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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE EXPERT OPINION TESTIMONY OF PROFESSOR CATHERINE SMITH

INTRODUCTION

Professor Catherine Smith's expert opinion testimony is inadmissible because it is irrelevant and not helpful to the Court. By her own admission, Professor Smith is not an expert in history or sociology. Yet Plaintiffs offer her testimony to provide "a historical and sociological analysis." Pls.' Resp. in Opp'n to Defs.' Mot. *in Limine* to Exclude Expert Op. Test. of Professor Catherine Smith 1, ECF No. 421 ("Pls.' Resp."). Professor Smith is a lawyer who analyzed legal sources to draw a legal conclusion. And the legal conclusion drawn—that children are a protected class warranting heightened judicial scrutiny—has already been rejected by this Court. Professor Smith's expert report and testimony usurps the Court's role, is irrelevant to the issues remaining in this case, and should be excluded.

ARGUMENT

I. This Court has rejected the claim that Plaintiffs are a suspect or semi-suspect class meriting heightened scrutiny, thereby rendering Professor Smith's report and testimony irrelevant.

In its order on Defendants' motions for judgment on the pleadings and summary judgment, this Court explicitly held that minor children and future unborn generations are not a suspect class meriting heightened review under the Equal Protection Clause. Op. & Order 56–58, ECF No. 369 ("Oct. 15, 2018 Order"). Because the Court has rejected this claim, Professor Smith's testimony, which argues solely that children should be a protected class owed heightened scrutiny under the Equal Protection Clause, is no longer relevant. *See* Defs.' Mot. *in Limine* to Exclude Expert Op. Test. of Professor Catherine Smith 16, ECF No. 379 ("Defs.' Mot."). Yet Plaintiffs argue that Professor Smith's testimony remains relevant because "[t]he issue of whether [their] Equal Protection claims might require an intermediate level of scrutiny or some form of heightened scrutiny, such as where Plaintiffs are found to be members of a

'quasi-suspect' or 'semi-suspect' class . . . has not been determined by this Court[.]" Pls.' Resp. 4.

The plain language of this Court's Opinion and Order demonstrates otherwise. This Court first noted that "Plaintiffs contend that 'posterity'—which they defined to include both unborn members of plaintiff 'future generations' and minor children who cannot vote—is a suspect classification." Oct. 15, 2018 Order at 56. The Court then defined the scope of Plaintiffs' posterity argument: "They assert that federal defendants' climate and energy policy treats 'posterity' differently than other, similarly situated individuals, in violation of the Equal Protection clause." *Id.* at 57. And foreclosing Plaintiffs' Equal Protection claim, the Court stated that "[b]oth the Supreme Court and the Ninth Circuit have held that age is not a suspect class." *Id.* (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008)). Defining the universe of related surviving claims, the Court then found that "the rejection of plaintiffs' proposed suspect class does not fully resolve their equal protection claim" because "strict scrutiny is also triggered by alleged infringement of a fundamental right." Oct. 15, 2018 Order at 58. It is this sole Equal Protection claim—the claim that Defendants' actions and inactions unequally burden Plaintiffs' fundamental rights—that survives the Court's order. *Id.*

The Court made the scope of its Opinion and Order clear when addressing Plaintiffs' Equal Protection claims. The relevant sub-section of the Court's Opinion and Order is titled "*Plaintiffs' Remaining Claims*," which would suggest that, were any of Plaintiffs' claims to survive, those claims would not go unmentioned. *See id.* at 55.

To the extent Plaintiffs argue that the Court addressed whether children and posterity are "suspect" classes owed strict scrutiny but not whether they are "quasi-suspect" or "semi-suspect"

classes owed heightened scrutiny, Plaintiffs ignore the plain language of the order.[1] Pls.' Resp. 4; Pls.' Pre-trial Mem. 61 n.57, ECF No. 384 ("Pre-trial Mem."). The Court expressly considered the applicable standard of review in two situations: "when the plaintiff alleges either discrimination against a 'suspect or semi-suspect class' or infringement of a fundamental right." Oct. 15, 2018 Order 56. It then rejected the application of heightened scrutiny to Plaintiffs in the first situation where Plaintiffs allege they are a "suspect or semi-suspect class." In support, the Court cited numerous cases finding that age is not a suspect class and therefore applying *rational* basis review, not some other form of heightened scrutiny. *Id.* at 57.

Plaintiffs' citation to *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), is unavailing. In *Perry*, the court found that "[a]ll classifications based on sexual orientation appear suspect," 704 F. Supp. 2d at 997, but held that it need not apply heightened scrutiny because "Proposition 8 fails to survive even rational basis review." *Id.* Here, in contrast, this Court has already held "that defendants' affirmative actions would survive rational basis review," ECF No. 83 at 30, and that "age is not a suspect class" owed heightened review. Oct. 15, 2018 Order 57.

As this Court has made abundantly clear, Plaintiffs' surviving Equal Protection claim is based not on a suspect or semi-suspect classification but on fundamental rights. And Professor Smith's report does not speak to fundamental rights. ECF No. 379-1 at 4 ("Smith Rep.") ("In my expert opinion, climate change's consequences for children raises . . . an 'area of constitutional sensitivity' that warrants heightened scrutiny, *even when no fundamental right is at issue*." (emphasis added)); *id.* at 39 ("The federal defendants set policy for both systems, and given the

[1] Notably, in their Amended Complaint, Plaintiffs argue that they are a "suspect class," not a "quasi-suspect" or "semi-suspect class." ECF No. 7 ¶ 294.

discussion below, those policies should be reviewed under heightened scrutiny for the deprivations they cause the wellbeing of children, *even if there were no fundamental right at stake*." (emphasis added)); Ex. 1, Smith Dep. Tr. 115:16–18 ("Smith Dep.") ("Q: And would you testify at trial about the existence of certain fundamental rights? A: Not at this time, that I'm aware of."). Because Professor Smith's report speaks only to suspect classification, it is irrelevant to Plaintiffs' surviving Equal Protection claim.

II. Professor Smith reaches a legal conclusion by looking to legal sources she believes support her legal analysis.

Befitting her education and training, Professor Smith's expert report reads like a legal brief. First, she tells the Court what legal conclusion to reach[2]—the proper level of scrutiny to apply to Plaintiffs as a protected class—and hints at a roadmap for getting there.[3] Second, she develops the legal sources[4] she believes support the creation of a new multifactor test for determining when heightened scrutiny should apply to children.[5] And third, she applies that test

[2] Smith Rep. 1 ("I conclude that based on a historical and sociological legal analysis, at least intermediate scrutiny is warranted when government action imposes a lifetime of hardship on children for matters beyond their control, as in the case of the national energy system causing dangerous climate change").

[3] *Id.* at 1–2 ("I have developed an expert opinion on why children already have gained protected status in numerous contexts and why the harm to children from climate change should be treated as an area of 'special constitutional sensitivity'") (quoting *Plyler v. Doe*, 457 U.S. 202, 226 (1982)).

[4] *Id.* at 9–36 (analyzing the Constitution, English law, presidential initiatives, international conventions and jurisprudence, and United States Supreme Court case law).

[5] *Id.* at 36 ("The child-centered cases offer valuable guideposts for when heightened review is warranted to prevent large-scale injuries to children. In my expert opinion, based on a historical and sociological analysis, as an overlay to the Supreme Court's *Carolene Products* factors, heightened review is warranted for children as a class when the government: 1) denies children a right or benefit based on matters beyond their control; and (2) the right or benefits stem from a) government-controlled large-scale systems that b) impose a lifetime of hardship by cutting off economic resources, inflicting psychological harm, preventing the formation of familial bonds,

to the facts before circling back to the conclusion. There are two principal problems with this: (1) Plaintiffs purport Professor Smith to be an expert and not a legal advocate; and (2) Professor Smith has no expertise in the areas underlying her factual inquiry.

Addressing the first problem, Plaintiffs contend that

> [t]he principal function of Professor Smith's expert report is to elaborate on the historical unequal treatment of children and the "new insights and societal understandings" revealed by her eighteen years of *legal* scholarship, and her analysis of the historical and sociological *underpinning of law* "as a set of institutional practices that have evolved over time and developed in relation to . . . cultural, economic, sociopolitical structures and institutions."

Pls.' Resp. 7 (emphasis added). This description all but concedes that Professor Smith's report and testimony are based on her legal expertise and apply legal analysis to reach legal conclusions about the law. Rather than offer an analysis of historical or sociological sources, such as contemporaneous writings or events, historical texts or treatises, or sociological analyses of particular eras, Professor Smith analyzes legal documents, such as the Constitution, law review articles, and case law. This is not to denigrate Professor Smith's survey of how different aspects of the law have applied to children over time. But her analysis is fundamentally legal in nature;[6] it cannot fairly be characterized as a "factual analysis" merely by attaching the labels "historical" and "sociological" to it.

Drawing a distinction between permissible and impermissible expert testimony, Plaintiffs note that "expert testimony that concerns or 'embraces an ultimate issue' is not *per se* inadmissible." Pls.' Resp. 6 (quoting Defs.' Mot. 8). But while "an expert may offer his opinion

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or depriving them of the foundations necessary for life.").

[6] The legal nature of Professor Smith's analysis is readily apparent when her report is compared to Plaintiffs' Pre-trial Memorandum. The Pre-trial Memorandum, which is a piece of legal advocacy, makes the same arguments and cites the same cases as Professor Smith. *Compare* Smith Rep. 18-35 *with* ECF No. 384 at 62-65.

as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, . . . he may not testify as to whether the legal standard has been satisfied." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212–13 (D.C. Cir. 1997). In this case, Professor Smith advocates for a new legal standard, *i.e.*, that intermediate scrutiny is required "when government actions impose a lifetime of hardship on children for matters beyond their control." Smith Rep. 35. And, contrary to Plaintiffs' claim that Professor Smith "refrains from *applying* heightened scrutiny to the conduct of Defendants that is challenged in this case," Pls. Resp. 8, Professor Smith contends that her new legal standard is satisfied. *See* Smith Rep. 36–45 (presenting a set of facts about climate change and science, energy policy, fossil fuel development, renewable energies, history, and sociology that Professor Smith contends triggers intermediate scrutiny); *id.* at 39 (concluding that Defendants' climate and energy "policies should be reviewed under heightened scrutiny" because they satisfy Professor Smith's test).

It is this presentation of facts that triggers the second principal problem with Professor Smith's report—she is no more an expert than the Court in climate change and science, energy policy, fossil fuel development, renewable energies, economics, health, medicine, history, and sociology. *See* Defs.' Mot. 14-15. For example, Professor Smith concludes that "[t]he nation's fossil fuel energy system and degrading land management practices have been the primary cause of increased atmospheric greenhouse gases, particularly carbon dioxide, which is heating the planet and causing dangerous conditions for children." Smith Rep. 36–37. When asked how she knows this, she responded that she knows "as a person on the planet, an individual reading social media and the news and newspapers, and just as somebody who's, you know, paying attention to what's happening." Smith Dep. Tr. 95:16–24. As gatekeepers, trial judges consider whether, among other things, testimony is relevant and reliable. *United States v. Hankey*, 203 F.3d 1160,

1168 (9th Cir. 2000). Here, Professor Smith offers testimony founded upon: her existence as a human; social media; and the news. And she offers such testimony to prove that these facts satisfy the legal standard triggering heightened scrutiny. Professor Smith's non-expert opinions on climate change and science, energy policy, fossil fuel development, renewable energies, economics, health, medicine, history, and sociology do not aid the trier of fact and should therefore be excluded. *See United States v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002) ("Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact." (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993))).

Plaintiffs claim that they "use the expert assistance of Professor Smith's historical and sociological analysis in a manner similar to the historical background of discrimination identified in" *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–68 (1977). Putting aside the fact that the Court in *Arlington Heights* nowhere suggested that expert testimony is necessary to elucidate "historical background," Professor Smith is not a historian or sociologist offering her analysis of historical or sociological sources. Her expertise, like the Court's, is in the law and she is no better equipped than the Court to analyze legal sources to reach a legal conclusion of what level of scrutiny is owed to Plaintiffs. *See Arjangrad v. JPMorgan Chase Bank, N.A.*, No. 3:10-cv-01157-PK, 2012 WL 1890372, at *7 (D. Or. May 23, 2012) ("[E]xpert testimony that consists of legal conclusions is unhelpful and inadmissible." (citing *United States v. Boulware*, 558 F.3d 971, 975 (9th Cir. 2009))). To the extent Professor Smith offers opinions on non-legal topics to support her claim that heightened scrutiny is triggered in this case, those opinions are inadmissible lay opinions. *See* Fed. R. Evid. 701.

III. Professor Smith applies law to fact to reach a legal conclusion and thus occupies the exclusive province of the trial judge.

Defendants have explained that, "[b]y resolving disputed questions of law, Professor Smith's expert report occupies the 'exclusive province of the trial judge.'" Defs.' Mot. 13 (citing *Hornish v. King Cty.*, 899 F.3d 680, 701 (9th Cir. 2018) (quoting *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008))). Professor Smith's proposed testimony also improperly intrudes on this judge's role as fact-finder, because "evidence that merely tells the jury what result to reach is not sufficiently helpful to the trier of fact to be admissible." Defs.' Mot. 13 ((citing *Nationwide*, 523 F.3d at 1060) (quoting *Kostelecky v. NL Acme Tool/NL Indus., Inc.*, 837 F.2d 828, 830 (8th Cir. 1988))).

In response, Plaintiffs insist that "Professor Smith's testimony does not tell the trier of fact 'what result to reach' but instead describes the historical and sociological underpinnings to consider when applying a heightened standard of review when harm to children is alleged." Pls.' Resp. 8. In fact, Professor Smith does tell the Court what result to reach. First, Professor Smith tells the Court that heightened scrutiny should, in fact, apply to the Defendants' actions challenged in this case. Smith Rep. 39. Second, Professor Smith passes judgment on Defendants' climate, energy, and economic policies and political process. Professor Smith's test for determining when heightened scrutiny is warranted for children as a protected class subsumes the analysis of whether heightened scrutiny should apply to a particular set of facts because it requires a factual inquiry of whether the government is denying children a right that stems from a large-scale system, and if denied, whether those children will suffer a lifetime of hardship. Smith Rep. 36. Once Professor Smith determines heightened scrutiny applies, she has already made a value judgment about the government action and decided it will impose a lifetime of hardship. Thus, in applying her test to Defendants' actions, purportedly to show that the Court

should apply heightened scrutiny, Professor Smith passes judgment on Defendants' actions and implicitly tells the Court what result to reach. For this additional reason, her testimony should be excluded.

None of the various cases Plaintiffs reference in their Response supports a different conclusion. Pls.' Resp. 9. For example, in *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037 (D. Ariz. 2005), the district court in fact precluded from trial all aspects of various law professors' proffered expert testimony discussing Maine law on piercing the corporate veil because the testimony constituted inadmissible legal opinion and impermissibly sought to apply law to facts. *Id*. at 1044–46. And while Plaintiffs correctly note that the court allowed two of the law professors to "opine on corporate norms and whether the conduct of the parties complied with the norms," Pls.' Resp. 9, this opinion testimony merely identified prevailing corporate behavioral customs—it did not opine on the appropriate law to apply. *Pinal Creek Grp.* at 1044–46, 1048. Thus, testimony concerning whether the relationship between certain corporate entities was consistent with prevailing customs did not impermissibly apply law to facts, as Professor Smith attempts to do here.

Hangarter v. Provident Life & Accident Insurance Co., 373 F.3d 998 (9th Cir. 2004), similarly provides no support for Plaintiffs. As in *Pinal Creek Group*, the proponent of expert testimony in *Hangarter* sought to establish the standard of care relevant to a particular industry—not to instruct the court as to applicable law. *Id.* at 1016–17. Professor Smith's testimony differs from the consultant's testimony in that case, both because it advocates for a particular legal standard of review and because Professor Smith cannot apply her test without also making a value judgment about Defendants' conduct. The other cases cited by Plaintiffs also dealt with the admissibility of expert testimony to establish a standard of care or a practice

in a particular industry—not a legal standard—and thus provide no support for the result Plaintiffs advocate here. *Halsted v. City of Portland*, No. 3:10-cv-00619-AC, 2012 WL 13054271, at *2 (D. Or. Mar. 7, 2012) (allowing testimony on police policies and training standards); *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1294 (D. Haw. 2007) (allowing testimony on "standard of care amongst family law practitioners" in Hawaii but precluding testimony on "legal conclusions," the "applicable law," and the application of "the law to the facts"); *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836, 841 (10th Cir. 1996) (allowing testimony on insurance industry standards and practice); *Highlands Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 180, 182 (S.D.N.Y. 2008) (allowing testimony on "customs and practices" of the securities industry); *Siring v. Or. State Bd. of Higher Educ. ex rel. E. Or. Univ.*, 927 F. Supp. 2d 1069, 1076 (D. Or. 2103) (allowing testimony on "review practices, policies, and procedures relevant to a tenure-track professor" in the Oregon University system). In none of these cases did the court rely on an expert to establish the legal standard of review to apply to the plaintiffs' claims.

Finally, Plaintiffs' two remaining, narrower arguments can be dismissed simply by looking at the record and this Court's orders. Plaintiffs argue that Professor Smith's testimony cannot be said to occupy the role of the Court in resolving "disputed questions of law" because Defendants do not expressly dispute that "Plaintiffs are capable of being considered a quasi- or semi-suspect class or that in particular *sui generis* circumstances children need protection from a heightened standard of review." Pls.' Resp. 10. In fact, Defendants have expressly opposed the application of heightened scrutiny to Plaintiffs throughout this lawsuit. Defs.' Mot. to Dismiss 25–26, ECF No. 27 ("'Any minority can be said to be powerless to assert direct control over the legislature,' but that does not justify heightened scrutiny under the Fifth and Fourteenth

Amendments." (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985)); Defs.' Mot. for Summ. J. 24 n.8, ECF No. 207 (arguing Plaintiffs' alleged Equal Protection violation fails because "[r]ational basis review applies to the claim of age-based discrimination because age is not a suspect class."). The suggestion that Defendants have somehow failed to dispute this point because they have not used the magic words "semi-suspect" or "quasi-suspect" is specious.

Plaintiffs also posit that "[d]enying Defendants' motion will not preclude Defendants at trial from objecting to Professor Smith's testimony to the extent that it enters the realm of legal conclusions." Pls.' Resp. 9 (citing *Boeing Co. v. KB Yuzhonoye*, No. cv 13-00730-AB, 2015 WL 12803452, at *3 (C.D. Cal. Nov. 3, 2015)). But while the rules of evidence are not ordinarily applied as stringently in bench trials as in jury trials, they should not be ignored, and *Boeing* provides no support for Plaintiffs' contrary argument. The court in *Boeing* found that the expert's limited application of law to the facts had at least some value given the complexities of the corporate structures at issue in the case. 2015 WL 12803452, at *3. By contrast, Plaintiffs' Equal Protection claims involve no similarly complex or esoteric topics; rather, they fall directly within a court's fundamental expertise in the law and Constitution. And unlike the expert in *Boeing* whose expertise was in business and corporations, Professor Smith's expertise is purely legal.

Because Professor Smith's expertise is limited to the law and her testimony focuses solely on the appropriate legal standard of review to apply to Plaintiffs' claims, her proffered testimony falls completely within the "exclusive province of the trial judge" and should be excluded.

CONCLUSION

This Court has already rejected Professor Smith's argument that children are a protected class warranting heightened judicial scrutiny, and Professor Smith does not address Plaintiffs' remaining fundamental rights claim. Her legal opinions are therefore irrelevant and her non-legal opinions are inadmissible lay opinions. Because experts "may not testify about the law," *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 749 (9th Cir. 2005), Defendants respectfully request that the Court exclude the Smith Report and related testimony.

Dated: November 20, 2018

Respectfully submitted,

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Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION
Case No. 6:15-cv-01517-TC

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs,
VS
UNITED STATES OF AMERICA, et al.,
Defendants.

VIDEOTAPED DEPOSITION OF CATHERINE SMITH
Wednesday, September 19, 2018, 8:38 a.m.
Denver, Colorado

REPORTED BY:
Lisa J. Gretarsson, CSR, RPR, CRR

Q. And you would agree that you're not an expert in land management.

A. Yes.

Q. And when you say here that the fossil fuel energy system and degrading land management practice have been the primary cause of increased atmospheric greenhouse gases, what do you mean by primary cause?

A. Would you like to unpack "primary" or "cause" first?

Q. Your choice.

A. I mean, I think primary would be main or central or significant. You could think of it in different ways. I'm not sure if my view or opinion of that is paramount, but -- and then cause is just contributing to increased atmospheric greenhouse gases.

Q. And how do you know that the nation's fossil fuel energy system and degrading land management practices are the primary cause of increased greenhouse gases?

A. Well, I'd say they're sort of my personal response, just from my own -- as a person on the planet, an individual reading social media and the news and newspapers, and just as somebody who's, you know, paying attention to what's happening.

I'd also say from reading the complaint and

for itself.

A. The report focuses, for the most part, on the equal protection clause.

Q. (BY MS. BORONOW) Okay. You would agree that your report doesn't analyze substantive due process?

A. Not directly.

Q. Okay. Does it analyze it indirectly anywhere?

A. I think that -- it doesn't directly address the fundamental rights under substantive due process, but I think the arguments could be used in a -- in terms of the evolution of rights. Those arguments could be used in the fundamental rights context as well, but that's -- my report is focused on the equal protection clause.

Q. Okay. And would you testify at trial about the existence of certain fundamental rights?

A. Not at this time, that I'm aware of.

Q. Okay. I want to turn to the end of your report, not the very end, but section C, I think, where you go through the types of hardships and deprivations of rights that children may suffer.

A. Yes.

Q. So is it your expert opinion that the United States' control over the energy system will deny equal