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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,	Case No. 6:15-CV-01517-AA
Plaintiffs,	**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER DENIAL OF REQUESTS TO CERTIFY ORDERS FOR INTERLOCUTORY REVIEW**
v.	
UNITED STATES OF AMERICA, *et al.*,	
Defendants.	**Expedited Hearing Requested**

Introduction

The Ninth Circuit has now requested that this Court "promptly resolve" Defendants' "motion to reconsider the denial of the request to certify orders for interlocutory review." Nov.

8, 2018 Order 2, attached as Ex. 1. And the court of appeals, like the Supreme Court, has left little doubt about how that motion should be resolved. The Ninth Circuit cited the Supreme Court's two orders "noting that the justiciability of plaintiffs' claims 'presents substantial grounds for difference of opinion,'" a direct quotation from the statute governing certification for interlocutory appeal. *Id.* Presented with those three orders from higher courts expressly invoking the interlocutory-certification standard, Plaintiffs contend that this Court should deny interlocutory certification. Pls.' Resp. in Opp'n to Defs.' Mot to Reconsider Denial of Requests to Certify Orders for Interlocutory Review, ECF No. 428 ("Resp.").

Plaintiffs' substantive arguments lack merit for the reasons explained in Defendants' previous motions and elaborated further below. But Plaintiffs' position is especially meritless because it would disregard the pointed and repeated statements of the Supreme Court and the Ninth Circuit. It is simply implausible that those courts repeatedly cited the interlocutory-certification statute yet believed that this Court had a valid basis to deny interlocutory certification based on either the statute or the law-of-the-case doctrine. The orders of the Supreme Court and the Ninth Circuit have made unmistakably clear what the appropriate course in this case is: this Court should certify its orders denying Defendants' dispositive motions for interlocutory appeal, and allow the Ninth Circuit to resolve the controlling legal issues underlying this suit.

Argument

Notwithstanding three orders from higher courts invoking the standard for certification of orders for interlocutory appeal, Plaintiffs contend that this Court should deny certification "[b]ecause this Court has treated certain matters as 'law of the case,' because neither this Court's

MTD Order nor MSJ Order address all of Plaintiffs' claims, and because certain of Plaintiffs' claims require further factual development." Resp. 21. None of the three arguments has merit.

1. As Defendants have explained, the law-of-the-case doctrine presents no impediment to certifying this Court's orders denying Defendants' motions for interlocutory appeal. This Court may revisit its prior decisions under Federal Rule of Civil Procedure 54, and the law-of-the-case doctrine poses no obstacle to doing so when "intervening controlling authority makes reconsideration appropriate." *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995). Here there is not one and not two, *but three* intervening orders from higher courts clearly signaling that reconsideration is "appropriate." *Id.* This Court should reconsider its earlier denial and certify its orders denying Defendants' dispositive motions for interlocutory review under 28 U.S.C. § 1292(b).

There is no cause for concern about piecemeal litigation. The text of Section 1292(b) makes clear that certification of an "order" for interlocutory appeal places the entire "order" before the court of appeals. Because this Court's orders denying Defendants' dispositive motions address the central issues in the case, this Court's decision to certify on any one of those issues would place the entirety of the respective orders before the Ninth Circuit. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("[T]he appellate court may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court. (internal citation and quotation marks omitted)); *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2015) (The appellate court may therefore "address those issues material to the order from which appeal has been taken." (emphasis omitted) (quoting *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir.

1990))), *cert. denied*, 137 S. Ct. 416 (2016), *and cert. denied* 137 S. Ct. 2263 (2017); *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008) ("[W]e have jurisdiction to reach the merits of the entire complaint because it was at issue in the certified order . . . ."). That would remove all of those issues from this Court and avoid piecemeal litigation.

2. Plaintiffs' contention that Defendants' dispositive motions left some of their claims unaddressed is incorrect. Plaintiffs insist that the government's dispositive motions did not address the alleged violation of their "implicit rights to personal security, bodily integrity, and family autonomy," among others. Resp. 22. As an initial matter, the government's argument that this Court lacks jurisdiction to hear this case would plainly require the termination of this suit in its entirety. Moreover, contrary to Plaintiffs' assertion, Defendants' dispositive motions throughout the litigation have made clear that Plaintiffs fail to state *any* cognizable constitutional claim, that *all* of Plaintiffs' claims should be dismissed, *and* that judgment on *all* claims should be entered for Defendants—including all variations of Plaintiffs' substantive due process claim. *See* Fed. Defs.' Reply in Supp. of Mot. to Dismiss 9-10, ECF No. 57 ("MTD Reply"); Defs.' Mot. for Summ. J. 24, ECF No. 207 ("MSJ"); Defs.' Reply Mem. of Law. in Supp. of Mot. for Summ. J. 38-39 & n.11, ECF No. 315 ("MSJ Reply"). Indeed, in resolving Defendants' dispositive motions, this Court's orders addressed the merits of each of the four claims listed in Plaintiffs' Complaint. Nov. 10, 2016 Op. & Order 28-51, ECF No. 83 ("MTD Order"); Oct. 15, 2018 Op. & Order 48-59, ECF No. 369 ("MSJ Order"). There are no claims left to decide.

In any event, the Ninth Circuit has expressly held that certification under Section 1292(b) is not reserved for movants who can show they will run the table on appeal and thereby

"terminate the litigation." *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982) (recognizing that "controlling question" has not been interpreted "so narrowly"); *see Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) ("[N]either § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it 'may materially advance' the litigation."). Plaintiffs cannot reasonably contend that resolving the numerous disputed legal questions about the claims that have been the focus of this litigation for the past three years would not "materially advance" the litigation.

3. Finally, none of Plaintiffs' claims can be saved by further factual development. As Defendants have explained, each of the seven controlling questions raised for interlocutory appeal can and should be decided as a matter of law. Plaintiffs argue that a factual inquiry into "history and tradition" is needed to determine whether a new fundamental right to a climate system capable of sustaining human life exists. Resp. 23. But this Court found such a right to exist in the absence of any factual development on a motion to dismiss. MTD Order 32. And courts routinely adjudicate the scope of the Due Process Clause—a quintessential legal question—without trials. Similarly, Plaintiffs contend that the "issue of standing is a mixed question of fact and law." Resp. 23 (quoting *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 641 (B.A.P. 9th Cir. 1992)). But the government has repeatedly argued that, regardless of any further factual development, Plaintiffs lack standing *as a matter of law*. Fed. Defs.' Mem. of P. & A. in Supp. of Their Mot. to Dismiss 7-19, ECF No. 27-1; MTD Reply 2-9; MSJ 6-14; MSJ Reply 2-15. Cases are routinely dismissed for lack of standing as a matter of law, despite the notion that facts are sometimes relevant to standing analysis; but the obvious point that facts can

bear on standing inquiries is not an absolute guarantee that plaintiffs will be able to either get to summary-judgment-stage or trial-stage resolution of standing issues. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (finding based on summary judgment record that respondent lacked standing as a matter of law); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 102-10 (1998) (finding, based on record developed for motion to dismiss, that respondent failed to demonstrate that the relief sought would likely remedy its alleged injury and therefore lacked standing). Standing is most often conceived of and resolved as a *threshold legal issue*. *See, e.g., Steel Co.*, 523 U.S. at 102 (describing Article III standing as a "threshold jurisdictional question"); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) ("Standing is a threshold matter central to our subject matter jurisdiction" that must be resolved "before proceeding to the merits."). Moreover, beyond Plaintiffs' lack of standing, the government's argument that Plaintiffs' claims are non-justiciable under Article III and beyond the Court's equitable power require no factual development. And it should also go without saying that no factual development is required to assess whether the APA's provisions for administrative and judicial consideration of the issues Plaintiffs seek to raise are controlling. *Cf.* Resp. 24.

In sum, this Court has recognized that "[t]his is no ordinary lawsuit." MTD Order 3. In its first order in this case, the Supreme Court observed that the "breadth of [Plaintiffs'] claims is striking. . . and the justiciability of those claims presents substantial grounds for difference of opinion." ECF No. 330-1 at 2. In its most recent order, the Supreme Court expanded that observation to observe that, in fact, the claims themselves "present[] substantial grounds for difference of opinion." ECF No. 416 at 2. And the Ninth Circuit has now echoed the Supreme Court's observations. Ex. 1 at 2. Plaintiffs suggest that this Court has "unfettered" and

"unreviewable" discretion to deny certification notwithstanding this new (and repeated, on the Supreme Court's part) guidance from higher courts. Resp. 12-13. Courts, however, must exercise their discretion based not on the specter of reviewability, but on considerations of judgment, the law, and the interests of justice. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (citing *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807))). This is inherent in the text Congress chose for Section 1292(b). Congress set out the three factors for a reason—to induce a careful analysis of whether interlocutory appeal certification is proper—and we submit it is proper in a case this novel. By contrast, Plaintiffs are proceeding as if the main driver of this Court's decision on the pending motion should be the abstract point that district court discretion over certification decisions is broad. The answer to the Plaintiff's approach is that however broad Section 1292(b) discretion is, it is not so broad as to allow "sound legal principles" to be disregarded. A Ninth Circuit ruling on a certified appeal here could plainly (1) obviate the need for a trial by resolving controlling questions of law, as well as (2) require dismissal of all or substantial parts of this case and, as a result, materially advance this litigation's termination, and now (3) the Supreme Court has instructed that there is a substantial ground for difference of opinion on the unprecedented legal issues posed by this case.

There is no real room for doubt about what the Supreme Court and Ninth Circuit believe the next step in this litigation should be. This Court should certify its orders denying Defendant's dispositive motions for interlocutory appeal, so that the Ninth Circuit can consider

in an ordinary appellate posture the justiciability and, if necessary, merits of Plaintiffs' claims in advance of any trial.

Conclusion

For all of the foregoing reasons, this Court should grant the United States' request that it certify for interlocutory appeal its November 10, 2016 Opinion and Order as well as its October 15, 2018 Opinion and Order.

Dated: November 14, 2018

Respectfully submitted,

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