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' RESPONSE TO DEFENDANTS'
NOTICE OF SUPPLEMENTAL AUTHORITY

In Defendants' Notice of Supplemental Authority, ECF No. 35, Defendants once again ignore the allegations in Plaintiffs' Complaint in favor of attacking a strawman. Regardless of Defendants' desire to recast the allegations of Plaintiffs' Amended Complaint, it is Plaintiffs who control the violation alleged—not Defendants. Plaintiffs are not asking the Court to compel the Government to set a new ceiling for controlling greenhouse gas emissions or to provide a stable environment. Nor are Plaintiffs asking the Court to hold private companies financially responsible for contributing to climate change and its consequences. Put simply, Plaintiffs are not asking the Court to mandate that Defendants *do more* than its previous commitments to combat climate change. Rather, they are seeking

a declaration that Defendants cannot *do less* without violating Plaintiffs' constitutional rights.

Furthermore, in the cases they cite, Defendants fail to acknowledge or address one incontrovertible truth. As stated by Judge Keenan in *City of New York v. BP P.L.C.*:

> *Climate change is a fact of life . . . Global warming*, or the gradual heating of the Earth's surface and atmosphere caused by accumulation of greenhouse gas pollution in the atmosphere, *has led to* hotter temperatures, longer and more severe heat waves, extreme precipitation events including heavy downpours, rising sea levels, and other *severe and irreversible harms*.

No. 18 CIV. 182 (JFK), 2018 WL 3475470, at *1, *6 (S.D.N.Y. July 19, 2018) (appeal pending) (emphasis added). *See also City of Oakland v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 3109726, *1–3 (N.D. Cal. June 25, 2018) (appeal pending).

Before it began removing protections against the increasing and worsening effects of climate change (the "Rollbacks"[1]), the Government recognized the

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[1] Defendants' climate change Rollbacks continue to spiral the nation into a graver deteriorating situation. Defendants announced the following additional Rollbacks in August and September of 2018 alone: freezing antipollution and fuel-efficiency standards for automobiles; slowing the pace of efforts to cut carbon emissions while acknowledging that "the rollback of the pollution controls would also reverse the expected health gains from the tougher [Obama-era] regulations"; scaling back EPA requirements that companies monitor and repair methane leaks; and repealing a Department of Interior restriction on intentional venting and burning of methane from drilling operations. *See, e.g.*, Coral Davenport, *Trump Administration Unveils Its Plan to Relax Car Pollution Rules,* N.Y. Times, Aug. 2, 2018, https://www.nytimes.com/2018/08/02/climate/trump-auto-emissions-california.html; EPA and Department of Transportation, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,817 (August 24, 2018) (codified at 29 C.F.R. Parts 523, 531, 536,

scientific consensus that "[c]limate change poses a *monumental threat* to Americans' health and welfare by driving long-lasting changes in our climate, leading to an array of severe negative effects, which will worsen over time." Fed. Defs.' Obj. to F&R at 1, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. May 2, 2016) (emphasis added). In turn, Defendants acknowledged "*the need to act*, [and] the Executive Branch over the past decade has engaged in numerous initiatives *to reduce* the emissions of carbon dioxide (CO_2) and other greenhouse gasses (GHGs) that contribute to global warming." *Id.* (emphasis added). In 2016, while actively seeking to combat the threat of climate change, Defendants admitted "that the consequences of climate change are already occurring and, in general, those consequences will become more severe with more fossil fuel emissions." Fed. Defs.' Answer ¶ 10, *Juliana*, No. 6:15-cv-01517 (emphasis added).

The scientific truth and facts of climate change and its consequences have not changed since 2016. There is no science to support Defendants' Rollbacks.

537); Lisa Friedman, *Trump's Plan for Coal Emissions: Let States Regulate Them*, N.Y. Times, Aug. 17, 2018, https://www.nytimes.com/2018/08/17/climate/trump-clean-power-rollback.html; *see also* Press Release, U.S. EPA, *EPA Proposes Affordable Clean Energy (ACE)*, Aug. 21, 2018, https://www.epa.gov/newsreleases/epa-proposes-affordable-clean-energy-ace-rule; U.S. EPA, *Regulatory Impact Analysis for the Proposed Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program*, Aug. 2018, https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf; Coral Davenport, *Trump Administration Wants to Make It Easier to Release Methane Into Air*, N.Y. Times, Sept. 10, 2018, https://www.nytimes.com/2018/09/10/climate/methane-emissions-epa.html; Press Release, U.S. EPA, *EPA Proposes Oil and Gas Targeted Improvements Package to Advance President Trump's Energy Dominance Agenda*, Sept. 11, 2018, https://www.epa.gov/newsreleases/epa-proposes-oil-and-gas-targeted-improvements-package-advance-president-trumps-energy.

Indeed, the only unspoken excuse for this misadventure is a denial of science. By rolling back climate changes rules, regulations, policies, and practices implemented in response to the "severe and irreversible" harm "to the health and welfare" of Plaintiffs, Defendants do not leave these risks the same as they were, but knowingly and recklessly cause them to "worsen over time." *See* Fed. Defs.' Obj. to F&R at 1, *Juliana*, No. 6:15-cv-01517. Defendants cite no judicial decision sanctioning such Governmental conduct.

Defendants' filing focuses on three distinguishable federal decisions that sound in tort and regulatory law and that are not binding in this matter, and one state court decision arising out of the Washington State Constitution. All are inapposite to the claims in this case.

In both *City of Oakland v. BP* and *City of New York v. BP*, plaintiffs sought *money damages* under a nuisance theory from defendants whose conduct contributed to climate change. Neither case addresses any of the claims at issue here. Moreover, in *City of Oakland*, prior to ruling on the Motion to Dismiss, Judge Alsup actually ordered a full day "science tutorial" by counsel and their experts and concluded:

> The issue is not over science. *All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so*, and that eventually the navigable waters of the United States will intrude upon Oakland and San Francisco. . . . In sum, *this order accepts the science behind global warming. So do both sides*. The dangers raised in the complaints are very real. . . . The problem deserves a solution

> on a more vast scale than can be supplied by a district judge or jury *in a public nuisance case*.

2018 WL 3109726, at *4, *9 (emphasis added). The particularly limited scope of a nuisance suit in the context of global climate change is a recurring theme throughout Judge Alsup's opinion denying relief. *See, e.g.*, *id.* at *7 ("Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus.[2]"); *see also City of New York*, 2018 WL 3475470, at *7 (discussing the impropriety of nuisance claims as a means to address foreign greenhouse gas emissions in federal court).

In contrast, this suit is not a "nuisance claim" against private entities. Plaintiffs here assert a federal constitutional law claim challenging official governmental action affirmatively increasing domestic injury from an admitted clear and present danger.

And in continuing to argue that separation of powers precludes Plaintiffs' suit, Defendants again ignore the long history of courts fulfilling their constitutional obligation to serve as a check on executive overreach. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 419 (1998); *Youngstown Sheet & Tube*

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[2] Indeed, if government action is necessary to bring about a "worldwide consensus," the Defendants' Rollbacks, which are contrary to the rest of the world's actions on climate change, clearly interfere with that worldwide consensus.

Co. v. Sawyer, 343 U.S. 579 (1952); *see also Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102, 107 (D.C. Cir. 2018) (holding that Riverkeeper had standing and a viable cause of action).

Defendants likewise mischaracterize the holding on the merits in *Delaware Riverkeeper Network v. Fed. Energy Regulatory Commission*. Significantly, the *Riverkeeper* plaintiffs challenged FERC's unique funding structure and use of tolling orders as violating the Pennsylvania Environmental Rights Amendment. *See id.* at 110 ("the rights created by the Amendment bind only state and local government, not the federal government"). Because no such claims are asserted here, the ultimate denial of the claim in that case is not relevant to this matter.

Finally, because the *Aji P.* court merely declined to find a cognizable right to a "stable environment" under the Washington State Constitution, that decision is also distinguishable. *Aji P. v State*, No. 18-2-04448-1, 2018 WL 3978310, at *2 (Wash. Super. Aug. 14, 2018). In addition, in contrast to the present action, the *Aji P.* plaintiffs asked the court to order defendants to develop a climate action plan which would do more than the government had ever previously done. Despite the breadth of that requested relief, the *Aji P.* decision begins, "[b]oth sides in this case agree that anthropogenic climate change caused by increased greenhouse gas emissions poses severe threats to our environment and *requires urgent*

governmental action."[3] *Id.* at *1 (emphasis added). Finally, the *Aji P.* decision calls for investing in science—not rejecting or defying it. *See id.* at *4 (citing Steven Pinker, *Enlightenment Now – The Case For Reason, Science, Humanism, And Progress* 154 (2018)).

Thus, as recognized even in the judicial opinions cited by Defendants, all reputable science leads to one inescapable conclusion: "the devastating effects of climate change" are real—effects that are exacerbated each day that Defendants' Rollbacks stand or escalate. *Id.* at *1.

The requested relief in this case is limited in scope and well within this Court's power to grant as an appropriate remedy to address Defendants' violations of Plaintiffs' constitutional rights. Plaintiffs therefore again urge the Court to deny Defendants' Motion to Dismiss.

Dated: September 19, 2018

Respectfully submitted,

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[3] All parties and the court agreed that *urgent governmental action* is necessary—not inaction or backwards action. *Id.*

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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' Response to Defendants' Notice of Supplemental Authority to be served on all counsel of record via CM/ECF on September 19, 2018.

/s/ Michael D. Hausfeld
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