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

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

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

Attorneys for Plaintiffs

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; et al.,

Defendants.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' TRIAL EXHIBIT LIST

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' TRIAL EXHIBIT LIST

INTRODUCTION

Plaintiffs request that this Court deny Defendants' motion to strike Plaintiffs' entire exhibit list and certain categories of exhibits therein. The Ninth Circuit has found that "only pleadings are subject to motions to strike." *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). "[A] motion to strike materials that are not part of the pleadings may be regarded as an invitation by the movant to consider whether [proffered material] may properly be relied upon." *Natural Resources Defense Council v. Kempthorne*, 539 F.Supp.2d 1155, 1161 (E.D. Cal. 2008) (citing *U.S. v. Crisp*, 190 F.R.D. 546, 551 (E.D. Cal. 1999); *Monroe v. Bd. of Educ.*, 65 F.R.D. 641, 645 (D. Conn. 1975) ("[A] motion to strike has sometimes been used to call courts' attention to questions about the admissibility of proffered material in [ruling on motions].").

Motions to strike are "generally regarded with disfavor" and materials should not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation. *Dayton v. Sears Roebuck & Co.*, No. 2:12-CV-01945-TLN, 2014 WL 5797172, at *2 (E.D. Cal. Nov. 6, 2014); *see Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) ("[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.").

Defendants cannot demonstrate the harm required to overcome the important factors weighing against a motion to strike with regards to either Plaintiffs' entire exhibit list or the specific categories that Defendants argue are objectionable.

I. Defendants Face No Prejudice Where They Had Already Received and Reviewed the Vast Majority of Documents on Plaintiffs' Exhibit List

The harm and prejudice required to support a motion to strike cannot be demonstrated by Defendants as to their request to strike Plaintiffs' *entire* exhibit list because virtually all of the

documents on the list were previously disclosed to Defendants. As several courts have held in discussing Rule 1006 of the Federal Rules of Evidence, the issue is whether the party has made the underlying documents or data available to the opposing party for examination "at a reasonable time and place." Fed. R. Evid. 1006. "A reasonable time and place has been understood to be such that the opposing party has adequate time to examine the records to check the accuracy of the summary." *United States v. Isaacs*, 593 F.3d 517, 527 (7th Cir. 2010). A district judge may "prevent a party from springing summaries of thousands of documents on the opposing party so late in the day that the party can't check their accuracy against the summarized documents before trial." *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 753 (7th Cir. 2005).

Defendants entirely misrepresent the timing of disclosure of the contents of Plaintiffs' Exhibit List. Far from "[f]oisting a massive exhibit list . . . on Defendants a mere two weeks before trial," Mot. at 2, Plaintiffs identified and served the vast majority of these documents on Defendants weeks—even months—before they appeared on Plaintiffs' exhibit list by utilizing: various Motions *in Limine* Seeking Judicial Notice of Publicly Available Documents (Doc. 254, 340, 380); expert reports; the Youth Plaintiffs' records served in response to a far-reaching subpoena issued by Defendants; deposition exhibits; and through evidence attached to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment. As illustrative of the overreach of Defendants' motion, Defendants seek to strike exhibits that are on Defendants' own Exhibit List! Perplexingly, Defendants simultaneously contest the length of Plaintiffs' exhibit list while supporting the length of their own exhibit list (1,616 exhibits) with the justification that many of their exhibits come from similar sources: "Defendants' exhibit list, while also long, contains approximately 650 exhibits exclusive of deposition exhibits, records Plaintiffs produced

to Defendants, and Congressional hearings [introduced through a Motion *in Limine* Seeking Judicial Notice]." Mot. at 4 n.3. Of the 1,938[1] exhibits on Plaintiffs' exhibit list:

— 300 exhibits[2] were served on Defendants on June 28, 2018 as exhibits to Plaintiffs' first Motion *in Limine* Seeking Judicial Notice of Publicly Available Documents. Doc. 254. Defendants reviewed and responded with objections to these exhibits on July 24, 2018, but took either "no position" or lodged "no objection" to the vast majority of these exhibits. Doc. 327, 331, 334. This Court granted in part and denied in part Plaintiffs' Motion *in Limine* on October 15, 2018, taking judicial notice of many of these documents as "not subject to reasonable dispute" under Federal Rule of Evidence 201. Doc. 368.

— 584 exhibits[3] were served on Defendants on August 24, 2018 as exhibits to Plaintiffs' second Motion *in Limine* Seeking Judicial Notice of Publicly Available Documents. Doc. 340. After receiving an extension of almost a month to respond, Doc. 356, and after indicating that the additional time would "provide Defendants with sufficient time to review" the documents, Doc. 346, Defendants responded with objections on

---

[1] Pursuant to this Court's order, Plaintiffs first served Defendants with their exhibit list on October 12, 2018. Declaration of Julia A. Olson in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Strike Plaintiffs' Trial Exhibit List ("Olson Decl.") ¶ 7. Plaintiffs sent an updated exhibit list on October 18, 2018. Olson Decl. ¶ 7. Plaintiffs provided Defendants with summaries of any changes made to the October 18 version in reference to the October 12 version. Olson Decl. ¶ 7. Defendants' Motion refers to Plaintiffs' October 18, 2018 version of their exhibit list, which contained 1,902 exhibits (Defendants incorrectly state the total as 1,908 in their Motion). Olson Decl. ¶ 7. Defendants' Motion to Strike was filed before Plaintiffs filed their exhibit list with the Court; Plaintiffs' final exhibit list filed with this Court on October 19, 2018 contained 1,938 exhibits. Doc. 402-1. Throughout this Response, Plaintiffs will refer to exhibits contained within the filed version of their exhibit list, Doc. 402-1.

[2] Exh. P-1 to P-300.

[3] Exh. P-301 to P-884.

September 28, 2018, objecting to only two exhibits and taking either "no position" or "no objection" on the remaining exhibits. Doc. 357, 366. This second Motion *in Limine* is still pending before this Court.

— 452 exhibits[4] were served on Defendants in Plaintiffs' third Motion *in Limine* Seeking Judicial Notice of Publicly Available Documents on October 15, 2018, the deadline set by this Court for filing all Motions *in Limine*. Doc. 380. Many of these exhibits were first exchanged with Defendants on September 28, 2018 in an attempt to resolve authenticity disputes prior to filing a third Motion *in Limine*. Olson Decl. ¶ 10. This third Motion *in Limine* is still pending before this Court.

— 55 exhibits[5] are medical and personal records of Plaintiffs, responsive to Defendants' broad-reaching subpoena issued on July 25, 2018 requesting such documents in advance of depositions. Olson Decl. ¶ 13. These records were produced to Defendants as they became available to counsel for Plaintiffs. Olson Decl. ¶ 13. The vast majority of these records were served on Defendants in August 2018, with some additional documents served in early October. Olson Decl. ¶ 13. These same records and documents are included on Defendants' exhibit list. *See* Doc. 396-1 at 82–93.

— 427 exhibits[6] are expert reports of Plaintiffs' expert witnesses and some of the associated exhibits and cited references. Defendants first received many of these expert reports (including the associated exhibits and cited references) in July and August 2017. Olson Decl. ¶ 14. Plaintiffs served Defendants with updated versions of

[4] Exh. P-885 to P-1336.
[5] Exh. P-1337 to P-1391.
[6] Exh. P-1502 to P-1908, P-1919 to P-1938.

these expert reports and any additional expert reports in April 2018, with the exception of one report served in August 2018 and Plaintiffs' expert rebuttal reports served in September 2018. Olson Decl. ¶ 14. Plaintiffs supplemented these expert reports with additional references and minor edits in advance of some experts' depositions. Olson Decl. ¶ 14. These reports, references, and associated exhibits were theoretically reviewed and examined by Defendants in advance of their depositions of Plaintiffs' experts, and Defendants had the opportunity to further explore these sources during those depositions. Many of these same documents are included on Defendants' exhibit list as exhibits used in these experts' depositions. *See* Doc. 396-1 at 65–79.

— 57 exhibits[7] are documents used as exhibits at depositions of Defendants' experts, which all occurred in August and September 2018. Olson Decl. ¶ 15. These same documents are included on Defendants' exhibit list. *See* Doc. 396-1 at 57–65.

— 2 exhibits[8] are deposition transcripts from Plaintiffs' July 2017 depositions of C. Mark Eakin, Coordinator for Department of Commerce's National Oceanic and Atmospheric Administration's Coral Reef Watch program, and Dr. Michael Kuperberg, Executive Director of the U.S. Global Change Research Program, neither of whom are testifying at trial during Plaintiffs' case in chief. These deposition transcripts are also included on Defendants' exhibit list and have been available to Defendants since the depositions were taken over one year ago. *See* Doc. 396-1 at 56–57.

---

[7] Exh. P-1444, P-1445, P-1447 to P-1501.
[8] Exh. P-1443 and P-1446.

After accounting for all of the exhibits listed above that Defendants have had weeks—and, in some cases, months and years—to review prior to receiving Plaintiffs' exhibit list, there are 61 remaining exhibits that may be new to Defendants as of service of Plaintiffs' exhibit list. Many of these "new" exhibits were produced by Defendants themselves.[9] Reviewing 61 new documents in two weeks is hardly prejudicial, especially considering that Defendants themselves requested to extend the deadline for exchanging and filing exhibit lists closer to trial—the deadline to exchange exhibit lists was originally set by the Court for October 1, 2018. Doc 343, 356; Olson Decl. ¶ 2.

Defendants' complaint that they will have to spend "hundreds of hours" reviewing these exhibits in the weeks before trial is preposterous considering over 96% of these exhibits have long been in Defendants' possession. *See GSI Tech., Inc. v. United Memories, Inc.*, 5:13-CV-01081-PSG, 2015 WL 12942202, at *2 (N.D. Cal. Oct. 23, 2015) (rejecting party's argument to exclude exhibits that were allegedly "new" when they were produced by the parties during discovery). Defendants cannot shift the blame to Plaintiffs if they failed to perform adequate review of these exhibits in the months that the documents have been in their possession and therefore must spend time reviewing all of them now. Importantly, Defendants have already had the opportunity to lodge specific objections as to authenticity to almost three-quarters of these exhibits through Plaintiffs' three Motions *in Limine*. Olson Decl. ¶¶ 8–10. Defendants in fact opted not to lodge objections to most exhibits filed through these Motions *in Limine*, instead either lodging "no objection" or taking "no position" on the vast majority. Olson Decl. ¶¶ 8–10. Most of the documents introduced through Plaintiffs' Motions *in Limine* are publicly available

[9] *See, e.g.*, Exh. P-1234, P-1236, P-1237, P-1238, P-1242, P-1258, P-1259; *cf.* Exh. P-1335, P-1336, P-1394, P-1397–P-1406 (videos of official congressional testimony hosted on C-SPAN).

federal agency documents and reports, which, in Defendants' own words, "are likely to be deemed admissible by the Court." Mot. at 4 n.3.

In contrast to the months Defendants have had to review most of the exhibits on Plaintiffs' exhibit list, Plaintiffs were only made aware of close to 450 of the 1,616 exhibits on Defendants' exhibit list on October 12, 2018, when Defendants notified Plaintiffs of their intention to file a Motion *in Limine* seeking judicial notice of those documents. Olson Decl. ¶ 4. Plaintiffs also learned of Defendants' intention to include additional, previously undisclosed documents featured on their exhibit list on October 12 upon receipt of Defendants' first version of their exhibit list. Olson Decl. ¶ 4. Before October 12, Defendants had previously indicated to Plaintiffs that they anticipated having around 60–80 exhibits on their exhibit list. Olson Decl. ¶ 3. While Defendants provided Plaintiffs with a *list* of these documents on October 12, Plaintiffs did not receive copies of all of these documents until the week of October 15—and some not until October 18, 2018, the day before the deadline to file exhibit lists. Olson Decl. ¶ 5; *see also* Plaintiffs' Objections to Defendants' Exhibit List, Doc. 400. This late service is in spite of the fact that most of these exhibits were responsive to Plaintiffs' Contention Interrogatories first served on Defendants on August 17, 2018 and to which, after Plaintiffs granted a 3-week extension, Defendants provided partial responses on September 28, 2018 and amended responses on October 7, 2018. *See* Plaintiffs' Motion to Compel Responses to Interrogatories, Doc. 388. Defendants did not identify ***any*** of these documents in ***any*** of these responses. Olson Decl. ¶ 6; *see also* Plaintiffs' Objections to Defendants' Exhibit List, Doc. 400 at 1–3. Defendants cannot viably complain of prejudice from too little time to review Plaintiffs' exhibits when Plaintiffs will have far less time to review many of the documents that Defendants failed to disclose in

discovery yet included on their exhibit list. This Court should deny Defendants' Motion to Strike Plaintiffs' entire exhibit list.

II. Plaintiffs' Exhibit List Reasonably Reflects What Plaintiffs Intend to Introduce at Trial

Plaintiffs have narrowed their exhibit list to those exhibits reasonably anticipated for use at trial, and will withdraw any documents identified as unnecessary during the dynamic process of preparing for trial testimony, as is standard pretrial practice. Notably, the volume and contents of Plaintiffs' exhibit list is a direct result of Defendants' refusal to respond to Plaintiffs' requests for admission, engage in Rule 30(b)(6) depositions, or to agree to any facts beyond those asserted in the Answer almost two years ago, and the concomitant threat to run to the Ninth Circuit Court of Appeals with a petition for writ of mandamus on any discovery order Plaintiffs might have obtained had they moved to compel Defendants to participate in basic discovery. Olson Decl. ¶ 11. Plaintiffs requested judicial notice of entire documents through the Motion *in Limine* process in lieu of requests for admissions of specific facts at the behest of Defendants. Olson Decl. ¶ 11. Similarly, Plaintiffs have had to rely on statements set forth in documents produced by Defendants rather than on targeted statements made by representatives for Defendants in Rule 30(b)(6) depositions. Olson Decl. ¶ 11. Defendants now want it both ways—having forced Plaintiffs towards inherently more document-intensive discovery processes, they now complain that Plaintiffs rely on too many documents.

Nonetheless, Plaintiffs have gone to great lengths to narrow their exhibit list and have included only those exhibits that Plaintiffs reasonably believe will be used at trial. Olson Decl. ¶ 7. Plaintiffs need not know in advance with certainty that *all* exhibits listed on their exhibit list will be introduced at trial. *Labyrinth Optical Techs. LLC v. Alcatel-Lucent USA, Inc.*, 2015 WL 12720323, at *8 (C.D. Cal. Mar. 10, 2015) (citing 20% as an acceptable proportion of exhibits on

an exhibit list not ultimately used at trial). Defendants' speculations as to how, or whether, Plaintiffs will use these exhibits at trial are not grounds to strike any of the categories of otherwise admissible exhibits targeted by Defendants. This Court should not strike any of the exhibits offered by Plaintiffs and should reserve evaluation of their probative value for when and if they are presented at trial for a particular purpose.

A. News Articles Are Appropriate Sources of Evidence

The news publications cited on Plaintiffs' exhibit list are appropriate and admissible sources of evidence. Under the Federal Rules of Evidence, news articles "are self-authenticating" and "require no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902. Indeed, Defendants themselves include many news articles on their own exhibit list.[10] *Cf. Luong v. City & Cty. of San Francisco*, C 11-05661 MEJ, 2013 WL 1191229, at *7 (N.D. Cal. Mar. 21, 2013) ("Defendants noted that such materials were included in its exhibit list, thus there is no prejudice resulting from Plaintiffs' untimely inclusion of these exhibits on their list."). Defendants' arguments for exclusion are thus based entirely on speculation about Plaintiffs' intended uses for these exhibits. While the role of these news articles may vary by their associated witness, valid and intended probative purposes of these news articles include assisting the Court in evaluating the opinions of each parties' expert witnesses in this case under Federal Rule of Evidence 703 and as a means to refresh the recollection of the Youth Plaintiffs as to specific details when testifying about injurious events recorded in their local news. *See* Fed. R. Evid. 803(5); *see also Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998) (finding newspaper articles sources reasonably relied by experts in the field and thus admissible to support expert

[10] *See, e.g.*, Doc. 396-1, Exh. DX-897, DX-923, DX-924, DX-926, DX-1061, DX-1065.

testimony under Rule 703). In addition, Plaintiffs have the burden in this case to establish whether "the government *knew* its acts caused" danger to the Youth Plaintiffs; thus newspaper articles can be relevant to establish government knowledge at the time the articles were published. Opinion and Order Denying Defendants' Motion to Dismiss, Doc. 83 at 86. Defendants' speculation as to the role that the entire category of "news articles" will play in Plaintiffs' case at trial is not enough to support their burden to demonstrate harm worthy of a motion to strike all of these exhibits. *Cf. Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 2571332, at *11 (N.D. Cal. June 30, 2012) (rejecting motion to exclude testimony as cumulative where Defendants had "not submitted a more narrowly tailored request to exclude" and because exclusion as cumulative "is an issue better resolved at trial.").

B. Publications of Non-Governmental Organizations Are Appropriate Sources of Evidence

Contrary to Defendants' assumptions, the non-governmental organization publications included on Plaintiffs' exhibit lists are all tethered to Plaintiffs' expert witnesses and thus admissible as useful support for the Court's evaluation of these experts under Federal Rule of Evidence 703. Olson Decl. ¶ 11 (noting that Plaintiffs' second Motion *in Limine* featured sources from expert reports' references lists); *see United States v. Cazares*, 788 F.3d 956, 977 (9th Cir. 2015) ("Expert witnesses may rely on inadmissible hearsay in forming their opinions, so long as it is of a type reasonably relied upon by experts in their field."); *Odyssey Wireless, Inc. v. Apple Inc.*, No. 15-CV-01735-H-RBB, 2016 WL 7644790, at *8 (S.D. Cal. Sept. 14, 2016) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.") (internal citations and quotations omitted). It is also worth noting that Defendants themselves include sources from nongovernmental organizations on their exhibit list,

the vast majority of which are totally unrelated to the testimony of their experts and are thus objectionable as irrelevant and hearsay.[11] *Cf. Luong*, 2013 WL 1191229, at *7 ("Defendants noted that such materials were included in its exhibit list, thus there is no prejudice resulting from Plaintiffs' untimely inclusion of these exhibits on their list."). Therefore, as Defendants admit, publications of non-governmental organizations are admissible for evaluating experts' opinions under Rule 703 and should not be categorically stricken from Plaintiffs' exhibit list.

C. Scientific Articles Supporting Plaintiffs' Experts' Opinions Are Not Cumulative

While Defendants attempt to place a numerical cap on relevant scientific evidence, Defendants have not demonstrated that the speculative cumulativeness of any *specific* scientific articles on Plaintiffs' exhibit list will outweigh their probative value. *Cf. Apple, Inc.*, 2012 WL 2571332, at *11 (rejecting motion to exclude testimony as cumulative where Defendants had "not submitted a more narrowly tailored request to exclude" and because exclusion as cumulative "is an issue better resolved at trial."). Arguing that multiple articles focused on the extremely broad categories of "coral reefs" or "arctic ice and ice melt" are cumulative reveals Defendants' ignorance of the depth and intricacies of Plaintiffs' experts' testimony. Further, Plaintiffs have not included *all* scientific articles referenced by Plaintiffs' experts on their exhibit list, but have rather worked to narrow each experts' references for inclusion on the exhibit list to only those articles believed to be most relevant and useful to the Court. Olson Decl. ¶ 7. Defendants do not attempt to—and cannot—demonstrate that these scientific articles listed as references to Plaintiffs' expert reports "could have no possible bearing on the subject matter of the litigation," a finding necessary to strike these exhibits from Plaintiffs' exhibit list. *Dayton*,

[11] *See, e.g.*, Doc. 396-1, Exh. DX-932.

2014 WL 5797172, at *2. Whether any of these articles ultimately become cumulative of other testimony despite Plaintiffs' efforts at streamlining "is an issue better resolved at trial." *Apple, Inc.*, 2012 WL 2571332, at *11.

D. Videos and Films Are Appropriate Sources of Evidence

Defendants lodge an array of objections to Plaintiffs' video exhibits, none of which are convincing. First, Defendants argue that videos of statements made by former Presidents are not relevant to the claims of this case. While Defendants are correct that Plaintiffs' claims challenge the actions and acts of omission of federal agencies, as the Chief Executive, a President does not make statements untethered from executive agency research, actions, and inactions, nor do agencies act untethered from executive command. *See generally* Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001); *cf. United States v. Hardrick*, 766 F.3d 1051, 1055 (9th Cir. 2014) (finding video evidence probative as to Defendants' knowledge). Defendants also complain of the length of these videos, ignoring the very common practice of distilling an exhibit down to its relevant elements for presentation at trial.

Second, Defendants argue that video news reports are inadmissible as hearsay or otherwise. These videos, aired on news networks ABC, NBC, and CBS in the 1980s, report on actions and inactions of Defendants, demonstrate the extent of Defendants' knowledge of global warming in the 1980s, and feature statements by federal government representatives and researchers. *See, e.g.*, Exh. P-1415 (statement of NASA official); Exh. P-1416 (statement of NASA official and expert witness James Hansen); Exh. P-1417 (coverage of draft EPA report to Congress); *cf. Hardrick*, 766 F.3d at 1055 (finding video evidence probative as to Defendants' knowledge). These videos directly bear on the subject matter of the litigation and cannot be prejudicial to Defendants in that they present statements made and actions taken by Defendants

themselves, *see* Fed. R. Evid. 801(d)(2), and thus should not be stricken from Plaintiffs' exhibit list. *Dayton*, 2014 WL 5797172, at *2.

Third, Defendants argue that videos of Plaintiffs near their homes and making statements about particular climate impacts are not probative. However, as young lay witnesses lacking the expertise to describe particular geographical features and impacts, these videos are a helpful and efficient way to demonstrate the physical impacts of climate change occurring near Plaintiffs' homes to the Court. These videos are extremely relevant and probative to Plaintiffs' claims of injury and demonstrate Plaintiffs' particularized injuries in a visual way. *See United States v. Rodriguez*, No. 3:10-CR-00120-EJL, 2011 WL 13196522, at *4 (D. Idaho July 25, 2011), *aff'd*, 502 F. App'x 637 (9th Cir. 2012) (finding video evidence of crime relevant and probative to claims because it "places the testimony of [witnesses] in perspective."). Further, most of these videos contain statements made by Plaintiffs themselves reflecting on extreme weather events or climate impacts, and thus qualify as the testifying Plaintiffs' present sense impression of these impacts. Fed. R. Evid. 803(1); *see, e.g.*, Exh. P-1437, P-1438. These videos directly bear on the subject matter of Plaintiffs' injuries, making Plaintiffs' claims of injuries more understandable to the Court, and thus should not be stricken from Plaintiffs' exhibit list. *Dayton*, 2014 WL 5797172, at *2.

E. Historical Government Documents Are Appropriate Sources of Evidence Where Plaintiffs' Claims Hinge on Longstanding Knowledge and the Nation's History

Plaintiffs' historical government documents are directly relevant and probative as to Plaintiffs' claims of a previously unenumerated fundamental right and to demonstrate Defendants' longstanding knowledge of the dangers of climate change. In recognizing unenumerated fundamental constitutional rights, the Supreme Court has long inquired whether such a right "is fundamental to the Nation's scheme of ordered liberty" or "deeply rooted in this

Nation's history and tradition." *McDonald v. City of Chicago, IL*, 561 U.S. 742, 744 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Although this analysis "has not been reduced to any formula," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)), it inherently involves factual analysis to understand whether that right was deeply rooted in the Nation's history and tradition. Plaintiffs' evidence from the Nation's "history and tradition" is quite relevant and critical to Plaintiffs' claims regarding a previously unenumerated fundamental right. Fed. R. Evid. 403. Further, these historical exhibits were references to Plaintiffs' expert witness Andrea Wulf's expert report and directly underpin her anticipated testimony at trial "related to the historical evidence that a balanced order of nature and humanity's connection with nature, including the climate system, is deeply embedded in the history and tradition of the United States." Plaintiff's Amended Witness List, Doc. 387 at 12; *see* Fed. R. Evid. 703. Defendants did not seek to exclude or limit the testimony of Andrea Wulf in any way.

As to exhibits relating to more recent administrations, as Defendants admit, "[t]he crux of Plaintiffs' claims is that Defendants have known for *more than* fifty years that carbon dioxide from the burning of fossil fuels was causing global warming." Mot. at 9 (emphasis added). Therefore, relevant evidence to this effect is not strictly limited to the Lyndon B. Johnson administration as Defendants suggest. Plaintiffs have included evidence from earlier federal administration and any such evidence is extremely relevant and probative as to Defendants' longstanding knowledge of climate change.

CONCLUSION

For the reasons set forth above, this Court should deny Defendants' motion to strike Plaintiffs' exhibit list and certain categories of exhibits.

Respectfully submitted this 2nd day of November, 2018,

/s/ Julia A Olson
JULIA A. OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

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

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

Attorneys for Plaintiffs