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' REPLY IN SUPPORT OF MOTION TO REOPEN DISCOVERY FOR PURPOSES OF DEPOSING FORMER SECRETARY OF STATE REX TILLERSON

In the midst of Defendants' continued Rollbacks of critical climate change protections, former Secretary of State Rex Tillerson publicly admitted that Defendants are following "what [President Trump] believe[s]"[1] based on "alternative realities" that are not "grounded in facts."[2] Tillerson's admissions are directly relevant to Plaintiffs' core allegation that Defendants' deliberate indifference to the known scientific threat of climate change has affirmatively

[1] Aaron Blake, *Rex Tillerson on Trump: 'Undisciplined, doesn't like to read' and tries to do illegal things*, Wash. Post, Dec. 7, 2018, https://www.washingtonpost.com/politics/2018/12/07/rex-tillerson-trump-undisciplined-doesnt-like-read-tries-do-illegal-things/?noredirect=on&utm_term=.9a5be603e4af.

[2] Anne Gearan and Carol Morello, *Rex Tillerson says 'alternative realities' are a threat to democracy*, Wash. Post., May 16, 2018, https://www.washingtonpost.com/politics/former-trump-aide-rex-tillerson-says-alternative-realities-are-a-threat-to-democracy/2018/05/16/4d0353f0-594b-11e8-8836-a4a123c359ab_story.html?utm_term=.a73eeac260e4.

increased the danger to Plaintiffs in violation of their constitutional rights. This Court should lift the stay of discovery to allow Plaintiffs to depose former Secretary Tillerson, a key witness with relevant personal knowledge of critical policy decisions rolling back efforts to address climate change, while his memory is fresh.

I. The Harm to Plaintiffs From The Continued Stay Outweighs The Likelihood That The Motion To Dismiss May Narrow Or Eliminate Discovery.

Contrary to Defendants' assertion, whether a motion to dismiss could eliminate discovery or even dispose of a case entirely does not "alone justif[y] the Court's entry of the stay." Defendants' Opposition at 5. Rather, the question involves a balancing test: "a stay is proper where the likelihood that such motion [to dismiss] may result in a narrowing or outright elimination of discovery outweighs the likely harm to be produced by the delay." *Weisman v. Mediq, Inc.*, No. 95-CV-1831, 1995 WL 273678, *2 (E.D. Pa. May 3, 1995); *19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000) ("In other words, the court should carefully balance the relative benefit and harm that would ensue to each party from the grant or denial of a stay.").

When evaluating a stay, courts also consider the scope of discovery requested. Recently, in a distinguishable case cited by Defendants, *Pfizer Inc. v. Johnson & Johnson*, Judge Joyner found that the scope of plaintiff's request for

discovery – a discovery plan that included more than 110 depositions of defendants and third parties regarding a range of topics – made for "a large and costly undertaking in this case," therefore weighing in favor of granting the stay. No. 17-CV-4180, 2018 WL 1071932 at *2 (E.D. Pa. Feb. 27, 2018). Despite Defendants' hyperbolic proclamations, Plaintiffs only ask that discovery be reopened for a limited purpose that is plainly narrow in scope: the deposition of one witness.

Significantly, courts further weigh the prejudice to plaintiffs seeking time-sensitive evidence as a result of a stay. *Pfizer*, 2018 WL 1071932 at *2 (weighing the stay's threat to "Pfizer's ability to collect time sensitive evidence");[3] *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) (granting plaintiff's request to depose defendant because of defendant's potential loss of recollection over time). In *19th Street Baptist Church,* a case mischaracterized by Defendants, the court actually granted plaintiffs' motion for immediate discovery because of the potential loss of evidence with the passage of time. 190 F.R.D. at 349-50.[4] The

[3] Although it granted the stay, the Court noted that if Pfizer's ability to collect time-sensitive evidence were threatened, Pfizer should "seek the Court's permission to lift the stay so that it may collect such evidence." *Id*. at n.2.

[4] Similarly, Defendants mischaracterize *In re Orthopedic Bone Screw Product Liability Litigation*, 264 F.3d 344, 365 (3d Cir. 2001) (staying discovery related to a claim dismissed by the trial court) and *Mann v. Brenner*, 375 F. App'x 232, 239 (3d Cir. 2010) (where "none of [plaintiffs'] claims entitle him to relief" and "if the motion is granted, discovery would be futile"). In contrast to those cases, in the present case, Plaintiffs have pleaded two causes of action that entitle them to relief. Moreover, as discussed extensively in Plaintiffs' brief in opposition to Defendants' motion to dismiss, Defendants' claim that the APA does not permit discovery is irrelevant because Plaintiffs' claims do not arise out of the APA. *See, e.g., NVE Inc. v. Dept. of Health and Human Servs.*, 436 F.3d 182, 189 (3d Cir. 2006); *Louisiana Forestry Ass'n v. Solis*, 889 F. Supp. 2d 711, 720 n.7. (E.D. Pa. 2012); *American Bankers Ass'n v.*

court concluded that "defendants have failed to show 'good cause' why this limited discovery should not occur." *Id*.

Similarly, the evidence Plaintiffs seek through a deposition of former Secretary Tillerson is time-sensitive and threatened by the continued stay of discovery. The longer Plaintiffs are required to wait to depose him, the weaker his recollection of relevant events will become. And with the passage of time, Plaintiffs will continue to suffer the mounting effects of Defendants' Rollbacks and to face the clear and present dangers posed by climate change. The likely harm caused by such delay outweighs the likelihood that Defendants' pending motion to dismiss will ultimately narrow or eliminate discovery.

II. The Court Should Allow Plaintiffs To Depose Former Secretary Tillerson Because He Is a Former Cabinet-Level Official With Relevant Personal Knowledge Central To This Litigation.

Plaintiffs seek to depose a *former* cabinet-level official with personal knowledge of Defendants' programmatic decision making at issue in this case. In this Circuit, there is no presumptive bar to doing them so.

Defendants cite numerous cases from outside this Circuit addressing a litigant's ability to depose a current high-ranking government official in a much narrower dispute, such as an action for employment discrimination or a suit for

National Credit Union Admin., 513 F. Supp. 2d 190, 200 (M.D. Pa. 2007) (all involving claims under the APA).

damages, where the official did not have personal knowledge of the dispute or where the information sought was available in the public record or through deposition of lower-level officials.[5] Def. Opp. at 7-8.

Because Plaintiffs seek to depose a *former* high-ranking government official, those cases are inapplicable. So too is the Second Circuit's test for deposing high-level government officials, cited by Defendants. *See Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). While some circuits have extended the *Morgan* doctrine by applying the above limitations on discovery to former high-ranking officers, the Third Circuit has not. *United States* v. *Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 318 (D.N.J. 2009) (noting that the Third Circuit has not extended the *Morgan* doctrine and barring the deposition of a former EPA

[5] *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941) (denying deposition of current Secretary of Agriculture); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586-87 (D.C. Cir. 1985) (denying deposition of current top Department of Labor officials where plaintiffs did not suggest "any information in the possession of these officials (regarding general enforcement proceedings) that it could not obtain from published reports and available agency documents"); *In re United States*, No. 14-5146, 2014 U.S. App. LEXIS 14134, at *2 (D.C. Cir. July 24, 2014) (per curiam) (denying deposition of current Secretary of Agriculture); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (denying depositions of current Attorney General and Deputy Attorney General); *In re McCarthy*, 636 Fed. Appx. 142, 143-44 (4th Cir. 2015) (granting writ of mandamus to quash deposition of current EPA Administrator where plaintiffs were authorized to take a Fed. Rule Civ. Pro. 30(b)(6) deposition of the agency and did not demonstrate "a need for [the administrator's] testimony beyond what is already in the public record"); *Tomaszewski v. City of Philadelphia*, No. 17-14675, 2018 WL 6590826, at *3-4 (E.D. Pa. Dec. 14, 2018) (denying deposition of current mayor where evidence likely gained from deposition was not essential to plaintiff's case and was available through alternative sources); *Johnson v. Attorney Gen. of the State of New Jersey*, No. 12-4850, 2015 WL 491561, at *3 (D.N.J. Aug. 18, 2015) (denying deposition of high-ranking current state police officer where no evidence that the officer had personal knowledge of the harm alleged).

Administrator only because plaintiffs submitted no evidence that the administrator had "personal involvement in or knowledge relevant to" the issues in the case).[6]

Additionally, in contrast to the cases cited by Defendants, Plaintiffs are challenging a programmatic violation of the U.S. Constitution, and the former official Plaintiffs seek to depose has intimate personal knowledge of Defendants' reasons for instituting the Rollbacks and the absence of science to support them. In the present case, there is a compelling reason for Plaintiffs to depose officers at the head of the cabinet-level agencies because they were integral to these programmatic decisions. Former Secretary Tillerson led the Department of State during the formative first two years of President Trump's administration,[7] when the programmatic rollbacks of the Obama administration's climate change policies were put into place. Former Secretary Tillerson's comments as well as his public disagreement with President Trump about the United States' participation in the Paris Agreement[8] make clear that he personally possesses information about Defendants' programmatic decisions that cannot be obtained from another source.

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[6] Additionally, the limited scope of the discovery Plaintiffs request negates the concern that qualified applicants would be discouraged from public service. *See* Def. Opp. at 8.
[7] Former Secretary Tillerson was in office from February 1, 2017 to March 31, 2018.
[8] Lucia Mutikani, *Tillerson says U.S. could stay in Paris climate accord*, Reuters, Sept. 17, 2017, https://www.reuters.com/article/us-usa-climate/tillerson-says-u-s-could-stay-in-paris-climate-accord-idUSKCN1BS0LW. *See also* Julie Pace and Jill Colvin, *President Trump pulls U.S. out of Paris climate accord, sparking global criticism*, PBS News Hour, Jun. 1, 2017, https://www.pbs.org/newshour/nation/president-trump-pulls-u-s-paris-accord-sparking-global-criticism.

III. The Harm to Plaintiffs From A Denial Of The Deposition Of Former Secretary Tillerson Would Outweigh The Burden On Defendants From Such A Deposition.

The Court should grant Plaintiffs' motion to lift the stay of discovery because the harm Plaintiffs would face from the denial of the deposition of Secretary Tillerson far outweighs any burden to Defendants from such a deposition.

Defendants identify only one burden they would face if Plaintiffs deposed former Secretary Tillerson: potential "protracted motion practice on the propriety of such depositions." Def. Opp. at 9-10. But any such harm would be self-imposed. In addition to this circular argument, Defendants do not explain why such motion practice would be an "undue burden" and instead only allege that Plaintiffs seek to "abuse [ ] the discovery process" while citing inapplicable and distinguishable case law. *Id.* at 9 (citing *Morgan*, 313 U.S. at 422 (distinguished *supra*) and *Nat'l Labor Relations Board v. Baldwin Locomotive Wokrs* [sic], 128 F.3d 39, 47 (3d Cir. 1942) (reviewing the administrative hearing decision of a National Labor Relations Board hearing officer, not a programmatic violation of the U.S. Constitution).

The harm Plaintiffs – and the public – will face if Plaintiffs are denied a deposition of former Secretary Tillerson far outweighs the purported burden on Defendants. With each day that passes, his recollection of events naturally becomes weaker. Lack of access to this time-sensitive evidence prejudices

Plaintiffs' ability to build their case. At the same time that the increasing impact of climate change endangers human life and property, Defendants continue to pursue sweeping Rollbacks and deny well-established science in favor of the "alternate realities" cited by former Secretary Tillerson.

For these reasons, Plaintiffs ask that the discovery stay be lifted to allow Plaintiffs to depose Mr. Tillerson. Additionally, at the status conference that Plaintiffs requested in their previous filing (ECF No. 41), Plaintiffs would also like to discuss deposing former Secretary of the Environmental Protection Agency, Scott Pruitt, and former Secretary of the Interior, Ryan Zinke, both of whom resigned from their positions but possess critical information from their time leading the Defendant agencies.

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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' Reply in Support of Motion to Reopen Discovery for Purposes of Deposing Former Secretary of State Rex Tillerson to be served on all counsel of record via CM/ECF on January 17, 2019.

/s/ Michael D. Hausfeld
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