JULIA A. OLSON (OR Bar 062230)
juliaaolson@gmail.com
Wild Earth Advocates
1216 Lincoln Street
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY (pro hac vice)
pgregory@gregorylawgroup.com
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS (OR Bar 041029)
Andrearodgers42@gmail.com
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Attorneys for Plaintiffs

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

LISA LYNNE RUSSELL, Chief
GUILLERMO A. MONTERO, Asst. Chief
SEAN C. DUFFY (NY Bar 4103131)
MARISSA A. PIROPATO (MA Bar 651630)
FRANK J. SINGER (Cal. Bar 227459)
CLARE BORONOW (Admitted to MD bar)
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D Street, NW
Washington, D.C. 20004

Tel: (202) 305-0445 (S. Duffy)
Fax: (202) 305-0506
E-mail: sean.c.duffy@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

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

JOINT STATUS REPORT
AS OF AUGUST 16, 2018

The parties respectfully submit this joint status report to inform the Court of the status of expert reports, depositions, and other pending or upcoming matters since the last status conference on July 17, 2018.

1. Opening Statements

***Plaintiffs' Separate Statement*:**

This Court is extremely familiar with the claims in this case. To update the Court on what has occurred generally following the Status Conference on July 17:

Defendants' Motions and Applications are Denied: Plaintiffs spent an intense two weeks responding to motions and applications filed by Defendants at all levels of the judiciary, seeking to prevent this case from going to trial. The Ninth Circuit panel that previously ruled in favor of Plaintiffs did so again. The application for stay presented to Justice Kennedy and by him referred to the Supreme Court was "denied."

Defendants have tried to stop the case from going to trial in three different ways.[1] *First*, they moved this Court for a protective order and a stay of all discovery; these motions were denied. Defendants then took the extraordinary step of filing a second Petition for Writ of Mandamus with the Ninth Circuit Court of Appeals, also requesting an emergency stay while the Ninth Circuit considered the petition. The same panel of three judges who decided the first

[1] Starting in April, Defendants filed seven motions with this Court (ECF Nos. 195 (Motion for Judgment on the Pleadings), 196 (Motion for a Protective Order and for a Stay of All Discovery), 207 (Motion for Summary Judgment), 216 (Motion to Stay Discovery Pending Resolution of Objections), 217 (Motion for Protective Order), 305 (Motion to Amend Schedule), 307 (Motion for a Stay Pending a Petition for Writ of Mandamus); objections to a previous ruling (ECF No. 215 (Objections to Order Denying Motion for a Protective Order and Stay of Discovery)); and four petitions to a higher court to overrule the decisions of this Court (ECF Nos. 211 (Notice of Filing Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari), 246 (Notice of Filing Application for a Further Extension of Time Within Which to File a Petition for Writ of Certiorari), 308 (Notice of Filing of Petition for Writ of Mandamus and Emergency Motion for a Stay), 321 (Notice of Filing of Application to the Supreme Court for a Stay)).

petition were assigned to the case again. On Monday, July 16th, the Ninth Circuit panel denied Defendants' request for an emergency stay while the panel decided the second Petition.

On Tuesday, July 17, immediately after the prior status conference concluded and the day before oral argument before Judge Aiken on Defendants' Rule 12(c) Motion for Judgment on the Pleadings and Motion for Summary Judgment, Defendants filed an emergency application with the Supreme Court, also asking to stay this case. At that point, there were motions pending at the District Court, the Ninth Circuit, and the Supreme Court. On Friday, July 20, the Ninth Circuit panel ruled in favor of Plaintiffs, denying Defendants' second Petition for Writ of Mandamus. That following Monday, July 23, Plaintiffs filed their response to the government's emergency stay request with the Supreme Court.

On Monday, July 30, the Supreme Court denied the government's request to stop this case, without dissent, holding:

> The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.

Second, Defendants filed a Motion for Judgment on the Pleadings, arguing, in part, that President Trump should be dismissed as a party because, they claim, all of the other defendants can remedy the climate harm the Youth Plaintiffs are experiencing and the President is an unnecessary defendant for the remedy. Plaintiffs offered to stipulate to the dismissal of the President "without prejudice"; however, Defendants refused to stipulate. Plaintiffs' offer to stipulate to the dismissal of the President is now being considered by Judge Aiken.

Third, Defendants moved for Summary Judgment, asserting essentially the same arguments previously advanced in their original Motion to Dismiss denied by this Court on

November 10, 2016. Defendants argued: (1) Plaintiffs do not have standing to bring this case; (2) the issues presented should be left to the political branches of government; and (3) Plaintiffs do not have valid legal claims. To defend this motion, Plaintiffs presented substantial factual evidence, including 385 government documents, Plaintiffs' declarations of harm, and their expert reports.

On Wednesday, July 18, Judge Aiken held oral argument on Defendants' motions for Judgment on the Pleadings and Summary Judgment. At the conclusion of oral argument, Judge Aiken stated she would issue a written order soon. Defendants' substantial motion practice is hardly conserving the resources of the courts, or the parties, particularly when Defendants continue to make the same legal arguments they have been making since filing their Motion to Dismiss in 2015, without engaging with the material facts of the case.

The Parties Commenced Depositions: Since the July 17 Status Conference, Defendants have finally begun working with Plaintiffs to schedule and conduct depositions of their respective experts as well as the Youth Plaintiffs. A timeline of the history of Plaintiffs' efforts to schedule deposition is attached hereto as **Exhibit 1**. The current calendar illustrating the agreed-upon deposition schedule is also attached hereto as **Exhibit 2**. Dates yet to be agreed-upon are set forth in red text.

Further, in order to have documents offered in evidence, Plaintiffs are using Motions in *Limine* for judicial notice of documents in lieu of the pending Requests for Admissions ("RFAs") given the nature of the documents in issue (predominantly government documents that are public records). Defendants' Second Motion for Protective Order is being held in abeyance until the Court decides Plaintiffs' Motions in *Limine* to seek judicial notice of the documents referenced in RFAs and until the parties have further opportunity to finalize their agreement on substituting

contention interrogatories for depositions under Rule 30(b)(6). As part of this discussion, Plaintiffs agreed any responses of Defendants to outstanding discovery requests (currently the Rule 30(b)(6) deposition notices and those RFAs that are the subject of the Second Motion for Protective Order, as well as the subsequent sets of RFAs and Rule 30(b)(6) deposition notices that were served after Defendants filed their Second Motion for Protective Order) are held in abeyance during the same time period. Plaintiffs have since pursued authentication of documents referenced in their RFAs through the judicial notice process described by this Court at the June 6 Status Conference.

Rather than prepare for trial, Defendants have clearly made the studied decision to unnecessarily overwhelm counsel for Plaintiffs and this Court with an avalanche of repetitive ancillary motions and not engage in the steps necessary to prepare for trial on the merits on October 29, 2018. As a result, Plaintiffs have been forced to address Defendants' last minute attempt to cram 48 depositions into a two-month window. This figure does not include the depositions of any rebuttal experts or fact witnesses.

A week after receiving Defendants' expert witness list in July, and before receiving the expert reports, Plaintiffs noticed Defendants' experts' depositions given Plaintiffs' deadline for producing any possible rebuttal experts. While Plaintiffs have been willing to meet and confer in good faith, the failure of Defendants to timely respond to requests to meet and confer and conduct discovery of Plaintiffs and Plaintiffs' experts should not prejudice Plaintiffs' ability to timely depose Defendants' experts on a schedule that works for Plaintiffs' counsel and Defendants' experts, taking into account the geographic location of the experts to avoid a scheduling nightmare of cross-country depositions, with two or three depositions occurring on the same day in multiple cities around the nation. The parties met and conferred on the

deposition scheduling issue on August 15, but court assistance may be required if the parties remain unable to reach agreement on a mutually agreeable deposition schedule.

Defendants' conduct should also not prejudice Plaintiffs by jamming 21 Plaintiff depositions into a time frame that does not work in light of the expert deposition schedule or Plaintiffs' school schedules. While Plaintiffs offered up one final proposed schedule for deposing 19 of the Youth Plaintiffs, by not deposing the Youth Plaintiffs during the weeks previously agreed to by the parties in June, July, and August, this Court has said that Defendants have waived their right to depose Plaintiffs.

***Defendants' Separate Statement*:**

Defendants continue to maintain that this case should be dismissed and have moved to terminate it on multiple jurisdictional and substantive grounds. Defendants acknowledge that this Court has either disagreed with or not yet ruled on Defendants' challenges, but respectfully reaffirm their position that this case is improper for several reasons. Among other things, Plaintiffs lack standing to bring this lawsuit, Defs.' Mot. for Summ. J., ECF No. 207; the Administrative Procedure Act requires Plaintiffs' lawsuit to challenge discrete government action or a discrete failure to act, which their complaint fails to do, Defs.' Mot. for J. on the Pleadings, ECF 195; Plaintiffs' claims infringe on legislative and executive functions that the Constitution assigns to the political branches, *id*; and the complaint fails to state legally cognizable theories of recovery, ECF No. 207. Defendants' pending motions for judgment on the pleadings and summary judgment are not, as Plaintiffs assert, "repetitive and ancillary motions," but, instead, go to threshold issues. The Ninth Circuit—and more recently, the Supreme Court—contemplated a narrowing of this case before trial and Defendants believe that the resolution of the pending dispositive motions will appropriately narrow the case, if not

dispense of it altogether. *See* ECF No. 330-1 (Supreme Court directing the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.").

Discovery (including expert discovery) and trial are also improper because *de novo* proceedings are presumptively improper in cases governed by the APA's judicial review provisions. Defs.' Mot. for Protective Order & Stay of Discovery, ECF No. 196. Again, Defendants recognize that this Court disagrees with Defendants' position on the applicability of the APA (Orders, ECF Nos. 212, 300) and that this Court has entered orders on the timing of discovery activity and for trial itself (Minute Order, ECF No. 192 (scheduling certain expert disclosure deadlines and setting an October 29, 2018, trial date)). Defendants' compliance with Court orders, however, cannot and should not be viewed as a concession that discovery or trial is proper; nor can or should Defendants' compliance be viewed as a waiver of Defendants' objections to these proceedings.

Finally, Defendants note that Plaintiffs have contributed to the discovery delays in this case. As discussed below, Defendants are attempting to work with Plaintiffs to schedule depositions for the named Plaintiffs, but Plaintiffs have continued to erect road blocks, including claiming without providing any reason that two Plaintiffs are totally unavailable for deposition during the next 2.5 months. Plaintiffs also belatedly served a new 115-page expert report on Friday, August 10, knowing that Defendants' expert reports were due Monday, August 13.

2. <u>District Court Activity since the Last Status Conference</u>

***Plaintiffs' Separate Statement*:**

On July 18, Judge Aiken held oral argument on Defendants' Motion for Judgment on the Pleadings (ECF No. 195) and Motion for Summary Judgment (ECF No. 207).

At the parties' request, Judge Aiken has scheduled a telephonic status conference for August 27 at 1:30 p.m. to discuss issues concerning trial.

To narrow the number of evidentiary issues at trial, Plaintiffs filed their Motion in *Limine* Seeking Judicial Notice of Federal Government Documents (ECF No. 254). Defendants filed a response on July 24 (ECF No. 327) and Plaintiffs replied on August 3 (ECF No. 331). After Plaintiffs filed their reply brief, Defendants belatedly responded to Plaintiffs' request to meet and confer to resolve Defendants' outstanding objections. Contrary to Defendants' assertions, Plaintiffs did not misrepresent Defendants' position in the reply brief with respect to the Court taking judicial notice of the documents to which Defendants did not object. Defendants' response brief plainly stated: "Defendants respectfully request that the Court take judicial notice of the existence and authenticity of documents for which Defendants have 'no objection.'" ECF No. 327 at 2. Plaintiffs did not say that Defendants had "joined Plaintiffs' motion in limine," but simply repeated what Defendants themselves said in their response brief. Plaintiffs will be filing a supplemental declaration and supporting tables to address Defendants' belated change in position on many of the documents for which Plaintiffs are seeking judicial notice. Plaintiffs also will be filing a second Motion *in Limine* seeking judicial notice of additional federal government documents.

***Defendants' Separate Statement*:**

Since the July 17, 2018, status conference, Judge Aiken held a hearing on Defendants' Motion for Judgment on the Pleadings (ECF No. 195) and Motion for Summary Judgment (ECF No. 207) on July 18, 2018, but has not yet issued a decision on either motion. At the parties' request Judge Aiken has scheduled a telephonic status conference for August 27 at 1:30pm.

During the call, Defendants intend to inquire as to when the Court intends to issue a ruling on the pending dispositive motions.

In addition, the parties have briefed Plaintiffs' Motion in Limine Seeking Judicial Notice of Federal Government Documents (ECF No. 254). Defendants filed a response to that motion on July 24 (ECF No. 327) and Plaintiffs filed a reply on August 3 (ECF No. 331). As discussed below, the parties have continued to discuss these judicial notice issues outside of their briefings in an effort to narrow the number of disputed documents.

3. Appellate Proceedings

***Plaintiffs' Separate Statement*:**

As more fully above, Defendants took the extraordinary step of filing a second Petition of Writ of Mandamus with the Ninth Circuit Court of Appeals, also requesting an emergency stay while the Ninth Circuit considered the petition. On Monday, July 16, the Ninth Circuit panel denied Defendants' request for an emergency stay while the panel decided the second Petition. On Tuesday, July 17, Defendants filed an emergency application with the Supreme Court, also asking to stay this case. On Friday, July 20, the Ninth Circuit panel ruled in favor of Plaintiffs, denying Defendants' second Petition for Writ of Mandamus. On July 23, Plaintiffs filed their response to the government's emergency stay request with the Supreme Court.

On Monday, July 30, the Supreme Court denied the government's request to stop this case, without dissent.

***Defendants' Separate Statement*:**

On July 20, the Ninth Circuit denied Defendants' petition for writ of mandamus without prejudice, noting that "the issues that the government raises in its petition are better addressed through the ordinary course of litigation." ECF No. 326-1 at 5. The Ninth Circuit left open the possibility that Defendants could seek review of future district court orders, stating: the

"government can still challenge any specific discovery request on the basis of privilege or relevance, or by seeking a tailored protective order under Federal Rule of Civil Procedure 26(c). If the government challenges a discovery request and the district court issues an order compelling discovery, then the government can seek mandamus relief as to that order." *Id.* at 6-7.

On July 17, Defendants applied to the Supreme Court for a stay of discovery and trial pending the Ninth Circuit's disposition of the pending writ petition. *See* ECF No. 321. On July 30, the Supreme Court denied Defendants' request for a stay without prejudice. *See* ECF No. 330. However, the Supreme Court noted that the "breadth of respondents' claims is striking" and "the justifiability of those claims presents substantial grounds for difference of opinion." ECF No. 330-1. The Supreme Court directed the district court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Id.*

4. <u>Motion Practice</u>

***Plaintiffs' Separate Statement*:**

There are four motions pending before this Court:

1. Defendants' Motion for Judgment on the Pleadings (ECF No. 195);
2. Defendants' Motion for Summary Judgment (ECF No. 207);
3. Plaintiffs' Motion in *Limine* Seeking Judicial Notice of Federal Government Documents (ECF No. 254);
4. Defendants' Motion for Protective Order (ECF No. 217). As set forth in this Court's Order of June 27, 2018, ECF No. 249, this Motion is held in abeyance while Plaintiffs review Defendants' responses to their requests for judicial notice and as Plaintiffs propound new discovery requests.

This week, Plaintiffs intend to file a supplemental declaration in support of Plaintiffs' reply to the Motion in *Limine* updating the Court of the parties' respective positions, and a second, similar Motion in *Limine* and a notice of additional disputed issues of material facts raised in Defendants' expert reports relevant to Defendants' Motion for Summary Judgment.

At the August 15 meet and confer, counsel for Defendants indicated Defendants have no plans to file additional motions, other than Motions in *Limine*.

***Defendants' Separate Statement*:**

a. Dispositive Motions

Defendants currently have two dispositive motions pending before this Court: Defendants' motion for judgment on the pleadings (ECF No. 195) and Defendants' motion for summary judgment (ECF No. 207). Both motions are fully briefed. On July 18, 2018, the Court held oral argument on both motions, though the Court has not yet issued a decision on either motion. *See* ECF No. 325. The Court should, as directed by both the Supreme Court and the Ninth Circuit, proceed to rule on the fully-submitted motions expeditiously.

b. Non-Dispositive Motions

There are currently two non-dispositive motions that have not been resolved in the case. The first is Defendants' second motion for protective order, filed on June 4, 2018. ECF No. 217. Briefing on that motion is suspended while Plaintiffs review Defendants' responses to their requests for judicial notice and as Plaintiffs propound new discovery requests. *See generally* June 27, 2018 Order, ECF No. 249.

The second pending motion is Plaintiffs' June 28, 2018, motion *in limine* seeking judicial notice of hundreds of exhibits. ECF No. 254. Defendants responded to that motion on July 24 (ECF No. 327) and Plaintiffs replied on August 3 (ECF No. 331). The parties are engaged in

discussions to continue to narrow the documents in dispute. Plaintiffs sent Defendants additional foundational information for certain documents on July 31. On August 9, Defendants sent a letter to Plaintiffs outlining Defendants' current position on each document in light of that additional information.

In the August 9 letter, Defendants also noted that Plaintiffs misrepresented Defendants' position in their reply brief. Contrary to assertions made in Plaintiffs' reply brief, Defendants have not joined Plaintiffs' motion in limine and do not endorse Plaintiffs' reasons for judicial notice as set forth in their motion. Rather, as outlined in their response brief, Defendants have no objection to the Court taking judicial notice of documents "that were created by defendant agencies" and are "believed by Defendants . . . to be authentic." ECF No. 327 at 2. Defendants take no position as to certain documents "that were not created by agency defendants or [can] not be authenticated by Defendants," *id.*, but maintain that it remains Plaintiffs' burden under Federal Rule of Evidence 201 to establish that the existence and authenticity of such documents is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Defendants objected to this Court taking judicial notice of documents for which Plaintiffs have not proffered an adequate foundation, including documents for which they do not provide a source or for which the source is unreliable. ECF No. 327 at 2. In the letter, Defendants request that Plaintiffs "revise their reply so as to correct the inaccuracies identified in this letter and to apprise the Court of the parties' respective positions in light of the additional information that Plaintiffs provided."

On August 15, Plaintiffs filed a supplemental declaration in support of their reply in support of their Motion in Limine Seeking Judicial Notice of Federal Government Documents. ECF No. 334. In this declaration filed the evening before the status conference, Plaintiffs

provide new URLs for certain documents to which Defendants previously objected in this declaration. ECF No. 334-4. Defendants have not had an opportunity to review these URLs and for that reason continue to object to these documents. Defendants also note that Plaintiffs' declaration is essentially a surreply to their own reply as it presents new arguments in support of particular documents. *Id.* Defendants have tried to work with Plaintiffs to reduce the number of disputed documents but are prejudiced by Plaintiffs' belated attempt to provide a foundation for these documents.

5. Discovery

***Plaintiffs' Separate Statement*:**

Depositions: As indicated by the timeline set forth at **Exhibit 1** hereto, the parties began meeting and conferring on discovery in the summer of 2017. At that time, Defendants stated they would take the depositions of all 21 Plaintiffs for purposes of assessing their standing. In response, Plaintiffs maintained they would make themselves available for depositions under a mutually convenient arrangement. After Judge Coffin set a trial date and deadlines for expert discovery on April 12, 2018, counsel for Plaintiffs repeatedly inquired about scheduling Plaintiffs' depositions and encouraged prompt scheduling of those depositions during their summer vacations, even before the depositions were noticed. After weeks of discussions, but no notices of depositions, and mindful of the heavy deposition schedule the parties would face in August and September with experts, as well as the school schedules of Plaintiffs, counsel for Plaintiffs conferred with Plaintiffs about their entire summer schedules in order to make Plaintiffs available in Eugene over the course of three weeks in the summer months, per agreement with Defendants in the parties' May 10 meet and confer session. At that time, Plaintiffs even agreed to come to Eugene at Plaintiffs' expense. Plaintiffs' proposed schedule addressed the availability of each Plaintiff: some Plaintiffs were available to be deposed in June,

some in July, and some in August. Many Plaintiffs were otherwise unavailable during the other proposed weeks.

Over the course of June and July, Defendants changed their tactics and announced they would not depose Plaintiffs. As Judge Coffin said at the June 6 status conference, that was a strategy choice on Defendants' part. Judge Coffin also explained that, if Defendants did not take Plaintiffs' depositions during the weeks they were available while on summer vacation, Defendants would waive their right to take Plaintiffs' depositions.

On July 25, Defendants again altered their approach and, out of the blue, noticed the depositions of each of the Youth Plaintiffs to occur during the week of August 6, some less than 10 court days away. For the first time, and again without prior notice, Defendants sought production of documents in conjunction with those depositions via broad subpoenas, requesting documents both in Plaintiffs' possession and in the possession of third parties, such as medical providers. Previously, Defendants had stated that, if Plaintiffs' experts and Plaintiffs were not relying upon Plaintiffs' medical or other health records for purposes of standing (and they were not), Defendants would not seek any production of documents from Plaintiffs. Thus, not only did Defendants (at the last minute) again change their fundamental strategy of not deposing Plaintiffs, Defendants also changed their strategy of requesting production of documents, which could have been sought many months ago, without prejudicing Plaintiffs in their trial preparation and particularly the short time frame between receiving Defendants' expert reports, preparing for those expert depositions, and Plaintiffs' deadline for serving any rebuttal reports.

The parties quickly met and conferred on these notices and subpoenas to Plaintiffs. Counsel for Plaintiffs explained that, if Plaintiffs had to gather and produce medical records and other documents prior to their depositions, then none of the depositions could go forward during

the noticed week. Counsel for Plaintiffs offered that depositions could be taken of Plaintiffs during the week of August 6 in Eugene without the document production, an offer that Defendants rejected.

Because Defendants rejected the offer to take depositions of Plaintiffs who were available during the week of August 6, on the basis that Defendants now needed documents (contrary to their prior position that they would not request documents), it remains Plaintiffs' view that Defendants waived their right to take Plaintiffs' depositions, consistent with Judge Coffin's admonitions during our previous two status conferences. ECF No. 223, Transcript of June 6, 2018 Status Conference at 26:3–17 ("[Plaintiffs] are available during this time period, and if you opt not to depose them, you are waiving the opportunity to take the deposition."); ECF No. 328, Transcript of July 17, 2018 Status Conference at 28: 7–14 ("[I]f you bypass the window that plaintiffs have for having their depositions taken, I see no prejudice in just deferring your examination of the plaintiffs . . . until trial.").

Further, Defendants' strategic delay tactics in noticing Plaintiffs' depositions at the last minute and belatedly requesting production of documents has now put Plaintiffs in the position of having to take and defend 27 expert depositions during the same two-month window when Defendants want to take 21 Plaintiffs' depositions. Defendants' knowing decision to seek depositions and documents at the end of the discovery period has placed the parties in a bind; a bind Plaintiffs consistently tried to avoid when counsel explained to Defendants that Plaintiffs' depositions needed to be completed prior to August 13, so that the remaining weeks before trial could be devoted to 26 expert depositions, motion practice, trial briefing, and trial preparations.

Even though Defendants' delay resulted in a waiver of any right to depose Plaintiffs, on August 9, counsel for Plaintiffs made the following offer: (1) Defendants agree to a deposition

schedule for experts; (2) given the time windows available as a result of the expert deposition schedule, Plaintiffs will make themselves available at the locations and times set forth below for no more than 2-hour depositions; and (3) Plaintiffs will produce Plaintiffs' responsive, non-privileged documents as set forth below.

Offered Schedule:

a. The week of August 20-24: Plaintiffs available that week are Hazel, Avery, Tia, Jacob, Zealand, Miko, Isaac, Kelsey, Aji, Kiran, and Alex. If Defendants pay to fly Sophie, Jayden, Jaime, Journey, and Nathan to Eugene, they may also be able to attend depositions that week.

b. September 12: Levi, immediately preceding the Wanless deposition.

c. September 14: Victoria, immediately following the Jacobson deposition.

d. September 18: Nick, immediately following the Trenberth deposition, unless an unanticipated school conflict arises.

e. Xiuhtezcatl is not available for a deposition beyond the week he made himself available this summer. Defendants have his declaration and will be able to examine him at trial.

f. Sahara is also presently unavailable for any dates that work for both her and her counsel, given the expert deposition schedule. Defendants have her declaration and will be able to examine her at trial.

g. For those Plaintiffs being deposed during the week of August 20, Plaintiffs offered to produce those Plaintiffs' responsive, non-privileged documents on or before August 15. For those Plaintiffs being deposed later, Plaintiffs offered to

produce those Plaintiffs' responsive, non-privileged documents during the week of August 20.

Exhibit 2 is a calendar that includes all of the dates for depositions of experts and Plaintiffs, proposed by Plaintiffs on August 9 and revised to incorporate those dates agreed-upon at the August 15 meet and confer.

Counsel for Plaintiffs indicated they needed a written response to this proposed Plaintiff deposition schedule no later than Friday, August 10, so that Plaintiffs can reserve these dates and travel arrangements can be made where necessary. The calendar provided in **Exhibit 2** does not include travel days and deposition preparation days, but illustrates the number of days that will be needed to complete the actual depositions by early October.

Defendants rejected that August 9 proposal and refused to meet and confer via telephone to resolve any disagreements. While the parties met and conferred on these depositions in person on August 15, Plaintiffs will not make themselves available for deposition unless all aspects of the deposition schedule for experts and Plaintiffs can be resolved.

In sum, Plaintiffs timely noticed the depositions of Defendants' experts a week after Plaintiffs received their identities and before Defendants noticed the depositions either of Plaintiffs or of Plaintiffs' experts. Further, Defendants stalled for months in noticing depositions that could have been taken since April, based on their own strategy. Plaintiffs made an offer for depositions of those Plaintiffs currently available for the week of August 20; that offer was rejected. Defendants have chosen to wait until August 15 to attempt to reach agreement on these depositions, causing counsel for Plaintiffs now to be unable to make arrangements for one or more Plaintiffs during the week of August 20. These are children and young people, many with school starting, and they and their families need adequate notice.

Rebuttal Experts Reports: The parties have agreed to amend the date for Plaintiffs to serve their rebuttal expert reports to September 19.

Contention Interrogatories: Plaintiffs again proposed, and Defendants are considering, that the number of contention interrogatories be increased to 70 interrogatories per agency Defendant.

Requests for Production: In lieu of Plaintiffs propounding a Request for Production, Defendants agreed to provide the America First Energy Plan for Defendant Department of State.

Pre-trial Memoranda: As depositions are now occurring through early October, the parties have agreed to serve and file trial memoranda on a date after the completion of depositions.

***Defendants' Separate Statement*:**

c. Plaintiffs' discovery requests

Plaintiffs have served requests for admission and Rule 30(b)(6) deposition notices on the Departments of Energy, Agriculture, Defense, Commerce, Interior, and Transportation. The discovery requests propounded on the Departments of the Interior, Agriculture, and Energy were the subject of Defendants' June 4, 2018 motion for protective order. ECF No. 217. Before Plaintiffs' response to that June 4, 2018 motion for protective order was due, Plaintiffs moved to suspend briefing on the motion and hold Defendants' responses to Plaintiffs' requests for admission and Rule 30(b)(6) deposition topics in abeyance pending resolution of Plaintiffs' motion for judicial notice of certain government records. The suspension was also intended to give the parties the opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions. *See* ECF No. 247. This Court granted the Plaintiffs' unopposed motion on June 27, 2018. ECF No. 249.

At the oral argument on Defendants' motion for judgment on the pleadings and motion for summary judgment, Plaintiffs stated on the record that they have "foregone [their] 30(b)(6) depositions." Tr. of Oral Arg. at 44, line 17. Defendants take this to mean that Plaintiffs have effectively withdrawn their notices of 30(b)(6) depositions and do not intend to issue additional such notices.

In that same unopposed motion to hold Defendants' motion in abeyance, Plaintiffs asked that the Court suspend the briefing schedule pending resolution of Plaintiffs' motion for judicial notice of documents referenced in Request for Admission ("RFAs") previously served on the Departments of Interior, Agriculture, Transportation, Energy, and Defense. ECF No. 247 at 2. As noted, above, Plaintiffs have filed a motion in *limine* seeking judicial notice and the parties are currently engaged in discussions to narrow the documents in dispute. At present, the only pending discovery requests from Plaintiffs are the RFAs, which have been suspended pending this Court's resolution of Plaintiffs' motion in *limine* seeking judicial notice.

b. Defendants' discovery requests

On July 25, 2018, Defendants noticed the deposition of each of the 21 named Plaintiffs in this case accompanied by a subpoena duces tecum requesting that Plaintiffs provide additional documents related to allegations set forth the amended complaint (ECF No. 7) and in each witness' declaration.

Defendants intend to serve a limited number of interrogatories in the next several days, in part, to narrow the issues for trial, as directed by the Supreme Court and the Ninth Circuit.

c. Expert reports and depositions

Pursuant to this Court's April 12, 2018 minute order (ECF No. 192), Defendants served Plaintiffs on July 12, 2018, with their initial identification of the experts whom they may call to

testify at trial. On July 20, 2018, Defendants noticed depositions for all of Plaintiffs' experts for whom Defendants have received a report. That same day, Plaintiffs noticed depositions on the eight experts that Defendants identified in their July 12, 2018 letter. The parties have since conferred on several occasions in an effort to schedule all of the 25 expert depositions over the next two months. As of this filing, Defendants have deposed two of Plaintiffs' experts, Dr. Howard Frumkin, and Dr. Ove Hoegh-Guldberg and intend to depose the remainder in August, September, and early October. Defendants are also working with Plaintiffs to make Defendants' experts available for deposition at mutually convenient times during those same months. Pursuant to this Court's April 12, 2018, minute, Defendants served Plaintiffs on August 13, 2018, with expert reports.

On the evening of Friday, August 10, 2018, Plaintiffs served a 115-page report of James Gustave ("Gus") Speth. The report is not a rebuttal to Defendants' experts; instead it is an affirmative report setting forth Mr. Speth's opinions regarding U.S. energy policy over the past forty years. By serving the report well after all of the Plaintiffs expert reports were due (July 12, 2018), on the Friday before the Monday, August 13 deadline for Defendants' expert reports, Plaintiffs have prevented Defendants from addressing the report in their expert reports. Plaintiffs have long been aware of Defendants' concerns about the prejudice associated with submitting an additional expert report in a manner timed to prevent Defendants from the opportunity to review and offer a rebuttal report. Defendants have asked Plaintiffs to withdraw the report, or in the alternative, allow Defendants to file a rebuttal report, with a due date of October 26, 2018.

d. Other Depositions

On July 25, 2018, Defendants noticed the depositions of all named Plaintiffs during the week of August 6, which was one of the three weeks that Plaintiffs' counsel stated that the

Plaintiffs would be available for deposition. *See* ECF No. 319 at 13. On July 31, counsel for Plaintiffs told Defendants that no named Plaintiffs were available for deposition during the week of August 6. In the deposition notices, Defendants have asked Plaintiffs to produce all documents relating to their alleged injuries and their allegations that Defendants "caused climate change." To date, none of the Plaintiffs have produced this information.

On August 9, Plaintiffs transmitted a letter wherein they indicate that 11 of the 21 named plaintiffs would be available to sit for depositions in Eugene, OR during the week of August 20 – 24, dates that were not previously discussed by the parties for such depositions. Plaintiffs also indicate that an additional five named plaintiffs could be made available to sit for depositions in Eugene that same week, but only on condition that Defendants pay for plaintiffs' travel expenses. Otherwise, Plaintiffs argue, the opportunity to depose those five plaintiffs has been waived. In addition, Plaintiffs propose that depositions for three named plaintiffs take place either immediately before or after expert depositions that will take place in New York, Miami, and Denver, respectively. Finally, Plaintiffs indicate that two named plaintiffs are unavailable for deposition and any opportunity to depose those plaintiffs has been waived.

Defendants do plan to go forward with scheduling depositions of named plaintiffs in Eugene the week of August 20 – 24, and will endeavor to schedule depositions in other cities as Plaintiffs have proposed. Defendants are not willing to pay travel expenses to depose the five out-of-town plaintiffs in Eugene, however Defendants offer to depose those five plaintiffs at a time when and place where those plaintiffs are available, including on weekends if that would work better for Plaintiffs' school schedules.

With respect to the two named plaintiffs for whom Plaintiffs' counsel claims unavailability, Defendants contend that it is neither reasonable nor plausible to claim that the

plaintiffs are unavailable to attend a deposition when there are still two and a half months until trial and when Defendants can depose those two plaintiffs at a time when and place where those two plaintiffs are available. Plaintiffs' refusal to produce named plaintiffs for deposition, and to condition their willingness to participate in depositions prior to trial is prejudicial to Defendants and should not be allowed. This court should require the Plaintiffs to participate in scheduling the depositions of the named plaintiffs.

6. Further Status Conferences

The parties propose that a further in-person status conference be held with this Court in Eugene, Oregon on September 20, 2018 or a date that is convenient for the Court and the parties.

Respectfully submitted August 16, 2018

By */s/*
JULIA A. OLSON

JULIA A. OLSON
1216 Lincoln Street
Eugene, Oregon 97401
Tel: (415) 786-4825

Attorney for Plaintiffs

By */s/*
SEAN C. DUFFY

SEAN C. DUFFY (NY Bar 4103131)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D St., NW
Washington, D.C. 20004
Tel: (202) 305-0445
Fax: (202) 305-0506
E-mail: sean.c.duffy@usdoj.gov

Attorney for Defendants