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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-TC

DECLARATION OF JULIA A. OLSON in Support of Plaintiffs' Response in Opposition to Defendants' Motion for Protective Order and Stay of Discovery Pending Defendants' Motion for Judgment on the Pleadings

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AND FOR A STAY OF ALL DISCOVERY

I, Julia A. Olson, hereby declare and if called upon would testify as follows:

1. I am an attorney of record in the above-entitled action and I have personal knowledge of the statements made herein.
2. Plaintiffs have worked with over 60 volunteer law students and lawyers who have spent over 2500 collective hours conducting document review and fact-finding through informal discovery in lieu of propounding requests for production of documents on Defendants.
3. Plaintiffs' experts, who are generously donating their services to Plaintiffs, have spent hundreds of hours working under tight timelines to prepare and update their expert reports in order to meet Court-ordered deadlines in this case. Several experts have also arranged and/or blocked off their schedules to ensure they will be available for testimony during discovery and trial.
4. Plaintiffs have been spending months drafting narrowly tailored Requests for Admissions to serve on Defendants with pin cites to the source of the fact in government documents and on government websites in order to streamline Defendants' verification process of those Requests for Admissions.
5. Prior to receiving Defendants' Rule 12(c) Motion for Judgment on the Pleadings, Defendants' Motion for a Protective Order and Stay of All Discovery, and now Defendants' Motion for Summary Judgment, Plaintiffs had committed to propound all discovery by the end of May, during the meet and confer sessions with Defendants.
6. In response to the meet and confer sessions with Defendants, Plaintiffs have been complying with Defendants' request to Bates stamp and produce all sources relied upon by Plaintiffs' experts in their expert reports.

7. Based on agreements reached during meet and confer sessions, the parties were in the process of scheduling 21 Plaintiff depositions during the months of June, July, and August. As Plaintiffs' counsel told Defendants on May 10, 2018, some of the Plaintiffs are only available and in the country during the first week of June. Defendants are now claiming that they will no longer take depositions during the first week of June as previously agreed, because they say they will not take any depositions until their motions listed above are decided. For example, Defendants wrote in their May 22, 2018 letter, p.2 of 3:

> The first reason the June 3-9 depositions do not work is because discovery is categorically improper. Defendants have made no secret of the fact that they view the Administrative Procedure Act as providing the only possible vehicle for challenging agency action. April 12, 2018, Hrg. Tr. 12:6-13:4; May 8, 2018, Jt. Status Report 2-3, 9 (ECF No. 194); Defs.' Mot. for Judgment on the Pleadings (ECF No. 195); Defs.' Mot. for Protective Order (ECF No. 196); May 10, 2018, Hrg. Tr. 6:7- 21, 14:12-23, 21:22-22:4. For this reason, the United States does not intend to take depositions of Plaintiffs while it pursues the options for narrowing the case set forth in the Ninth Circuit's opinion denying mandamus.

The correspondence on this issue is attached hereto as **Exhibit A**.

8. Based on agreements reached during meet and confer sessions, the parties will be scheduling and taking expert and Rule 30(b)(6) depositions beginning in June and over the course of the summer.

9. Below are true and correct excerpts from the Reporter's Transcripts of Proceedings, with applicable citations, from Case Management Conferences before Judge Coffin relating to Defendants' positions on discovery. The last Case Management Conference, held May 10, 2018, does not have a docket citation, and it is therefore attached as **Exhibit B**.

> THE COURT: They are just asking you, if I understand it correctly, not to destroy any evidence, any of this material that you take down from the website but to preserve it and archive it.

MR. DUFFY: Right. And—

THE COURT: Do you have an objection to doing that?

MR. DUFFY: Our objection is it's—the litigation hold, the way these operate, in speaking with a number of my colleagues and agency staff who have been through this a few times, is that it's not just a matter of, okay don't toss this important document out. They have already got policies in place and in the record that of course, affects this, too. But a litigation hold stops the ordinary processes by which things are archived, e-mails destroyed, tapes are written over. It's actually a very onerous process for the agencies to redo their recordkeeping practices. And so what we would hope is—and plaintiffs keep promising it but they have yet to deliver it – is to give us a sense as to what exactly it is that they are going to be looking for in this litigation, given the answer and how that's narrowed the issues.

MS. PIROPATO: And, Your Honor, if I may clarify, there are two separate issues here. One is the websites and the retention of public information on the websites. And the second is the litigation hold letter that was propounded on January 24th, 2017, which is so broad in its scope that it's staggering.

Feb. 7, 2017 Case Management Conference Transcript, ECF No. 115 at 7:9-8:13.

MS. PIROPATO: And, Your Honor, if I may interject, I just want to remind some of the guideposts that plaintiffs have given us in their status report. They suggest they are going to take 35 fact depositions, and each 30(b)(6) witness is one witness. Having done this before, 130 – if you have a 30(b)(6) topic across 12 agencies, we could be dealing for each topic 12 witnesses. I have done this before. It is an enormous task to prepare those witnesses because there will not be percipient knowledge and then to effectively marshal everyone's schedules to get these massive amount of depositions to occur. So under their own schedule, the notion that we can, in under 70 days, do this massive amount of depositions is just unfathomable and divorced from reality based on my experience. To do this correctly, just for the depositions, it requires a lot of work, and I have been here before where I have worked 90-hour weeks and I've prepared my clients. But we need the time to prepare our factual case and to prepare our witnesses. And that schedule prejudices us and does not give us that time.

> THE COURT: Okay. Everybody is starting to use phraseology that, to me, is somewhat overstated: Unimaginable, unfathomable, immense, impossible, *et cetera*. What I am trying to do here is get a handle on this and reduce it to where it's not all those things but where it's manageable.

Feb. 7, 2017 Case Management Conference Transcript, ECF No. 115 at 21:24-25; 22:21-23

> MR. DUFFY: And Your Honor, this is Sean Duffy. We covered this last time. So I guess we don't need to get into it again. But as you may recall, when we met in November I raised the issue of filing a substantive answer and what efforts that would take. And it did take substantial efforts to get all of the agency personnel in place. And so we filed on January 13th. In the meantime, plaintiffs began this discovery process that we have described to you, which has been quite onerous. And it wasn't a matter of sitting around and waiting for four months to do this. It was dealing with a lot of immediate deadlines that we had in the interim. And with respect to the interlocutory order, that particular order, we didn't have the deadline. And then sometimes a lot of what we do is deadline driven.
>
> THE COURT: Okay.
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> MR. DUFFY: And, of course, there is the change in administration as well.
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> THE COURT: Yes, I know. I know. All right. But I am not going to issue a stay. We are going to try and keep on track as best we can on this case.

Apr. 7, 2017 Case Management Conference Transcript, ECF No. 143 at 31:24-32:20

> MR. DUFFY: I would disagree with both of those points. In fact, we are working with the agencies that have been propounded with requests for production to provide a response to those. We have said in the past that the requests are very broad. They continue to be very broad. But we are nonetheless moving ahead trying to identify custodians who are likely to have relevant, substantive, non-privileged information that would be responsive to the requests. And also, I would add that we believe that we need to meet and confer with the plaintiffs still to try to narrow these requests to something we can actually respond to.

June 14, 2017 Case Management Conference Transcript, ECF No. 179 at 5:16-6:3.

> THE COURT: Sure. And, you know, you can always file a motion for a protective order if you feel that some request is irrelevant. And I don't have any of those that have been filed to date in this case. So -- but that's always an option, as you know, I am sure, for you.

June 14, 2017 Case Management Conference Transcript, ECT No. 179 at 31:10-14.

> MR. DUFFY: Your Honor, if I can just add one comment that sort of ties these other comments up together. We received, I believe, eight Rule 30(b)(6) deposition notices, which I can't even guess how many people we are going to have to prepare and produce for those depositions. But it's got to be more than 20 in addition to the two we have already had. And now we also have the expert case, the getting experts in order -- experts are busy people, of course – to respond to 13 expert reports. And the point that Mr. Volpe makes, I think he states it better than I could have. This discovery circus, if you will, that we are dealing with is an enormous drain on our resources.

June 14, 2017 Case Management Conference Transcript, ECT No. 179 at 41:6-19.

> MR DUFFY: Your Honor, I just want to raise an issue, not for decision or ruling or anything like that today, but it's an issue that did come up during our meet and confer, and I just want to tee it up because it impacts a lot of discovery and other related issues, and that is I have done some discussion among my colleagues and we have done a little bit of preliminary research, and we believe that there's a jurisdictional requirement that the plaintiffs, to bring a claim, need to identify a waiver of sovereign immunity. So during our meet and confer last Thursday we put that issue out there, and we have invited them to invite that because the only one that we can see is the APA, and I do a lot of APA litigation, and those cases, you don't have discovery ordinarily. You have—the agency produces an administrative record and then plaintiffs seek to supplement that. And so we can discuss that during our meet and confer, and maybe we need to brief the issue. But I just want to put that out there because that affects a lot of different things, including these RFPs that plaintiffs have promised us and depositions and many other things. Another point I want to raise, and this is kind of relatively discrete, I think, but in its opinion, the Ninth Circuit raised the prospect of us moving to dismiss the president from this case. And we have, again, raised that issue during our meet and confers and have invited the plaintiffs, in the first instance, to voluntarily dismiss the president, or, if not, then I

guess the parties can discuss that, and that's something else we can brief.

THE COURT: Okay.

MS. OLSON: Your Honor, this is Julia Olson. And we have the case law that is responsive to both of those issues, and we will discuss both of those legal issues with the defendants at the in-person meet and confer and I think be able to resolve them without any motion practice.

THE COURT: Okay.

Mar. 26, 2018 Case Management Conference Transcript, ECF No. 190 at 15:15-17:2.

MR. DUFFY: Okay. So there's another issue, and it's another one that I think we are going to need to brief. And the plaintiffs in this case have not identified a waiver of sovereign immunity. You cannot sue the United States absent a waiver of sovereign immunity. And so we have discussed this amongst ourselves, and the only possible waiver of sovereign immunity that could apply in this case is the Administrative Procedure Act. Now, with the Administrative Procedure Act come very specific procedures, and that is the plaintiffs have to identify final agency action that they are challenging. They haven't done that in this case, but they need to. Then once they do that, the agency, whatever agency that is, has to produce an administrative record. And under the PAA and long-standing Supreme Court precedent, the court is confined to reviewing that record. There is no discovery in APA cases absent very limited circumstances. And so we would like to tee up that issue. We would like to brief that issue because the plaintiffs don't believe that the APA applies. I am not sure what their position is as to whether they need to identify a waiver of sovereign immunity, but we think they do. There's a lot of issues there, and it affects the whole course of the trial. So we talk about setting a trial date. From our position, if there's any case at all, it's going to be an administrative record review case.

THE COURT: Is there any distinction in your mind in terms of sovereign immunity between a lawsuit that seeks money damages and a lawsuit that seeks equitable relief from a court alleging that the government is engaged in unconstitutional conduct violating plaintiffs' constitutional rights and seeking a court order that the government refrain from that unconstitutional conduct?

MR. DUFFY: Yes, there is a distinction, and Congress has recognized it. So, for example, if you have a takings, under the Tucker Act, you can bring suit in the Court of Federal Claims and get just compensation. Under the PA, you can bring a constitutional claim as well and get equitable relief; essentially not money damages but an action that enjoins the agency or compels further action.

MS. PIROPATO: And, Your Honor, you raise a really good point because both the Tucker Act and the APA specifically contemplate that plaintiffs can bring constitutional claims. Ultimately, a Fifth Amendment taking claim is a constitutional claim. The APA specifically provides that plaintiffs may sue for constitutional claims. But then it limits the relief. And this is vis-à-vis agency action. And to be clear, plaintiffs here are challenging agency action. One potential approach is we recognize in the complaint that plaintiffs do identify certain agency actions. For example, we have seen decisions by the Department of the Interior, perhaps the Keystone Pipeline, perhaps the Clean PowerPoint Plan. We can produce administrative records for those agency actions while this issue is being briefed. While this issue is being briefed we can also keep negotiating with plaintiffs about the scope of discovery in the event that we do lose. So we are not proposing a total standstill. We are just saying that we believe there's a threshold issue about whether discovery is appropriate in the first instant before we run headlong into 30(b)(6) depositions, significant production of documents, and significant burdens on the agencies.

MS. OLSON: Your Honor, the Ninth Circuit in Presbyterian Church v. United States, 870 F.2d 518, directly addressed this issue and made a distinction between APA cases brought under Section 704 and the waiver of sovereign immunity provision in Section 702 and said that 702 is a broad waiver of sovereign immunity, including constitutional claims brought under the general federal question jurisdiction statute. So this is squarely addressed by the Ninth Circuit already. And what defendants told us yesterday during our meeting is that the moment we serve discovery, like requests for production of documents, they are going to move for a protective order against that discovery based on their argument that there needs to be an administrative record in this case.

THE COURT: Okay. Well, so be it, then. I will deal with the discovery issues when they arise. So you are obviously not in agreement.

> MR. DUFFY: Your Honor, I would just add one additional point. It's true that we did indicate that we could raise it in the context of a motion for protective order, but I think we still don't have any discovery. We can brief this issue. I mean, plaintiffs are talking about delay. We can brief this issue now. We don't need the discovery. I mean, if they are going to take the position that they are going to give us this discovery, it doesn't seem premature to brief this threshold issue.
>
> MS. OLSON: Your Honor, we intend to begin with 30(b)(6) deposition notices, and I want to just remind everyone that we did take two depositions last summer. So the defendants have already agreed to allow us to notice and take depositions. And then we will also likely serve some very limited requests for production of documents.

Apr. 12, 2018 Case Management Conference Transcript, ECF No. 191 at 12:6-16:8.

> THE COURT: I don't see this trial just being one continuous trial where you go immediately into the remedial phase if there's a finding that's adverse to the government's position on the liability issue. With that in mind, I just don't see a problem here with the—the proposed schedule of the depositions of the experts taking place before you get rebuttal reports.
>
> MS. PIRAPATO: That's fine, Your Honor. We will, to the extent we can, try to take them before the September deadline where it makes sense to do so where we feel prepared and where we have had enough caucusing with our own experts. I just wanted to raise a concern we had.

Apr. 12, 2018 Case Management Conference Transcript, ECF No. 191 at 28:20-29:6.

> MS. OLSON: The next issue are the NARA documents, and we are hoping we can have a date set for when we will have access to those documents.
>
> THE COURT: Is this part of what the government says it doesn't want to do at all? To provide discovery at all?
>
> MR. DUFFY: The NARA issue is not exactly what I would call a discovery issue. By law, people are entitled to obtain documents form NARA. There's a statute in place. I am not terribly well versed at it. The issue here is that some of the documents under NARA's procedures are subject to a protective order. They contain

things like personally identifiable information. And we have agreed to work with plaintiffs on NARA and to get that settled.

THE COURT: Okay. That's the issue. What next?

MS. OLSON: Your Honor, could we have a date for that? That issue has continues to persist, and it would be good to have a set date for when we will be able to access those documents.

MS. PIROPATO: Your Honor, I propose that if this is not resolved by the next status conference we deal with it then. NARA is not right here. We can't consult with them. We are in the midst of talking to NARA. We want to work with plaintiffs. Again, we are hard-pressed to agree to a date when the folks we are going to be dealing with the date are not in the room.

THE COURT: Okay.

MS. PIROPATO: Thank you.

THE COURT: Can you get back to her within a week?

MS. PIROPATO: We'll get back to Ms. Olson within a week. Thank you, Your Honor.

THE COURT: Next item.

MS. OLSON: Right. I think the next issue that we need to discuss is the depositions of the plaintiffs. The defendants have wanted to take all 21 depositions. And we had proposed that the best time frame to do that would be during the summer vacation of the youth and that we would bring the plaintiffs to one location in groups of five or seven so that we could conduct several depositions within a matter of days.

THE COURT: So you are talking about beginning in June?

MS. OLSON: Yes, Your Honor.

THE COURT: Would that work for the government?

MS. PIROPATO: We are fine with that, Your Honor.

MR. DUFFY: And I would just add this as an example of one of the exceptions to the administrative record rule where we are probing to find out if the plaintiffs have standing in this case. In

> any event, we have agreed to go forward over the summer. The proposals that plaintiffs have are fine.

Apr. 12, 2018 Case Management Conference Transcript, ECF No. 191 at 31:25-34:2.

> MR. DUFFY: I can't speak to future motions, because we haven't -- we haven't even contemplated future motions, you know, whether sovereign immunity would ever come up again, but our argument is what it is. And I don't think it's fundamentally different from the argument we raised in the brief. I think it continues to be that this case needs to proceed under the APA, if at all.

May 10, 2018 Case Management Conference Transcript, at 8: 10-18.

> THE COURT: Well, they're saying in their motion that I -- you know, briefly read, you know, in the time frame that was available, I haven't studied them thoroughly, but they're briefly saying that -- they're moving for judgment on the pleadings on the grounds that you can only proceed under the Administrative Procedures Act, and there is no APA claim in this case. We all know that. So what they're saying is your complaint has to be dismissed in its entirety. because you have to bring it under the APA. So surely you can address that issue.
>
> MS. OLSON: We can address that issue, your Honor. We think this Court has already addressed that issue in the prior decision denying the motion to dismiss and in the decision denying interlocutory appeal, and we believe the Ninth Circuit has found no clear error, and we believe that –
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> THE COURT: Well, then, the work's been done. So that's your answer. But I don't see why you need to wait until trial to do that.
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> MS. OLSON: Well, I think that there are delay tactics happening on the other side. And what's clear, and we've seen this in other cases, is that the Trump administration and the Department of Justice are raising issues to try to get orders from district courts that they can then take up on petitions for writ of mandamus to the Ninth Circuit, and I assume that that's the intention here. If the District Court denies their dispositive motion, that we'll be back in a scenario of trying -- of them trying to seek interlocutory appeal and another petition for writ of mandamus.

May 10, 2018 Case Management Conference Transcript, at 11:15-13:1.

> MR. DUFFY: And I would just point, moreover, that -- and I don't want to get into the arguments, because they're going to be briefed, but our argument is essentially that you need to bring this under the APA. You haven't fashioned this as an APA claim. And Congress, in the APA, and indeed in Rule 26, have exempted these types of proceedings from discovery, and discovery shouldn't proceed at all, and we would like a ruling on that. And in the meantime, we don't believe we should be proceeding with discovery in this case for that reason.

May 10, 2018 Case Management Conference Transcript, at 15:12-23.

> THE COURT: Well, Mr. Duffy, I appreciate your remarks, but if I can make an observation. The defendant cannot draft the complaint for the plaintiffs in the way that the defendant prefers it to be drafted. So when you say, "This is an APA case," it's not. There's no APA claim in the case that's been filed by the plaintiffs. So when you say that under the APA no discovery should be permitted, that essentially flips your role in the case to where you, as the defendant, are telling the plaintiff that you actually have an APA claim, and so we are not going to make any efforts to grant you discovery because you're not entitled to it under the APA, but it's not an APA case as we speak. It is a case wherein the plaintiffs are asserting that their constitutional rights are being violated by government action and inaction, as we described in the earlier rulings. That's the case that's before us and that does permit discovery and that hasn't been changed as we speak.
>
> MR. DUFFY: I think our argument --
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> THE COURT: But I'm not going to rule on your motion to stay at this time because I don't have the response from the plaintiff before me. If you want to be heard further on that, I can schedule something once they file their -- their response.
>
> MR. DUFFY: I think we need briefing on the issue. Our point isn't that this -- maybe I stated it wrongly before. Our point isn't that this is an APA case. Our point is that if you want to bring a constitutional claim suing government agencies, you have to bring in an APA, which does not allow for discussion.
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> MS. PIROPATO: To put it more bluntly, Congress made the call about how this lawsuit should be brought. Not us. Congress gave plaintiffs a vehicle. To the extent they want to bring these kind of claims, they have to avail themselves of the vehicle provided by Congress. That's the basic gist of our argument. Your point's well

taken that currently the complaint is not crafted in that manner. That is why we seek dismissal.

THE COURT: Okay. It seems to me you're asking the Court to revisit its ruling that it's already made, your motion to dismiss, and that's been denied. So as this case stands, it is a constitutional Bivens action that's analogous to a Bivens action against the Government for the plaintiffs alleging violation of their constitutional rights.

May 10, 2018 Case Management Conference Transcript at 15:14-17:19.

MR DUFFY: When you're trying to get and agency to act or cease in some type of action, the APA governs. We haven't—we did not make that argument in our motion to dismiss. It's a new argument.

THE COURT: Yeah. I think I said it's analogous to a Bivens action, but it involves constitutional claims that the plaintiffs are asserting. In essence, they are claiming that government action and inaction is violating rights secured to them by the Constitution of the United States under the substantive due process clause and on the public trust doctrine. And you moved to dismiss that, and the motion was denied, and here we are. But now you're asking me to stay discovery, because, in essence, you're saying that the ruling was wrong. And—but I'm not going to rule on that right now. I'm going to wait until I get their opposition, and then we can have—we can have further argument, if you wish to have it, at that time.

MR. DUFFY: Well, I will just say that us asking for a stay of discovery in this instance does not turn on the rightness or wrongness of the Court's ruling on the motion to dismiss. It turns on the plaintiffs not availing themselves of the cause of action that Congress provided.

MS. OLSON: Your Honor --

THE COURT: I don't quite understand that.

MS. PIROPATO: I think what Mr. Duffy's basic point is, previously the United States argued that under -- there was no standing. The motion to dismiss was proper based on 12(b)(1) and 12(b)(6). The 12(c) motion focuses on something quite different, subject matter jurisdiction, whether or not there can be an implied right of action for an equitable constitutional claim. Plaintiffs have tried to do what plaintiffs are doing here, which is to challenge federal agency action under the APA, but then not avail themselves

> of the restrictive procedures of the APA, and we cite cases where courts say, You cannot do that. That's the basis of this motion, which is something we have not briefed before and we'd welcome the opportunity to raise these arguments with the Court in -- once it's fully briefed.
>
> THE COURT: In fact, I do remember the Government moving to dismiss in part on the basis that there is no substantive due process right that the plaintiffs have and a habitable climate system, and there is no public trust doctrine, and the Court denied those arguments and did not dismiss the complaint based on those arguments. And you're asking the Court essentially to stay discovery based on the concept that the Court was wrong in its ruling. But this is --
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> MR. DUFFY: I would say that the Court --
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> THE COURT: -- I think, revisiting an issue that's already been determined by the court.
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> Mr. Duffy: The Court could be right on those issues, and plaintiffs still need to have a cause of action, and this -- the reason this dovetails with the stay and discovery in this case is because Congress has spoken to that issue in the APA, and the APA doesn't allow for discovery. It's administrative record review and Rule 26 exempts such cases from discovery. Our point is simply even if you're right on the substance of the claims, plaintiffs have to avail themselves of a cause of action and they haven't.
>
> THE COURT: Okay. Well, I will hear you further on that. In the meantime, I'm not going to stay anything in terms of discovery.

May 10, 2018 Case Management Conference Transcript at 19:4-22:11.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 23rd day of May, 2018.

Respectfully submitted,

/s/ Julia A. Olson