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

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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

Dated: April 19, 2018

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Climate change represents an urgent and potentially irreversible danger to human societies and the planet. As Defendants themselves acknowledged, "[c]limate change poses a monumental threat to Americans' health and welfare by driving long-lasting changes in our climate, leading to an array of severe negative effects, which will worsen over time." Am. Compl. ¶ 2 (citing Fed. Defs.' Obj. to F&R 1, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. May 2, 2016)). The science is clear: climate change is on track to cause human deaths, shorten human life spans, result in widespread damage to property, threaten human food sources, drastically affect air quality, and fundamentally alter the planet's ecosystem. *See, e.g.*, *id.* ¶¶ 48, 52, 55-57, 73, 77. Consistent with the global scientific consensus, the 2017 U.S. Climate Science Special Report found it "extremely likely" that human activities, especially emissions of greenhouse gases, are the "dominant cause" of climate change. *Id.* ¶¶ 55, 56, 101. Defendants have been on notice of these dangers for over fifty years. *Id.* ¶¶ 28-29; 84-102.

In response to the clear and present danger presented by climate change, the Federal Government previously "[r]ecogniz[ed] the need to act" and "engaged in numerous initiatives to reduce the emissions of carbon dioxide (CO_2) and other greenhouse gasses (GHGs) that contribute to global warming." *Id.* ¶ 2. In the past year, however, Defendants abandoned their responsibilities by rolling back these

protections ("the Rollbacks"), using junk science to wage a war on facts, data, and reliable principles and methods. In doing so, Defendants are not only increasing human contribution to climate change, they are rendering the government less able to deal with its life-threatening consequences, thereby affirmatively increasing the danger to Plaintiffs in violation of their constitutional rights.

In moving to dismiss Plaintiffs' claims, Defendants attempt to construct hurdles based on standing and ripeness to avoid the merits. In fact, Defendants address only one of three due process theories raised in Plaintiffs' Amended Complaint,[1] and make only a passing attempt to deal with Plaintiffs' public trust claim. However, because Plaintiffs have stated valid, ripe claims for relief, raising precisely the sorts of constitutional claims that are the province of the Judiciary, Defendants' Motion should be denied.

STANDARD OF REVIEW

At the motion to dismiss stage, the complaint is construed liberally, with the court accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bel Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (pleading standard "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to

[1] Even after Plaintiffs filed their Amended Complaint to further clarify their constitutional theories, Defendants made no substantive changes to their renewed Motion to Dismiss.

relief that is plausible on its face"). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (noting the facial plausibility standard "is not akin to a 'probability requirement'").

Here, Plaintiffs' well-pleaded complaint contains detailed allegations that are facially plausible and provide fair notice to Defendants. Accordingly, Defendants' Motion to Dismiss should be denied.

ARGUMENT

I. Plaintiffs Have Standing to Bring Their Claims.

Defendants' contention that Plaintiffs lack standing is wrong on the law and the facts. Plaintiffs meet the requirements of showing an injury that is "concrete and particularized," "actual or imminent," fairly traceable to Defendants' conduct, and capable of redress through this lawsuit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Defendants have acknowledged that human contribution to climate change presents a clear and present danger to life and property. *See, e.g.*, Am. Compl. ¶¶ 48, 85, 87. In rolling back critical climate change protections, Defendants act in defiance of a scientific consensus establishing that their affirmative actions will inevitably increase the severity of the consequences of climate change, to the detriment of Plaintiffs.

A. Plaintiffs' Claims Properly Draw on the Expertise of the Judiciary to "Say What the Law Is."

There is no doctrine preventing a court from hearing cases against the Executive Branch, as Defendants appear to argue. It is the Judiciary's duty to determine when the Executive has committed constitutional violations, and Plaintiffs allege such violations here. As a check on the other branches of government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[2] In performing this constitutional duty, courts must sometimes declare acts of Congress and the President unconstitutional. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 419 (1998); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In fact, this is precisely how separation of powers must function—the Judiciary acts as a check on the Executive Branch, ensuring that it does not take actions that violate the Constitution.[3]

Indeed, as the Supreme Court articulated in rejecting the narrow portrait of Judiciary authority Defendants paint here, Defendants "err[] by presuming that

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[2] *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (in *Marbury*, the Court "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

[3] *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty.").

interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). The Supreme Court "ha[s] long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Id.* at 703; *see also Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

Defendants erroneously cite *Allen v. Wright*, which only involved plaintiffs bringing "general complaints about the way in which government goes about its business," not the "specific threat of being subject to the challenged practices" Plaintiffs allege here. 468 U.S. 737, 760 (1984). Defendants also mistakenly rely on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). While the Court stated that the standing analysis was more "rigorous" when courts were analyzing whether "an action taken by one of the other two branches of the Federal Government was unconstitutional," the Court never ruled that the Judiciary should abstain from making such rulings. *See id.* at 408 (internal quotations omitted).

B. Plaintiffs Have Alleged Concrete, Imminent, and Particularized Injuries.

In arguing that Plaintiffs do not allege particularized injuries, Defendants focus only on Plaintiffs' allegations regarding the widespread harm resulting from climate change, and overlook the allegations where Plaintiffs lay out the particular

injuries they face, including specific organizational harms to the Clean Air Council ("CAC")[4] and severe climate-related health problems and threatened harm from extreme weather events for the individual Plaintiffs. *See* Am. Compl. at ¶¶ 8-10, 66; Ex. A, Decl. of Joseph O. Minott. That these injuries may affect others in addition to Plaintiffs does not mean they are not particularized. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."); *Massachusetts v. E.P.A.*, 549 U.S. 497, 522 (2007) (upholding standing related to climate change harms resulting from greenhouse gas emissions, rejecting arguments that the harms were "widely shared").[5] The contrary result would be absurd—a harm inflicted upon a small group of

[4] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) ("In determining whether [an organization has standing], we conduct the same inquiry as in the case of an individual"). CAC also has associational standing to bring suit because "(a) its members would otherwise have standing to sue . . . ; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); Ex. A.

[5] *See also Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process" as long as "the party seeking review be himself among the injured."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'"); *Schuchardt v. President of the United States*, 839 F.3d 336, 345 (3d Cir. 2016) (finding standing to challenge general government surveillance through PRISM).

individuals could be the basis for a lawsuit, but as the harm became more widespread, *no plaintiff* could sue to remedy that harm. *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.").

Plaintiffs' Complaint demonstrates that these harms are concrete and imminent,[6] because Plaintiffs describe the disastrous consequences of climate change that will result from increasing greenhouse gas emissions. *See* Am. Compl. at ¶¶ 29, 43-47, 56, 60, 91, 93, 98-99, 166. As such, Plaintiffs' Complaint sufficiently pleads imminent, concrete, particularized injuries.

C. Plaintiffs' Injuries Are Traceable to Defendants' Conduct.

Defendants' arguments under the second *Lujan* factor are unavailing because Plaintiffs' Complaint alleges that Defendants' actions increase the United States' contribution to climate change and describes the harmful effects those actions will have. Am. Compl. at ¶¶ 139-171. It is of no consequence that Defendants' challenged actions are discussed in the aggregate, because Plaintiffs are permitted

[6] Because Plaintiffs seek declaratory relief, they "need not have suffered the full harm expected." *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 193-94 (3d Cir. 2004) ("[A] plaintiff has Article III standing if there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.") (internal quotations omitted).

to bring claims alleging that widespread, systemic Constitutional deficiencies create a "'substantial risk of serious harm.'" *See Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)); *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (potential constitutional violations may be analyzed "in combination" when they have a "mutually enforcing effect" of depriving a constitutional interest).[7] Nor are Plaintiffs' challenges "generalized." Rather, they target a specific list of rollback actions. Am. Compl. at ¶¶ 141, 143.[8]

The Supreme Court has already rejected Defendants' argument that redress against the United States would be ineffective because it would only address one contributor to climate change. The Supreme Court found that such an argument "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." *See Massachusetts*, 549 U.S. at 524. *Massachusetts* found that emissions from vehicles alone were sufficient to show causation for standing purposes. *Id.* at 524-25. Here, there is a stronger showing of causation, as the Rollbacks remove a wide range of environmental regulations that will increase emissions from various sectors.

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[7] *See also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (finding standing based on aggregate climate harms caused by six electric power corporations that operated multiple power plants in twenty states), *rev'd on other grounds*, 564 U.S. 410 (2011).

[8] Defendants' attempt to raise the lack of "specific alleged failure[s] to regulate," Mot. at 11, is irrelevant to Plaintiffs' lawsuit, which concerns Defendants' affirmative de-regulation of climate protections, not failures to regulate.

The Court should reject Defendants' argument that they are not the actual cause of emissions. Plaintiffs have standing to sue government regulators where the "administrative agenc[ies] authorized the injurious conduct." *Am.'s Cmty. Bankers v. F.D.I.C.*, 200 F.3d 822, 827 (D.C. Cir. 2000); *A v. Nutter*, 737 F. Supp. 2d 341, 357 (E.D. Pa. 2010). Furthermore, Defendants' assertion that the United States is not the "predominant" source of greenhouse gas emissions is misleading. Historically, the United States has been the number one contributor of such emissions. While those emissions were surpassed by other countries in more recent years, Defendants' rollback actions will increase United States emissions while other countries simultaneously reduce their emissions.[9] Plaintiffs' allegations establish Defendants' constitutional violations and their anticipated effects. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1246 (D. Or. 2016) ("[F]ossil fuel combustion accounts for the lion's share of greenhouse gas emissions produced in the United States; defendants have the power to increase or decrease those emissions; and defendants use that power to engage in a variety of activities that actively cause and promote higher levels of fossil fuel combustion."). More

[9] *See* Am. Compl. ¶ 127 n.137 (citing Niklas Hohne et al., *Action by China and India slows emissions growth, President Trump's policies likely to cause US emissions to flatten*, Climate Action Tracker (May 15, 2017), http://climateactiontracker.org/assets/publications/briefing_papers/CAT_2017-05-15_Briefing_India-China-USA.pdf). This forecast was done before more recent further rollback actions, such as the rollback of vehicle emission regulations, which will only worsen the outlook.

granular causation issues are properly left for later stages of the litigation. *See Am. Elec. Power Co.*, 582 F.3d at 347 (causation in climate cases is "best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing").

D. Plaintiffs' Injuries Are Redressable by This Court.

The relief Plaintiffs seek is within the Court's authority to grant—a declaration that any rollbacks that exacerbate the life-threatening effects of climate change violate Plaintiffs' constitutional rights. *See* Am. Compl. § VII; *Plata*, 363 U.S. at 526 (courts have broad authority "to fashion practical remedies when confronted with complex and intractable constitutional violations"); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) ("The power of the federal courts to grant equitable relief for constitutional violations has long been established."), *abrogated in nonrelevant part by Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012).

The declaration requested by Plaintiffs would address the "monumental threat" Defendants' actions pose by leading to changes in Defendants' climate policies.[10] If Defendants do not change course in response to a declaration, Plaintiffs could obtain an order enjoining Defendants' actions. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the

[10] *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (finding it "substantially likely" that the Executive Branch "would abide by an authoritative interpretation of the census statute and constitutional provision by the [Court]").

jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . ."). It is proper for the Court to grant such relief against the Executive Branch. *See Clinton*, 520 U.S. at 702-06. This is particularly true when the relief can be achieved through an order directed at Executive officers. *See Franklin*, 505 U.S. at 803 ("For purposes of establishing standing, . . . we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.").[11] That is the case here, where orders on climate policy, including Executive Orders issued by the President, take effect through administrative agency officials, including Defendants Pruitt, Perry, and Zinke.

Defendants' other arguments mischaracterize the relief Plaintiffs seek. Plaintiffs have not asked the Court to direct Defendants to "perform particular

[11] *See also Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) ("In most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials. . . . If Swan's injury can be redressed by injunctive relief against subordinate officials, he clearly has standing . . . ."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (granting injunction against Secretary of Commerce to prevent unconstitutional Executive Order issued by the President from taking effect); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1331 n.4 (D.C. Cir. 1996). The case cited by Defendants, *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005), was ultimately decided on facts different from the present case: "Finally, there are no other officials—subordinate or otherwise—to whom the Court could issue an order that would redress the constitutional violation alleged by Newdow in this case." *Id.* at 282.

Executive acts" or "enact additional authority." *See* Mot. at 11-12. Rather, Plaintiffs have asked the Court to declare that Defendants' actions are unconstitutional—precisely the proper domain of the Judiciary.

In sum, the Supreme Court's finding in *Massachusetts v. EPA* forms a basis for Plaintiffs' standing in this case: "[G]lobal warming has already harmed and will continue to harm [Plaintiffs]. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if [Plaintiffs] received the relief they seek. We therefore hold that [Plaintiffs] have standing to challenge [Defendants' rollbacks]." *Massachusetts*, 549 U.S. at 526.

II. Plaintiffs' Claims Are Ripe.

Climate change threatens human survival. Scientific evidence establishes that if "unabated, continued greenhouse gas emissions, especially CO_2, will initiate dynamic climate change," the consequences of which will soon be irreversible. Am. Compl. ¶¶ 60, 73, 77. Despite actual knowledge of these dangers, Defendants have taken steps to increase the harm to Plaintiffs. *Id.* ¶¶ 32-34, 84-102.

Rather than address these troubling realities, Defendants attempt to distract the Court from reviewing the merits of this action by focusing on an irrelevant body of administrative law. But the "acts of all [government] officers must be justified by some law," and when an official violates the law, the courts "generally have jurisdiction to grant relief. . . . Otherwise the individual is left to the

absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Reich*, 74 F.3d at 1327 (finding plaintiffs could pursue constitutional violation, even though they could not pursue Administrative Procedure Act ("APA") claim challenging regulations implementing Executive Order due to lack of "agency action"); *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"). Indeed, Plaintiffs' claims are not only ripe for review—they are urgent.

A. The Procedural Mandates of the APA Are Irrelevant.

Plaintiffs' claims are ripe for judicial review based on the controlling standard in this Circuit. Rather than rely on—or even mention—that standard, Defendants erroneously rely on 5 U.S.C. § 706, the statutory provision controlling the scope of review in APA actions, to argue Plaintiffs' claims are not ripe. Third Circuit law, however, is clear that this section is irrelevant to non-APA claims.

The only section of the APA relevant to this action is 5 U.S.C. § 702, which "waives sovereign immunity in 'nonstatutory' review of agency action under section 1331." *Jaffee v. United States*, 592 F.2d 712, 718 (3d Cir. 1979); *Wigton v.*

Berry, 949 F. Supp. 2d 616, 626 (W.D. Pa. 2013) (noting that the Third Circuit has "emphasized that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA") (internal quotations omitted).[12] "Nonstatutory" claims are brought outside the statutory provisions "that specially provide for review of agency action." *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 413 n.18 (3d Cir. 2012).

Defendants erroneously cite *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) to mistakenly suggest that Plaintiffs' non-APA claims are subject to the APA's procedural requirements. No such support can be found in the opinion.[13] In

[12] *See also Khodara Envtl., Inc. ex rel. Eagle Envtl., L.P. v. Burch*, 245 F. Supp. 2d 695, 711-12 (W.D. Pa. 2002) (collecting cases), *rev'd and remanded on other grounds by Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187 (3d Cir. 2004) ("[T]he procedural mandates of the Administrative Procedures Act are not controlling here, as this case does not arise under the APA."); *McKoy v. Spencer*, 271 F. Supp. 3d 25, 32 (D.D.C. 2017) ("It is well-established that one need not assert an APA claim to make use of the APA's waiver of sovereign immunity.").

[13] In reversing an APA ruling, the Supreme Court merely referenced the APA's waiver of sovereign immunity in noting the record did not allow for "mature consideration" of the plaintiffs' Fifth Amendment claim. *Lincoln*, 508 U.S. at 195. In fact, the *Lincoln* Court was not even presented with the question of whether constitutional claims are reviewed pursuant to the APA. The only other authority that Defendants offer for the sweeping proclamation that the APA controls Plaintiffs' constitutional law claims is a District Court decision outside this Circuit citing the *dissent* in *Webster*, 486 U.S. 592, a Supreme Court case with a majority opinion that is favorable to Plaintiffs. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014) (discussing the dissent in *Webster*, where the Court held that the CIA's decision to terminate an employee was unreviewable under the APA pursuant to 5 U.S.C. § 701(a)(2), but constitutional claims arising out of the same conduct were judicially reviewable).

addition, the Third Circuit has directly addressed this precise issue and rejected Defendants' position. *See Treasurer of New Jersey*, 684 F.3d at 397 (finding District Court erred in "holding that the scope of the waiver of sovereign immunity under section 702 is limited to 'final agency action'"). The Third Circuit explained that the "District Court's conclusion was at odds with opinions of several courts of appeals," which clarified that section 702's waiver of sovereign immunity extended to all nonmonetary claims against federal agencies and officers, regardless of whether the claims challenged a "final" action under the APA. *Id.* at 397-400. The *Treasurer* panel emphasized that the legislative history indicated that the waiver of sovereign immunity was not limited to APA suits. *Id.* at 400.[14]

The Third Circuit rejected similar arguments in *Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980), where the plaintiffs brought suit concerning the public health threat posed by radiation exposure within a 200 mile radius of a nuclear power plant, following an accident. Like this action, the plaintiffs alleged a violation of

[14] *See also Wigton v. Berry*, 949 F. Supp. 2d 616, 626 (W.D. Pa. 2013) ("Accordingly, § 702's waiver, which refers to 'agency action,' is not subject to 5 U.S.C. § 704's limitation of 'final agency action,' and could therefore encompass at least Plaintiffs' constitutional claims . . . brought outside the APA."); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006) (finding APA "House and Senate Reports' repeated declarations that Congress intended to waive immunity for 'any,' and 'all,' actions for equitable relief against an agency make clear that no such limitations were intended" and holding that "APA § 702's waiver of sovereign immunity permits not only Trudeau's APA cause of action, but his nonstatutory and First Amendment actions as well," and therefore plaintiff did not need to establish "final agency action") (internal citations omitted).

their constitutional rights, and they sought a public warning from the defendants, President Jimmy Carter and the United States. *Id.* In rejecting the defendants' argument that the challenged conduct did not constitute "agency action" within the meaning of the APA, the Third Circuit explained:

> [T]he plaintiffs make no claim for money damages but seek only equitable relief in the form of a warning to the general public. The waiver of sovereign immunity provided by section 702 does not require that a claimant successfully prove that an agency of the United States has in fact unreasonably or unlawfully failed to act. Rather, sovereign immunity is waived for "(a)n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity."

Id. Thus, as Plaintiffs' equitable claims arise out of the Constitution and not out of the APA, it is appropriate for the Court to evaluate ripeness under the controlling standard for declaratory judgment actions.[15]

B. Plaintiffs' Claims Readily Satisfy the Third Circuit Ripeness Test for Declaratory Judgment Actions.

When analyzing ripeness, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding [] consideration."

[15] Additionally, in the absence of final agency action, "courts have also permitted judicial review of presidential orders implemented through the actions of other federal officials. This cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority." *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018).

Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967). Recognizing that "declaratory judgments are typically sought before a completed injury has occurred," the Third Circuit has fashioned a three-part ripeness test for declaratory judgment actions. *Khodara Envtl., Inc. v. Blakey*, 376 F.3d at 196 (*citing Pic-A-State Pa. Inc. v. Reno*, 76 F.3d 1294, 1298 (3d Cir. 1996)). Courts consider the following factors: the "[1] adversity of the interest of the parties, [2] the conclusiveness of the judicial judgment and [3] the practical help, or utility, of that judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990).

1. Adversity. For a declaratory judgment claim to be ripe, "the defendant must be so situated that the parties have adverse legal interests." *Step-Saver*, 912 F.2d at 648. The adversity prong looks to "[w]hether the claim involves uncertain and contingent events, or presents a real and substantial threat of harm." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 342 n.9 (3d Cir. 2001). In general, "[p]arties' interests are adverse where harm will result if the declaratory judgment is not entered." *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995). Yet a "party seeking declaratory relief need not wait until the harm has actually occurred to bring the action." *Id.*[16] To "present a justiciable controversy in

[16] *See also Armstrong World Indus. v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992) ("[A] plaintiff need not suffer a completed harm to establish adversity of interest between the parties."); *Pacific Gas & Elec. Co. v. State Energy Resource Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("One does not have to await the consummation of threatened injury to obtain preventative relief.").

an action seeking a declaratory judgment to protect against a feared future event, the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Salvation Army v. Dep't of Cmty. Affairs of State of N.J.*, 919 F.2d 183, 192 (3d Cir. 1990) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460 (1974)). A "party need not . . . meet the nearly insurmountable burden of establishing that the relevant injury is a mathematical certainty to occur, nor must a party await actual injury before filing suit," as such a barrier "would eviscerate the Declaratory Judgment Act and render the relief it was intended to provide illusory." *Travelers*, 72 F.3d at 1154.

Here, viewing Plaintiffs' allegations as true, it is self-evident that the parties' legal interests are adverse. Plaintiffs have filed suit to protect against the threat of imminent and potentially irreversible harm. Am. Compl. ¶¶ 22, 60, 63. Defendants themselves have admitted that climate change poses a "monumental threat" to Americans' health and welfare and requires immediate action. *Id.* ¶ 2. Put simply, absent the declaratory relief sought in this action, Plaintiffs will be harmed.

2. Conclusiveness. The conclusiveness prong is a "short-hand term for whether a declaratory judgment definitively would decide the parties' rights." *NE Hub Partners*, 239 F.3d at 344. To have conclusive effect, "the legal status of the parties must be changed or clarified by the declaration." *Travelers*, 72 F.3d at

1155. Here, Plaintiffs seek an order clarifying their constitutional rights regarding an imminent threat to their lives and welfare, plainly satisfying this element.

3. Utility of Judgment. A declaratory judgment must "be of some practical help to the parties." *Travelers*, 72 F.3d at 1155. Under this prong, courts consider "'whether the parties' plans of actions are likely to be affected by a declaratory judgment,'" *Step-Saver*, 912 F.2d at 649 n.9, and "the hardship to the parties of withholding judgment." *NE Hub Partners*, 239 F.3d at 344-45. There would be tremendous hardship caused by withholding judgment in the present case. Plaintiffs allege that Defendants' actions will increase the frequency and severity of extreme weather events, and threaten Plaintiffs' very ability to survive. Am. Compl. ¶¶ 1, 22-23, 35-37, 77, 85. Plaintiffs further submit that the declaratory relief sought in this action is meant to serve as an enforceable practical mechanism they can employ to protect against Defendants' deliberate indifference to the immense threat posed by climate change. Thus, the final prong of the Third Circuit's ripeness test is easily satisfied.[17]

[17] In the alternative, even if the Court were to find that the APA framework applies to Plaintiff's non-statutory claims, Defendants' deliberate failure to enforce the climate change policies that were in place as of January 2017 would constitute final action that is ripe for review. Notably, "[w]here an agency has sharply changed its substantive policy, then, judicial review of its action, while deferential, will involve a scrutiny of the reasons given by the agency for the change." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 760 (3d Cir. 1982). Courts have also found the suspension or delayed implementation of a final regulation to constitute substantive rulemaking. *Id.* at 763 n.23. It is most important to "look at

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

The Supreme Court "ha[s] emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); *Kedra v. Schroeter*, 876 F.3d 424, 436 (3d Cir. 2017). Through their arbitrary rollbacks, Defendants have committed three forms of due process violations: (1) violation of the state-created danger doctrine, (2) violation of Plaintiffs' rights to life, liberty, and property, and (3) violation of the fundamental right to a life-sustaining climate system. While Defendants' Motion only addresses the last of these violations, Plaintiffs state a claim for relief under all three.

A. State-Created Danger.

The state-created danger doctrine, arising out of the Due Process Clause of

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the character of the action taken at the time it is taken in order to determine whether the APA applies." *Id.* In order to effectively change an existing rule or regulation, an agency: "must at least display awareness that it is changing position and show that there are good reasons for the new policy. . . . *[I]t is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (emphasis added) (internal quotations and citations omitted). Viewed in the aggregate, Defendants have changed course drastically from their former stance recognizing that the "monumental threat to Americans' health and welfare" posed by climate change necessitated serious government action, establishing a "sharp change" in policy, the reasons for which are immediately reviewable by this Court. Am. Compl. ¶¶ 2, 125, 160.

the Constitution, is designed to secure "certain individual rights against both State and Federal Government" when the government acts affirmatively to increase a danger or render the plaintiff more vulnerable to it. *Kedra v. Schroeter*, 876 F.3d 424, 447 (3d Cir. 2017); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). The doctrine applies against both state and federal actors. *See Juliana*, 217 F. Supp. 3d at 1252 ("in *DeShaney*, the Supreme Court was mapping the contours of the Due Process Clause, not section 1983. Defendants have cited no case or legal principle to justify limiting *DeShaney* to the section 1983 context."); *Rosciano v. Sonchik*, No. CIV 01-0472, 2002 WL 32166630, at *11 (D. Ariz. Sept. 9, 2002) (applying state-created danger doctrine against federal officials).

There are four requirements for a state-created-danger claim to lie in the Third Circuit: (1) the harm caused must be foreseeable and "fairly direct"; (2) the conduct alleged must shock the conscience; (3) the plaintiff must be "a foreseeable victim of the defendant's acts" or a "member of a discrete class of persons"; and (4) the state must take affirmative action "that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted." *Bright v. Westmoreland Cty.*, 443 F.3d 276, 281 (3d Cir. 2006).

1. The Harm to Plaintiffs is Foreseeable and Fairly Direct. In analyzing whether the harm is foreseeable, courts employ a common sense test to determine whether the defendants were on notice of the risks of their actions. *E.g.*, *L.R. v.*

Sch. Dist. of Philadelphia, 836 F.3d 235, 245 (3d Cir. 2016); *Arnold v. City of Philadelphia*, 151 F. Supp. 3d 568, 576 (E.D. Pa. 2015). A plaintiff need only show that defendants had an awareness of *a risk of harm*, not the precise harm suffered. *Arnold*, 151 F. Supp. 3d at 576. In addition, to establish the "fairly direct" requirement, the government's actions must precipitate or serve as the catalyst for the harm. *Van Orden v. Bor. of Woodstown*, 5 F. Supp. 3d 676, 683 (D.N.J. 2014).

Here, given the international scientific consensus that climate change poses a clear and present danger, Defendants have enhanced the danger by rolling back the protections that were put in place specifically to guard against those risks. *See, e.g.*, Am. Compl. ¶¶ 177-80. In addition, it is clear that Defendants' abdication of responsibility for protecting against these threats will cause harm to Plaintiffs. *Id.* at ¶ 1 (alleging Defendants' "acts to roll back regulations . . . will increase the frequency and severity of these extreme weather events and the dangers to [Plaintiffs]"). With decades of institutional knowledge, Defendants are clearly on notice of the inherent risks of the Rollbacks and the corresponding harms caused to Plaintiffs, thereby satisfying this prong. Am. Compl. ¶ 87.

2. Defendants' Deliberate Indifference Shocks the Conscience.

According to the Third Circuit, "Government action is arbitrary in the constitutional sense when it is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *L.R*, 836 F.3d at 246 (internal citation

and quotations omitted). As in the present case, where "a state actor has time to make an unhurried judgment a plaintiff alleging violation of substantive due process under state created-danger doctrine need only allege facts supporting an inference that the official acted with a mental state of deliberate indifference." *Kedra*, 876 F.3d at 437. Deliberate indifference is defined as a conscious disregard of a substantial risk of serious harm, *L.R.*, 836 F.3d at 246, or as "reckless indifference," "reckless disregard," or "gross negligence." *Kneipp v. Tedder*, 95 F.3d 1199, 1208 n.21 (3d Cir. 1996). Given the allegations discussed above regarding the Government's longstanding knowledge and deliberate disregard of the known risks of climate change, allegations that Defendants themselves have corroborated, this element too is easily satisfied. *See, e.g.*, Am. Compl. ¶ 48 (quoting Defendants' admission that climate change poses "risks to human health and welfare"); *id.* at ¶ 87 (emphasizing Defendants' own admissions "that officials and persons in the Federal Government have been aware of the evidence of climate change, its causes, and its consequences for over fifty years"); *id.* at ¶ 85 (listing admissions regarding the severe consequences of climate change).

3. Plaintiffs Are Foreseeable Victims. The third element of state-created danger "contemplates a degree of contact such that the plaintiff was a foreseeable victim of the defendant's acts in a tort sense." *Rivas v. City of Passaic*, 365 F.3d 181, 197 (3d Cir. 2004). "The relationship that must be established between the

state and the plaintiff can be 'merely' that the plaintiff was a foreseeable victim, individually or as a member of a distinct class." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 242 (3d Cir. 2008). Here, Plaintiffs are foreseeable victims with particularized injuries caused by Defendants' conduct. *See supra* Section I.B.

4. Defendants Affirmatively Used Their Authority to Create or Enhance the Danger to Plaintiffs. The fourth element is met if the government's conduct created or increased the risk of danger to the plaintiff. *L.R.*, 836 F.3d at 242. As explained by the Third Circuit:

> Rather than approach this inquiry as a choice between an act and an omission, we find it useful to first evaluate the setting or the "status quo" of the environment before the alleged act or omission occurred, and then to ask whether the state actor's exercise of authority resulted in a departure from that status quo. This approach, which is not a new rule or concept but rather a way to think about how to determine whether this element has been satisfied, helps to clarify whether the state actor's conduct "created a danger" or "rendered the citizen more vulnerable to danger than had the state not acted at all."

Id. at 243; *Bright*, 443 F.3d at 282; *Morrow v. Balaski*, 719 F.3d 160, 177 (3d Cir. 2013), *as amended* (June 14, 2013) (*en banc)* ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.") (internal quotations omitted).[18]

[18] *See, e.g.*, *Kneipp*, 95 F.3d at 1201 (finding state-created danger where police stopped couple and released husband, leaving visibly intoxicated wife to walk home alone in the cold, who was later discovered unconscious at bottom of an

Here, having recognized that climate change presents a "monumental threat," and having previously undertaken substantial action to combat that threat, the government cannot now turn a blind eye to the imminent dangers presented by climate change. In rolling back protections based on junk science, the government is affirmatively placing Plaintiffs in grave danger and enhancing a known risk. Based on Defendants' actions, CO_2 emissions are on track to be *greater* than they would have been had the government not disturbed the *status quo* in place to guard against the known dangers of climate change.[19]

Thus, Defendants have used their authority to render Plaintiffs more vulnerable to the dangers posed by climate change than had Defendants not acted at all, establishing a state-created danger.

B. Violations of Rights to Life, Liberty, Bodily Integrity, Personal Security, and Property.

In addition to Plaintiffs' state-created-danger claim, Plaintiffs bring what

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embankment, resulting in permanent brain damage due to hypothermia); *Van Orden*, 5 F. Supp. 3d at 682 (denying motion for judgment on the pleadings regarding plaintiffs' state-created-danger claim where motorist drowned after township opened floodgates to dam in anticipation of arrival of hurricane without closing affected road); *Munger v. City of Glasgow Police Department*, 227 F.3d 1082, 1086 (9th Cir. 2000) (finding state-created danger where man died of hypothermia after being left outside by police officer); *Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (finding state-created danger where county had a policy that prevented rescue of persons in danger of drowning based on arbitrary choice to protect lives of rescuers over lives of those drowning).

[19] *See Juliana*, 217 F. Supp. 3d at 1251-52 (denying motion to dismiss state-created danger claims where government acted with deliberate indifference in failing to prevent harm caused by climate change).

courts describe as "straight" substantive due process claims for violations of the rights to life, liberty, bodily integrity, personal security, and property. *See Vargas v. City of Philadelphia*, 783 F.3d 962, 973 (3d Cir. 2015). The standard for establishing such a due process violation is the same "shocks the conscience" test that applies to a state-created danger claim. [20] The right to property is viewed similarly—protected property interests "may not be taken away by the state for reasons that are arbitrary, irrational, or tainted by improper motive," or through conduct that "shocks the conscience." *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (internal quotations omitted).

Defendants' conduct shows deliberate indifference to the threatened harms of increased climate change, which satisfies the standard for substantive due process violations. *See supra* Section III(A)(2). Further, the Constitution protects the interests at issue here—the rights to life, liberty, and property. As a component of these rights, Plaintiffs "have a constitutional liberty interest in personal bodily integrity"—a liberty that the Rollbacks will invade. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by

[20] "The shocks-the-conscience test applies regardless of the theory upon which the substantive due process claim is premised." *Id.*

the Due Process Clause.")).

The property interest at issue here involves "real property," a protected due process interest. *Nicholas*, 227 F.3d at 141 (3d Cir. 2000). The deprivation of property due to flooding resulting from the United States' increased contributions to climate change is akin to a taking resulting from government-caused flooding, which courts have held may be actionable. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 27 (2012) (holding that "recurrent floodings, even if of finite duration," caused by government action can constitute takings); *St. Bernard Par. Gov't v. United States*, 121 Fed. Cl. 687, 724 (2015). Plaintiffs allege that the Rollbacks will increase the likelihood of flooding of their property, Am. Compl. ¶ 66, a due process violation of their right to property.

Defendants' actions also violate Plaintiffs' rights by adopting a custom, policy, and practice of rolling back protections against the increasing harms of climate change. Under this doctrine, the government violates due process rights "where its policymakers ma[k]e 'a deliberate choice to follow a course of action . . . from among various alternatives'" that "reflects deliberate indifference to the constitutional rights of" Plaintiffs. *See Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989)). Here, Defendants had a variety of choices—indeed, they need not have taken any action and could have left the critical climate protections in

place—but they instead chose to remove those protections, acting with deliberate indifference to Plaintiffs' rights to life, liberty, bodily integrity, personal security, and property.

C. Violation of Right to Life-Sustaining Climate System.

Courts recognize fundamental rights that are either "fundamental to our scheme of ordered liberty, or . . . deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (internal citations and quotations omitted), though bearing in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). The Supreme Court explained:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."

Planned Parenthood of South Eastern Pennsylvania v. Casey, 505 U.S. 833, 848-49 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)). The Court in *Obergefell* further explained that "[t]he generations that wrote and ratified the Bill of Rights . . . did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy

liberty as we learn its meaning." *Obergefell*, 135 S.Ct. at 2598. Because the Constitution is intended to encompass liberty interests recognized over time, the Supreme Court has periodically recognized various "fundamental liberty interests."[21]

The right to a climate system capable of sustaining life is similarly "fundamental to our scheme of ordered liberty," as it forms the foundation for those rights, as well as the rights to life, liberty, and property, since none of those rights could be enjoyed if Defendants render the climate incapable of sustaining life. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "a fundamental political right, because [it is] preservative of all rights."); *Juliana*, 217 F. Supp. 3d at 1250 ("Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'") (quoting *Obergefell*, 135 S.Ct. at 2601). The right is also "deeply rooted in this Nation's history and tradition."

[21] These include the rights to control the education and upbringing of one's children (*Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)), procreation (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)), bodily integrity (*Rochin v. California*, 342 U.S. 165, 172-73 (1952)), contraception (*Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)), marriage (*Loving v. Virginia*, 388 U.S. 1, 12 (1967)), abortion (*Planned Parenthood of South Eastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973)), family (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)), and sexual intimacy (*Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

Dating to James Madison, the Founders recognized that to "[a]ll animals, including man, and plants . . . the atmosphere is the breath of life. Deprived of it, they all equally perish."[22] Since that time, protections of the environment have become ingrained in the fabric of our society, from President Theodore Roosevelt's conservation efforts in the early 20th Century to the mid-century passage of the Federal Water Pollution Act and the Air Pollution Control Act, which laid the groundwork for the later Clean Water Act and Clean Air Act.[23]

The fact that the courts have not expressly recognized this right in this particular context does not prevent Plaintiffs' claims from moving forward. Indeed, the global consensus on climate change provides "new insight" recognizing this monumental threat, and the need for fundamental protection from that threat is "now manifest." *See Obergefell*, 135 S. Ct. at 2598, 2602. The court in *Juliana* provided the necessary "careful description of the asserted right," *Reno v. Flores*, 507 U.S. 292, 302 (1993), when it articulated that:

> [W]here a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause

[22] Founders Online, *Address to the Agricultural Society of Albemarle, 12 May 1818*, National Archives, http://founders.archives.gov/documents/Madison/04-01-02-0244.

[23] Recognition of the right to a climate capable of sustaining life also finds support in the international arena. *See, e.g.*, Am. Compl. ¶¶ 105-124; *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015). While not controlling, these authorities are viewed as "instructive" when delineating rights under the U.S. Constitution. *See Roper v. Simmons*, 543 U.S. 551, 575-76 (2005).

> human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation.

Juliana, 217 F. Supp. 3d at 1250.

Rather than address the scope of fundamental due process rights, Defendants cite irrelevant and outdated cases, including *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir. 1980).[24] According to the court in that case, the plaintiffs "argued that there is a constitutional right to a pollution-free environment." *Id.* at 1238. The court merely rejected that argument. *See id.* In the present case, Plaintiffs do not allege they have a right to a pollution-free environment. Rather, they assert a right to a climate system capable of sustaining life, which is directly tied to, and provides the foundation for, due process rights already recognized by the Supreme Court.

Once a fundamental right is established, the government can only infringe that right in very narrow circumstances. Due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302 (emphasis in original). Defendants' Motion offers no compelling state interests to justify the rollbacks. Nor could they provide

[24] Defendants also rely on *Washington v. Glucksberg*, 521 U.S. 702 (1997), Mot. at 14-15, which Chief Justice Roberts recognized was "effectively overrule[d]" by *Obergefell*. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

a compelling state interest. As Plaintiffs describe in their Complaint, Defendants have relied on junk science to support these actions, ignoring the resulting harms.

IV. Plaintiffs Have Stated a Claim for Violation of the Public Trust Doctrine.

Defendants' argument that the public trust doctrine is "purely a creature of state law," Mot. at 2, contradicts more than 100 years of Supreme Court precedent—and the Government's own position in many of those cases—affirming that the "public domain is held by the [federal] government as part of its trust." *United States v. Beebe*, 127 U.S. 338, 342 (1888). As sovereign trustee, "[t]he government is charged with the duty, and clothed with the power, to protect [the public trust] from trespass and unlawful appropriation," *id.*, and it has a duty to refrain from "substantial impairment" of that public trust, *Illinois Cent. Railroad Co. v. Illinois*, 146 U.S. 387, 435 (1892)).[25]

[25] *See also United States v. CB & I Constructors, Inc.*, 685 F.3d 827, 836 (9th Cir. June 29, 2012) ("In the public lands context, the federal government is more akin to a trustee that holds natural resources for the benefit of present and future generations."); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) ("All public lands of the United States are held by it in trust for the people of the United States."); *Germania Iron Co. v. United States*, 58 F. 334, 336 (8th Cir. 1893), *aff'd*, 165 U.S. 379 (1897) ("[T]he government is clothed with a trust in respect to the public domain."); *Conner v. U.S. Dept. of the Int.*, 73 F. Supp. 2d 1215, 1219 (D. Nev. 1999) ("The United States holds public lands in trust and has the right and obligation to protect those lands from trespass."); *United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk Cty., Com. of Mass.*, 523 F. Supp. 120, 125 (D. Mass. 1981) ("So restricted, neither the Commonwealth's nor the federal government's trust responsibilities are destroyed by virtue of this taking, since neither government has the power to destroy the trust . . . ."); *In re*

The Federal Government itself has repeatedly asserted its "right and [] duty to protect and preserve the public's interest" in the public trust resources. *In re Complaint of Steuart Transportation Company*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (emphasis added). "Such right does not derive from ownership of the resources but from a duty owing to the people." *Id.* Furthermore, as Secretary of the Interior, Defendant Ryan Zinke has an "underlying duty to exercise due diligence" to protect natural resources. *Commonwealth of Mass. v. Andrus*, 594 F.2d 872, 890 (1st Cir. 1979) ("Such a duty would be in keeping with the longstanding view of the Secretary as the guardian of the people of the United States, who is bound to see that 'none of the public domain is wasted or is disposed of to a party not entitled to it.'") (quoting *Knight v. United States Land Association*, 142 U.S. 161, 181 (1891)).

As alleged in the Amended Complaint, "the Government holds in trust the 'public domain,' which includes 'public lands and natural resources on them,'" Am. Compl. ¶ 194, and Defendant DOI manages the "Public Lands." *Id.* ¶¶ 18-19. Numerous federal courts have expressly held that Defendants' public trust rights and obligations extend to federal lands, waters, forests, and wildlife. *See, e.g., U.S. v. Union Pacific Railroad Co.*, 565 F. Supp. 2d 1136, 1147 (E.D. Cal. 2008)

Complaint of Steuart Transportation Company, 495 F. Supp. 38, 40 (E.D. Va. 1980) ("Under the public trust doctrine, . . . the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources.").

(National Forest System "lands [] may not be sold and are held in trust" for the public's benefit).[26]

In an attempt to sidestep more than a century of precedent confirming the federal public trust doctrine, Defendants rely on *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012),[27] an opinion that only tangentially addressed the application of the public trust doctrine. Mot. at 17. Yet, as Defendants implicitly concede, "'a close reading of *PPL Montana* reveals that it says nothing about the viability of federal public trust claims.'" Mot. at 18 (quoting *Juliana*, 217 F. Supp. 3d at 1258-60). This is so because of "the constitutional precept that public lands are held in trust by the federal government for all of the people." *United States v. Ruby Co.*, 588 F.2d 697, 704 (9th Cir. 1978) (citing U.S. Const. art. IV(3)).

Similarly, Defendants mischaracterize the Third Circuit's interpretation of the public trust doctrine. While the Third Circuit discussed the differences between

[26] *See also Juliana*, 217 F. Supp. 3d at 1255-56; *United States v. Merco Const. Engineers, Inc.*, No. CV 08-3609 PA (AGRx), 2010 WL 1068413, at *4 (C.D. Cal. Jan. 25, 2010), *aff'd sub nom. United States v. CB & I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012); *Conner*, 73 F. Supp. 2d at 1219.

[27] In *PPL Montana*, the Supreme Court considered the question of whether the State of Montana held title to certain riverbeds pursuant to the equal footing doctrine. *Id.* at 580-81. The Court analyzed the equal-footing doctrine in great detail and ultimately ruled against the State. *Id.* at 589-603. "As a final contention," the State made a last-ditch argument that failure to recognize its title to the riverbeds would "undermine" the public trust doctrine. *Id.* at 603. The Court summarily dismissed this argument in a cursory paragraph that did not address the merits of a public trust claim. *Id.* at 604.

state public trust doctrines in *W. Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988), it also expressly acknowledged the Federal Government's rights and duties as sovereign trustee. *Id.* at 1019 ("Submerged lands are thus impressed with a trust for the benefit of the public, and the sovereign's use and disposition of those lands must be consistent with that trust.").[28] This fatally undermines Defendants' argument that the public trust doctrine does not apply to the federal government.

By implementing the Rollbacks, Defendants are breaching their historic common law duty to present and future beneficiaries of the public trust, including Plaintiffs, to preserve the public trust. Furthermore, because the protection of the public trust was adopted into the Constitution, Plaintiffs have a due process interest in its maintenance. For the reasons explained above, Defendants are showing a deliberate indifference to the harms they are causing that interest through the Rollbacks, in violation of the Due Process Clause.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss should be denied.[29]

[28] Defendants also cite *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd, Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x 7 (D.C. Cir. 2014)—an out-of-circuit decision that misread *PPL Montana*.

[29] To the extent that the Court may find Plaintiffs' claims deficient in any regard, Plaintiffs respectfully request leave to amend.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael D. Hausfeld, hereby certify that I caused a true and correct copy of the foregoing Plaintiffs' Response to Defendants' Motion to Dismiss to be served on all counsel of record via CM/ECF on April 19, 2018.

/s/ Michael D. Hausfeld
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