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

DANIEL M. GALPERN (OR Bar 061950)
dan.galpern@gmail.com
LAW OFFICES OF DANIEL M. GALPERN
1641 Oak Street
Eugene, OR 97401
Tel: (541) 968-7164

JOSEPH W. COTCHETT
jcotchett@cpmlegal.com
PHILIP L. GREGORY (*pro hac vice*)
pgregory@cpmlegal.com
PAUL N. MCCLOSKEY
pmccloskey@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.
Plaintiffs,
v.
The UNITED STATES OF AMERICA; **BARACK OBAMA**, in his official capacity as President of the United States; et al.,

Federal Defendants.

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO STRIKE

INTRODUCTION

Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure ("FRCP"), Federal Defendants have moved to strike the following declarations and exhibits, which were filed with Plaintiffs' Opposition to Defendants' Motion to Dismiss:

- Exhibits 1 and 5 of the Declaration of Julia A. Olson (ECF No. 43, pp. 4-22, 71-108);
- Supplemental Declaration of Dr. James E. Hansen (ECF Nos. 42 and 47);
- Declaration of Michael C. MacCracken (ECF No. 44); and
- Declaration of John E. Davidson (ECF No. 46).

Plaintiffs hereby respectfully oppose Federal Defendants' Motion to Strike (ECF No. 58).

Plaintiffs believe this Court can resolve the Motions to Dismiss based solely upon the allegations of the First Amended Complaint ("FAC"). The FAC contains detailed, specific allegations establishing the necessary elements of subject matter jurisdiction and adequately states claims upon which relief can be granted. However, due to the nature of the attacks made by Defendants' Motions to Dismiss, and given the magnitude of what is at stake in this case, Plaintiffs believed it prudent to provide additional information outside of the FAC supporting this Court's subject matter jurisdiction and Plaintiffs' constitutional claims.[1] The attempt by Federal Defendants to suppress this information ignores the foundational legal principle that a court may look to extrinsic evidence where such jurisdictional attacks are made. Federal Defendants' Motion to Strike should be denied.

---

[1] With regards to this Court's subject matter jurisdiction and given the urgency presented by the injuries in this case, Plaintiffs also submit the additional declarations in the interest of judicial economy. It is more efficient for Plaintiffs to adequately demonstrate their standing at this early stage of the proceedings, as is their ultimate burden, before the Court addresses the merits of the case.

ARGUMENT

A. The Declarations And Exhibits Are Properly Before This Court Because They Were Filed In Response To Federal Defendants' FRCP 12(b)(1) Motion To Dismiss For Lack of Standing.

In attempting to strike the declarations and exhibits, Federal Defendants ignore or misinterpret the purpose for which these declarations and exhibits were submitted to this Court. Federal Defendants only appear to oppose the declarations and exhibits to the extent that they are used to oppose their FRCP 12(b)(6) motion to dismiss for failure to state a claim, not for opposing their FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, specifically standing.

Federal Defendants bring their motion to strike pursuant to FRCP 12(d), which states: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Furthermore, the standard of review Federal Defendants set forth in their Motion to Strike is the standard of review for a motion to dismiss for failure to state a claim. Mot. to Strike 2-3.

However, all of the declarations and exhibits Federal Defendants seek to strike were submitted to this Court in response to Federal Defendants' **12(b)(1)** motion to dismiss for lack of subject matter jurisdiction for the purpose of establishing standing.[2] Federal Defendants do not move to strike the 11 Plaintiff declarations, which they admit "present information relevant to the issue of whether the Complaint should be dismissed

---

[2] The Davidson Declaration supports Plaintiffs opposition to Federal Defendants' 12(b)(1) and 12(b)(6) motion to dismiss. Section A of this Brief explains why the Davidson Declaration is properly before this Court to establish subject matter jurisdiction; Section B of this Brief explains why it is properly before this Court in opposing Federal Defendants' FRCP 12(b)(6) motion to dismiss.

for lack of jurisdiction." Mot. to Strike 5. Just like the 11 Plaintiff declarations, the Supplemental Hansen Declaration, the MacCracken Declaration, the Davidson Declaration, and Exhibits 1 and 5 of the Olson Declaration, all "present information relevant to the issue of whether the Complaint should be dismissed for lack of jurisdiction." Therefore, Federal Defendants do not appear to challenge the use of the declarations and exhibits to the extent they are used to establish standing.

Even if Federal Defendants opposed use of these declarations and exhibits to establish standing, it would still be proper for this Court to consider them. Plaintiffs are required to establish standing in order to pursue the merits of their case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Before resolving claims, federal courts must first ensure they have jurisdiction. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible without exception.'") (citations omitted). "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102 n. 1 (9th Cir. 2007). "When subject-matter jurisdiction is questioned, the court must, of course, satisfy itself of its authority to hear the case. . . . The court must, however, afford the non-moving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Health Care Review Inc. v. Shalala*, 926 F. Supp. 274, 280 (D. Rhode Island 1996) (citations, footnotes and internal quotation marks omitted).

Plaintiffs are entitled to submit evidence to establish standing. *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997). Federal

courts have discretion to allow (or require) plaintiffs to supply supplemental evidence in order to support standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). It is not uncommon for courts to consider evidence outside the record when defendants challenge plaintiff's standing. *Bonneville Power Admin.*, 117 F.3d at 1527-28 (holding a plaintiff is entitled to submit standing affidavits, and rejecting attempt to strike affidavits on the basis that such affidavits constituted improper extra-record evidence).

Courts draw a distinction between evidence submitted for the limited purpose of establishing standing as opposed to evidence that goes to the merits of a case. *Id.* at 1528 ("We therefore consider the affidavits not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to this court's jurisdiction"); *see also Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1220-21 (N.D. Cal. 2004) (declining to strike portions of standing declarations); *Klamath-Siskiyou Wildlands Ctr. v. Bur. of Land Mgmt.*, No. 12-cv-1558, 2014 WL 525116, at *4-5 (D. Or. Feb. 6, 2014) (declining to strike portions of standing declaration as extra-record evidence when used solely to establish standing).

Similarly, the Supplemental Hansen Declaration, the MacCracken Declaration, the Davidson Declaration, and Exhibits 1 and 5 of the Olson Declaration are before this Court to confirm Plaintiffs have standing to pursue this case. Each of these documents addresses the three elements of standing: injury-in-fact, causation, and redressability.

The Supplemental Hansen Declaration supports the first prong of standing, injury-in-fact, and helps establish standing for future generations.[3] The MacCracken Declaration speaks both to the causation and redressability prongs of standing, and is also used to

[3] The Supplemental Hansen Declaration is *only* cited in Plaintiffs' Opposition Brief for purposes of standing. *See* Pls. Opp. to Fed. MTD 30-33, 40.

establish standing for future generations.[4] The Davidson Declaration is used to establish standing for future generations.[5] Exhibit 1 of the Olson Declaration is used to establish the federal government's role in causing climate change and goes to the causation prong of standing.[6] Finally, Exhibit 5 of the Olson Declaration is used to support the first prong of standing, injury-in-fact.[7] Accordingly, even had Federal Defendants objected to Plaintiffs' submission of the declarations to establish subject matter jurisdiction, it would clearly be proper for the Court to review them for that purpose.

Finally, to the extent that Defendants submitted a factual attack on Plaintiffs' standing,[8] it is well established that a court can "review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see also Evans v. B.F. Perkins, Div. of Standex Intern. Corp.*, 166 F.3d 642, 647 (4th Cir. 1999)
(on a challenge to subject matter jurisdiction under FRCP 12(b)(1) the district court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." (citation omitted)). In resolving a FRCP 12(b)(1) motion, this Court

---

[4] The MacCracken Declaration is *only* cited in Plaintiffs' Opposition Brief for purposes of standing. *See* Pls. Opp. to Fed. MTD 37, 38, 41.
[5] Paragraphs 5-71 of the Davidson Declaration are cited in the section of Plaintiffs opposition brief arguing that future generations have standing. Pls. Opp. to Fed MTD 41.
[6] Exhibit 1 is *only* cited in Plaintiffs' Opposition Brief for this purpose. *See* Pls. Opp. to Fed. MTD 1.
[7] Exhibit 5 is *only* cited in Plaintiffs' Opposition Brief for this purpose. *See* Pls. Opp. to Fed. MTD 30-32.
[8] Federal Defendants do not state whether they are making a facial or factual attack in their motion to dismiss. At least some of their arguments appear to be factual challenges. Furthermore, if their FRCP 12(b)(1) challenge were purely a facial one, Federal Defendants would have objected to Plaintiffs' attempt to submit *any* declarations with their opposition brief. Notably, Federal Defendants have not objected to the 11 Plaintiff declarations. Fed Mot. to Strike 5.

may "hear evidence regarding jurisdiction" and may "resolv[e] factual disputes where necessary." *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (citing *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). Evidence is "not restricted to the face of the pleadings." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Instead, this Court "may review *any evidence*, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Id*. (emphasis added); *see also Taylor v. Larson Berg & Perkins, LLC*, 2012 WL 993750 at *1 (E.D. Wash. 2012) (Chief Judge Peterson).

Here, Defendants raised several factual grounds to challenge standing. First, Defendants argue Plaintiffs' injuries are generalized grievances, not particularized harms. *See, e.g.,* Intervenor Reply 15 ("Problems such as 'diminished air quality,' 'crop loss[es],' and 'drought'—and all others identified by the plaintiffs as resulting from *global* climate change—necessarily affect all individuals on the planet and are neither 'particularized' nor 'personal' in nature." (internal citation omitted)); Fed MTD 8-11. Whether an injury is generalized, or concrete and particularized, is a critical element when establishing standing. Accordingly, Plaintiffs submitted 11 declarations, to which Federal Defendants do not object, illustrating with specific facts and examples how they are harmed by climate change in concrete and individualized ways that differ from others. Furthermore, the Supplemental Hansen Declaration helps illustrate Plaintiffs' individualized harms by, for example, illustrating how sea level rise would impact their homes and schools. Supp. Hansen Dec. ¶¶ 27-33.

Defendants also argue Plaintiffs have not established the causation prong of standing because they purportedly have not properly connected Federal Defendants'

actions to Plaintiffs' harms. Fed MTD 11-13. The Supplemental Hansen Declaration, the MacCracken Declaration, and Exhibit 1 of the Olson Declaration are all before this Court both to establish the fairly traceable link between Federal Defendants' actions and Plaintiffs' harms and to prove Federal Defendants did cause Plaintiffs' injuries through their material role in causing climate change.

Defendants raise factual challenges in arguing that Plaintiffs also failed to show a favorable ruling will redress their injuries. *See, e.g.* Intervenor MTD 19 ("There is indeed no basis to believe that reductions ordered here would lead to *any* overall reduction, much less the reduction allegedly needed to achieve the plaintiffs' goal of 350 parts per million carbon dioxide globally, or prevent or even slow the ongoing global warming effect that the plaintiffs allege. To the contrary, it is just as possible that greenhouse gas emissions in other nations would *increase* if severe limits were imposed in the United States . . . ."). The MacCracken Declaration, for example, illustrates how a favorable decision will redress Plaintiffs' harms. *See, e.g.,* MacCracken Dec. ¶ 10.

Finally, Federal Defendants argue future generations lack standing because they have not been harmed and have no constitutional rights. Fed MTD 16-19. The Davidson Declaration, in particular, seeks to refute Federal Defendants' arguments that future generations do not have standing and have no constitutional rights. Because one of Federal Defendants' FRCP 12(b)(1) factual challenges directly relates to Plaintiffs' constitutional rights in this case (future generations), and because the Court can consider declarations outside of the pleadings, the Davidson Declaration pertaining to "how principles of intergenerational obligation are expressly and implicitly imbedded in the United States Constitution, and whether and how those principles should affect

constitutional interpretation, government action and the exercise of judicial review" should not be stricken. Davidson Dec. ¶ 1. The Supplemental Hansen Declaration and MacCracken Declaration also establish standing for future generations.

In sum, because the Hansen Supplemental Declaration, MacCracken Declaration, Davidson Declaration, and Exhibits 1 and 5 of the Olson Declaration are all relevant to the issue of whether the case should be dismissed for lack of subject matter jurisdiction, it is proper for this Court to consider them at this stage.[9] These declarations are precisely the type of extrinsic evidence that courts often consider in resolving a defendant's jurisdictional attacks.

B. The Davidson Declaration In Response To Defendants' FRCP 12(b)(6) Motion To Dismiss Is Properly Before This Court.

The Davidson Declaration both establishes the Court's subject matter jurisdiction (as discussed above) and responds to Federal Defendants' FRCP 12(b)(6) motion to dismiss for failure to state a claim. Despite Federal Defendants' assertion, the Davidson Declaration was not an attempt by Plaintiffs "to avoid court-ordered page limits [ ] by submitting additional legal arguments." Fed Mot. to Strike 6. In support of their argument, Federal Defendants rely on *King Cty. v. Rasmussen*, 299 F.3d 1077, 1082 (9th Cir. 2002). In *King County*, the plaintiffs responded to the defendant's motion to dismiss by submitting a brief that was eight pages over the page limit – in direct violation of the court's rules. Accompanying this over-length brief was a declaration made by the husband plaintiff that clearly included legal arguments regarding his case. *Id*. Also in

[9] Should the Court wish to treat Defendants' FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction as a motion for summary judgment, for the limited purpose of deciding that Plaintiffs have established standing, Plaintiffs would not object. Indeed, the evidence before the Court clearly establishes Plaintiffs' standing and is undisputed by the Defendants.

violation of the local rules, the *King County* plaintiffs attempted to file a "surrebuttal brief." *Id*. The Ninth Circuit found these plaintiffs, on several fronts, were attempting to improperly submit further legal arguments, and affirmed the district court's decision to strike the over-length portions of the response brief, the surrebuttal brief, and the *legal arguments* in plaintiff's declaration (without striking that plaintiff's entire declaration).[10] *Id.* at 1081.

The Davidson Declaration is distinguishable from the declaration at issue in *King City*. Davidson is neither a party to, nor a lawyer on, this case. Nowhere in his declaration does Davidson refer to Plaintiffs, the facts of their case, or their specific claims. Far from "further briefing," the Davidson Declaration provides relevant information to the constitutional claims in the case, which were put at issue by Federal Defendants, not legal arguments made by Plaintiffs. In fact, Federal Defendants themselves describe the Davidson Declaration as concerning "the historical and philosophical underpinnings of intergenerational obligations." Fed Mot. to Strike 4. Courts must look at the historical underpinnings of alleged constitutional claims because whether a fundamental right is at stake is informed by an analysis of whether the right is "fundamental to our scheme of ordered liberty" or "whether the right is 'deeply rooted in this nation's history and tradition.'" *McDonald v. Chicago*, 561 U.S. 742, 767 (2010); *see Benton v. Maryland*, 395 U.S. 784, 795 (1969). That analysis necessarily requires a review of our nation's foundational history and documents, outside of the confines of the pleadings. The sources, like Locke, Paine, Jefferson, Madison, Blackstone, Mason, and Burke, detailed

[10] Here too, Federal Defendants only appear to want to strike the Davidson Declaration to the extent it addresses legal issues. Federal Defendants only explicitly object to paragraphs 64-77 of the Davidson Declaration. Fed Mot. to Strike 6.

in Davidson's declaration are all sources courts would look to in evaluating whether a fundamental right may exist. *McDonald v. Chicago*, 561 U.S. at 767-777 (citing Blackstone, English Bill of Rights, Federalist and Anti-Federalist Letters, Constitutional Debates, Historical Treatises on Constitutional Ratification and Reconstruction, and State Constitutions in evaluating whether the right to bear arms is protected by substantive due process); *Benton v. Maryland*, 395 U.S. at 795 (citing Roman Law, common law of England, Blackstone, and state constitutions).

Because the constitutional claims herein involve issues of first impression for this Court, and in light of the magnitude of what is at stake in this case, the Court may utilize Davidson's deep analysis and historical exposition as a guide to the origin of the rights and obligations that comprise the predicates of Plaintiffs' claims.

Finally, in the alternative, Professor Davidson has filed a motion to appear as *amicus curiae* for purpose of opposing Defendants' Motions to Dismiss. Given that Defendants have had the content and the opportunity to respond to the Davidson Declaration (and its same content) in their reply briefs, Plaintiffs respectfully request the Court grant Professor Davidson's motion to appear as an amicus curiae if it decides to strike the content of the Davidson Declaration.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Federal Defendants' Motion to Strike in the entirety.

/

/ /

/ / /

Respectfully submitted this 24th day of February, 2016,

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

PHILIP L. GREGORY (*pro hac vice*)
pgregory@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

DANIEL M. GALPERN (OR Bar 061950)
dan.galpern@gmail.com
LAW OFFICES OF DANIEL M. GALPERN
1641 Oak Street
Eugene, OR 97401 Tel: (541) 968-7164

Attorneys for Plaintiffs