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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-TC

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

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Defendants file this Notice to alert the Court of two recent and relevant judicial decisions issued after briefing on Defendants' pending motions for Judgment on the Pleadings (ECF No. 195) and for Summary Judgment (ECF No. 207) concluded on July 12, 2018. In both decisions, the courts found that a judicial solution for claims arising out of climate change—like that

requested in this case—is barred by the separation of powers. And in one decision, a court found that there is no constitutional right to a stable and healthy climate, in contrast to Plaintiffs' claims here.

In *City of New York v. BP P.L.C.*, the City of New York sued five oil and gas companies on trespass and nuisance theories alleging that their sale and promotion of fossil fuels contributed to climate change. No. 18-cv-182, 2018 WL 3475470 (S.D.N.Y. July 19, 2018) at *2. A court in the Southern District of New York found that the Clean Air Act displaced any federal common law claims regarding domestic greenhouse gas emissions because "Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act." *Id.* at *5. The court then went on to find that any claims attempting to hold the companies liable for foreign emissions were barred by the separation of powers:

> The "immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms. To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. government."

Id. at *7. This result is consistent with a recent case in the Northern District of California, where a Court dismissed a public nuisance claim brought by the cities of Oakland and San Francisco against the same five oil companies. Nos. 17-06011, 17-06012, 2018 WL 3109726 (N.D. Cal. June 25, 2018) at *9 (dismissing the cities' claims as barred by the separation of powers); *see* Defs.' Reply Mem. of Law in Supp. of Mot. for Summary Judgment 12-13, ECF No. 315.

In *Aji P. v. Washington*, twelve young residents of the State of Washington, including one of the named plaintiffs in this lawsuit, accused the State of failing to adequately address climate change. No. 18-2-04448-1, 2018 WL 3978310 (Wash. Super. Aug. 14, 2018) at *2. Similar to

the plaintiffs in this lawsuit, the plaintiffs in *Aji P.* asked the Superior Court of the State of Washington in King County to order the State to develop "an enforceable state climate recovery plan" and retain jurisdiction to "approve, monitor and enforce compliance" with that plan. *Id.* The court dismissed the case, finding that the "relief requested by Plaintiffs would require the Court to usurp the roles of the legislative and executive branches of our state government" in violation of the separation of powers. *Id.* at *3.

The court in *Aji P.* also addressed a second issue relevant to this case: whether the Constitution provides a fundamental right to a stable and healthy climate. In that case, the plaintiffs asserted a constitutional right nearly identical to the one that Plaintiffs request that the Court recognize here: a right to "stable climate system that sustains human life and liberty." 2018 WL 3978310, at *3. The court declined to recognize such a right, distinguishing it from the fundamental *individual* rights protected by the Due Process Clause. *Id*. The court explained:

> A stable and healthy climate, like world peace and economic prosperity, is a shared aspiration – the goal of a people, rather than the right of a person. These types of aims are the objectives of a polity, to be pursued through the political branches of government. They are not individual rights that can be enforced by a court of law.

Id. at *4.

These two decisions, in addition to recent decisions by the D.C. Circuit and a court in the Northern District of California, add to the growing chorus of judicial precedent that strongly supports Defendants' motions for Judgment on the Pleadings and for Summary Judgment in this case. *See* ECF No. 315 at 12-13 (citing *City of Oakland*) and 30-31 (citing *Delaware Riverkeeper Network v. Federal Energy Regulatory Comm'n.*, 2018 WL 3352897 at *3 (D.C. Cir. July 10, 2018)). As the Southern District of New York and Superior Court of Washington have held, any solution to climate change is legislative in nature and beyond the purview of the

courts. In addition, as the Superior Court of Washington has also recognized, "[t]here is no individual, personal right to a 'stable climate system.'" *Aji P.* at *3; *see also* ECF No. 315 at 30 (no "case has ever found a fundamental right arising from the natural environment or climate system").

These decisions are also relevant to Defendants' pending request that this Court certify for interlocutory appeal any denial of the two pending dispositive motions. *See* Mot. for Summ. J. at 30, ECF No. 207 ("At a minimum, the Court should certify for interlocutory appeal any denial of Defendants' motion."); Defs.' Reply in Supp. of Mot. for J. on the Pleadings at 19, ECF No. 302 (same). As the Superior Court of Washington observed in rejecting the constitutional right this Court has recognized, and as another federal court has observed, "*Juliana* is an outlier." *Aji P.* at *3 (citing *Lake v. City of Southgate*, 2017 WL 767879 (E.D. Mich., Feb. 27, 2017) at *4, n.3. The contrary legal determinations of these courts on the asserted constitutional right claimed by the Plaintiffs here confirm the Supreme Court's determination that the "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion," July 30, 2018 Order, ECF No. 330-1, and therefore that the second of the three requirements warranting certification for interlocutory appeal is met here. *See* 28 U.S.C. § 1292(b). And the fact that these courts reached these contrary conclusions without first compiling an evidentiary record that a trial would produce demonstrates that the question of whether there exists the cognizable constitutional rights that Plaintiffs claim presents a "controlling question of law" for which certification could "materially advance the ultimate termination of the litigation," which satisfies the remaining two requirements warranting certification for interlocutory appeal. Defs.' Notice of Order of United States Supreme Court 2, ECF No. 330 (quoting 28 U.S.C. § 1292(b)).

Dated: September 5, 2018

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