IV. Plaintiffs Have Stated a Public Trust Doctrine Claim.

Defendants do not dispute the inherently federal history of the public trust doctrine, or the Federal Government's numerous iterations of its rights and responsibilities as the trustee of the federal public trust. Yet Defendants misstate the holdings in the federal public trust decisions in *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012), and *W. Indian Co. v. Gov't of V.I. Islands*, 844 F.2d 1007 (3d Cir. 1988). Supp. Mot. at 31-33.

PPL Montana discussed the equal footing doctrine and state public trust doctrine, but it "said nothing at all about the viability of federal public trust claims

with respect to federally-owned trust assets." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1257 (D. Or. 2016); *see generally* Opp. at 34-35. And while the Third Circuit noted the differences between state public trust doctrines in *W. Indian Co.*, it also expressly recognized the Federal Government's duties as sovereign trustee. 844 F.2d at 1019 ("[T]he sovereign's use and disposition of those lands must be consistent with that trust. . . . These same principles were reconfirmed by the Supreme Court . . . regarding land as to which the sovereign prerogative belongs to the federal government.") (citing *Shively v. Bowlby*, 152 U.S. 1, 47–48, (1894)).

Defendants argue that the Property Clause of the Constitution grants them "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . without limitations." Supp. Mot. at 33. But as the Third Circuit explained in *W. Indian Co.*, this Constitutional grant of power imposes "fiduciary obligations owed to the public by the sovereign" and a requirement that the Government's decisions as trustee "affirmatively promote[] the public interest." 844 F.2d at 1019.

Reckless government action that threatens the sustainability of public lands held in trust by the Federal Government creates actionable harm to Plaintiffs.

CONCLUSION

For the foregoing reasons, as well as those stated in Plaintiffs' opposition brief, the Court should deny Defendants' Motion to Dismiss.

Dated: May 11, 2018

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CERTIFICATE OF SERVICE

I, Michael D. Hausfeld, hereby certify that I caused a true and correct copy of the foregoing Plaintiffs' Sur-Reply In Opposition to Defendants' Motion to Dismiss to be served on all counsel of record via CM/ECF on May 11, 2018.

/s/ Michael D. Hausfeld
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