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A New Environment for Climate Change Litigation

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With the federal executive branch backtracking from Obama-era climate change programs, the judicial branch may be increasingly receptive to novel forms of climate change litigation. In *Juliana v. United States*, Case No. 6:15-cv-01517-TC (D. Or.), a small group of young people and a climate scientist representing future generations are suing the federal government for violating their asserted constitutional rights to a stable climate system. In November of last year, U.S. District of Oregon Judge Ann Aiken denied a motion to dismiss that complaint.[1] In June 2017, Judge Aiken fully adopted the recommendation of Magistrate Judge Thomas Coffin to deny a related motion for interlocutory appeal.[2] Judge Coffin had found that the merits of the *Juliana* plaintiffs' admittedly groundbreaking claims were so strong that the denial of the motion to dismiss was not subject to reasonable difference of opinion. Both the denial of the motion to dismiss and the denial of the interlocutory appeal represent an unusual judicial receptiveness to climate change litigation. The fate of *Juliana* and other cases like it is worth watching closely as the federal judiciary reacts to the new administration.

Background

Famous climate change cases of the recent past have tended to involve statutory disputes rather than constitutional law or even common law (e.g. tort) disputes. For example, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Supreme Court first held that EPA has the authority to regulate greenhouse gas ("GHG") emissions under the Clean Air Act. The Court later narrowed that decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), holding that EPA's regulations reaching businesses

exclusively on account of their GHG emissions were not authorized by the Clean Air Act. The pending case of *West Virginia v. EPA*, No. 15-1362 (S. Ct.), asks, among other things, whether a previously unused section of the Clean Air Act can support the Clean Power Plan's requirement that power plants bring about external forms of energy savings, or possibly just shut down, in order to meet emissions targets. Back when EPA was eager to stretch its statutory authority to tackle the immensely complex problem of climate change, these cases were potential game changers for industry. In the present political climate, however, these cases may have short-lived effect.

Today, other forms of litigation related to climate change may have a greater likelihood of directly affecting industry in the near future. These may range from class action tort claims to NEPA challenges against individual projects to investor securities lawsuits.[3] Notably, across the full spectrum of these cases, basic climate change science is generally readily accepted.[4] Though doubts about the fundamentals of climate science — the occurrence of climate change and its cause by human activities — may still exist in the realm of the public discourse, they are not often entertained by the courts. From NEPA documents to judicial decisions, the international scientific consensus that climate change is happening, that it is both caused by and likely preventable through human activities, and that it presents an actual perilous risk, is taken seriously. The obstacles to judicial relief are a matter of who can be held liable and who has the authority or responsibility to do something about it.

Juliana represents a new type of climate change litigation, in which claims are brought against the federal government grounded in constitutional rights and/or the public trust doctrine. The plaintiffs in *Juliana* are coordinated by a nonprofit organization called Our Children's Trust, promoting a theory of the public trust doctrine most visibly advanced by Professor Mary Wood at the University of Oregon.[5] Our Children's Trust has brought a series of similar cases linked by their theory of the public trust doctrine. So far, Judge Aiken (a graduate of the University of Oregon Law School) appears to be their most receptive audience.

In November 2016, Judge Aiken denied the government and industry intervenors' motion to dismiss the plaintiffs' complaint.[6] The question at the motion to dismiss stage is whether, assuming all a plaintiff's factual allegations to be true, the plaintiff could possibly be entitled to legal relief. Judge Aiken held that neither the standing doctrine, the political question doctrine, the novelty of plaintiffs' asserted constitutional rights, nor the novelty of applying the public trust doctrine to the federal government, should bar the plaintiffs' claims at this early stage. By denying the motion to dismiss,

Judge Aiken allowed plaintiffs to continue the lawsuit by now seeking the factual evidence to support their claims on the merits. The key allegations the plaintiffs will seek to substantiate through discovery are (1) that the U.S. federal government has known for decades that climate change is caused by human GHG emissions and presents serious risks to the American people, and yet (2) that it has deliberately disregarded that risk while not just failing to regulate but indeed promoting and subsidizing GHG emissions all the while.

Following the denial of the motion to dismiss, the departing administration took the opportunity to admit most of the factual allegations in the complaint, including with regard to the international consensus on climate change science and the threat that climate change poses to the public health and welfare of current and future generations.[7] It remains to be seen whether the new administration will attempt to revoke those admissions. Industry intervenors have now withdrawn from the case, largely to avoid answering a request for admissions regarding their agreement with the government's admissions.[8]

The ideal outcome for the plaintiffs in *Juliana* would be for the court to declare a certain threshold for global temperature increase or pounds of carbon dioxide equivalent in the atmosphere, at which their constitutional rights to a life-sustaining climate system are violated. The plaintiffs would then ask the court to order the government to figure out the extent to which the United States is contributing to the potential for crossing that threshold, and do whatever it takes to curtail that contribution. For example, the court might find that anything more than 2 °C warming is a constitutional violation. EPA might determine that the planet is actually headed toward 4 °C warming, for which U.S. emissions will contribute 25%. Congress, EPA, and other federal agencies might then have to come up with a plan to reduce U.S. emissions by whatever amount it would take, all else being equal, to bring expected planetary warming to 3.5 °C (i.e. eliminate the country's 25% contribution to the 2 °C of extra warming).

In light of this structure, the potential effect of the *Juliana* litigation on industry is fairly indirect — even if the litigation were successful, there would still be a lot of flexibility in how the various parts of the federal government brought about the necessary emissions reductions. Nevertheless, if the court-ordered emissions reduction is sufficiently substantial, assuming that Congress and the federal agencies actually complied with the order, high-emission industries could expect significant economic effects whether in the form of higher taxes, stringent performance standards, prescriptive regulations, or penalties.

To understand the likelihood of success for the *Juliana* plaintiffs, it is necessary to consider each of the major legal issues that underlies the litigation.

Standing

The standing doctrine — governing whether a particular plaintiff has "standing" to bring a particular lawsuit — was initially developed by progressive jurists in the minority during the early twentieth century "*Lochner* era," in an attempt to prevent challenges to progressive legislation.[9] Since at least the 1980s, however, the standing doctrine has served more to bar claims brought by progressive organizations.[10] The theory underlying the doctrine is that Article III of the Constitution empowers the federal courts to decide cases and controversies, not generalized grievances regarding the enforcement of the laws. Thus, the doctrine enjoys separation-of-powers significance in delineating which claims can be heard by the federal courts, and which must be left to the political process.

The standing doctrine requires that a plaintiff have a (1) concrete and personalized injury, which is (2) fairly traceable to the complained of conduct by the defendant, and which is (3) redressable by the court.[11] All three of these requirements have presented major hurdles for climate change litigation.

The trouble with the concrete and personalized injury requirement is that judges may feel that a particular plaintiff's allegedly climate change-induced harm is too difficult to attribute specifically to climate change and/or too much like everyone else's climate change-induced harm. But evolving science is chipping away at these problems, providing plaintiffs with more and more tools to trace specific injuries to climate change, from rising sea levels to drought to tropical storms to failing fish populations.[12] As more particularized injuries are linked to climate change, plaintiffs can point to the specific injuries that affect them in specific ways. In *Juliana*, Judge Aiken accepted plaintiffs' allegations at face value, finding that such alleged injuries as algae blooms harming the local drinking water supply, heat waves damaging a family orchard, and decreased snowpack shortening the local ski season all constituted fairly pleaded concrete and personalized injuries resulting from climate change.[13]

The causation requirement presents two potential difficulties in most climate change cases. In actions against private entities, the difficulty thus far has been the idea that climate change would still be occurring on almost exactly the same scale even without the actions of any particular entity. However, recent scientific advancements seem to have made it possible to calculate a single actor's contribution to climate change. The

new science is making it possible to say that a particular entity contributed a specific portion of the emissions leading to climate change, even at a fraction of a percent.[14]

While previous cases dismissed attempts to hold single corporations responsible for climate change harms, finding that the causal link between the corporation and the harm was simply too tenuous and indeterminable,[15] the new science might eventually lead to liability for an entity's fractional share of the damages. In the much-watched case of *Lliuya v. RWE AG*, a Peruvian farmer threatened by melting glaciers is currently testing this approach against a major German utility in German court. The Essen District Court dismissed the complaint, broadly finding that the new apportionment science was relevant to damages but not causation, however the case will be heard on appeal later this year.[16]

The difficulty in challenging the actions of governmental entities is in finding that the challenged governmental policies have caused the complained-of (typically private) GHG emissions. The advantage of *Juliana* is that it does not challenge any particular government regulation or lack thereof, but rather the whole of U.S. government's actions and inactions taken together over the past many decades. It seems clear that the combined actions and inactions of the U.S. government have had some effect on the extent of U.S. GHG emissions. As such, Judge Aiken readily found the causation requirement met for purposes of the standing inquiry.[17] Whether causation will ultimately be factually demonstrated in the case, and at a level significant enough to trigger the plaintiffs' alleged constitutional rights, cannot yet be determined.

The redressability issue depends on the type of relief being sought in any particular climate change case. In the case of monetary damages against a private defendant, the answer is usually easy: monetary damages are the court's forte, and will result in compensating the plaintiff for her injuries. In the case of injunctive relief, however, the court faces the question of whether stopping a particular activity will have enough of an effect on climate change to actually abate any of plaintiff's injuries. Assume, for instance, that a company is responsible for 1% of global GHG emissions. That would make it one of the biggest single emitters on the planet. However, even stopping its operations altogether would leave 99% of global GHG emissions unchanged, likely meaning that climate change would still occur and plaintiff would still, for instance, need to build his flood wall. But in *Juliana*, the challenged GHG emissions account for 25% of global emissions, and thus very well may have a significant impact on climate change outcomes.[18]

In a similar case in the Netherlands, *Urgenda Foundation v. Kingdom of the Netherlands* [2015] HAZA C/09/00456689, the District Court for The Hague recently accepted such

reasoning. The court ruled that the Dutch government must do more to curb Dutch GHG emissions, using whatever means it might have available, both on the basis of the country's proportional responsibility for GHG emissions, and on the grounds that the Netherlands has a moral responsibility to exercise international leadership on the issue.[19] Should the plaintiffs in *Juliana* ultimately be found to have any of the constitutional rights they allege, it will be well within the court's traditional purview to remedy violations of those rights through injunctive relief. Thus, their climate change-caused injuries may well be redressable through the court's resulting power over 25% of global GHG emissions.

Political Question

The tension at the heart of the political question doctrine is whether it is necessary for the judiciary to be able to enforce the whole of the Constitution, or whether there are some parts of the Constitution within the exclusive authority of another branch and whose protection must be sought through that branch alone. The classic example is the power of impeachment, which the Constitution commits to the exclusive authority of Congress and which the federal courts do not have the power to second-guess.[20] Climate change, not being mentioned in the Constitution, is not such a clear case.

The more common but muddier analogy is the foreign affairs power of the executive, which the courts are generally loathe to encroach on.[21] The version of the political question doctrine used for dealing with more complicated territory like the foreign affairs power, known as the "prudential" political question doctrine, has recently been out of favor.[22] Nevertheless, Judge Aiken marched through the full prudential inquiry to analyze the motion to dismiss th*e Juliana* complaint.

In the context of the rights asserted and the relief requested by the *Juliana* plaintiffs, the only prudential test Judge Aiken found to present a reasonable hurdle was the potential for serious conflict with the other branches of government. Pragmatically, courts must consider the possibility (though generally unstated) that the executive might choose to disobey a court order, such as an order to undertake sweeping reforms to deal with climate change. Such an event would be nationally embarrassing and might damage the credibility of the courts. However, assessing the Obama administration at the time, Judge Aiken reasoned that there was no risk of fundamental embarrassment from ordering the executive simply to take stronger action on climate change than it was already proclaiming its intention to do.[23]

Substantive Due Process

Though the *Juliana* complaint stated its constitutional rights in several different formulations, each presenting unique issues and implications, the version of those constitutional rights that Judge Aiken took up for analysis was the possible fundamental right to a climate system capable of sustaining human life. The doctrine thus implicated was substantive due process. Substantive due process is a protection attributed to the 5th and 14th Amendments against government infringement of those rights that are so rooted in the tradition and history of this country, or so implicit in the concept of ordered liberty, that they must not be infringed no matter what legal process is afforded. The only exception is for restrictions that are narrowly tailored to serve a compelling government interest.[24]

The list of rights protected by the substantive due process doctrine does not appear in the Constitution. Instead, those rights have emerged over time, typically in the most high-profile Supreme Court cases, as judges "discovered" their existence. For example, in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Supreme Court found that the right to marry the person of one's choosing is a fundamental right, making it unconstitutional for states to refuse to grant or acknowledge same-sex marriages. In contrast to the use of the substantive due process doctrine in the modern era to secure progressive social protections, however, the Court in the early 1900s employed the doctrine to defeat progressive state labor protections by finding a fundamental right to economic liberty. The most famous such decision was *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court invalidated New York's maximum hours law for bakery workers. The tension in the substantive due process doctrine is between protection of truly fundamental but unenumerated rights, particularly those of minority groups who cannot effectively protect their rights through the political process, versus fear of an unaccountable judiciary able to expand and contract the Bill of Rights at will.

In *Juliana*, Judge Aiken attempted to balance this tension by identifying a fundamental right that was as close as possible to the mere non-annihilation of the planet. Thus, Judge Aiken proposed that the right to a climate system capable of sustaining human life is a protected fundamental right, supposing that it may be possible to determine an emissions threshold at which the risk of climate-induced catastrophe is so high that the right is violated.[25]

One of the primary counterarguments to the existence of such a right is the argument that the Constitution does not guarantee affirmative rights. That is, the government may be prohibited from actively destroying the planet, but it is not required to bring about a sustainable planet. In this regard, the history of school desegregation provides

an instructive analogy. First the Court found that "separate but equal" public schools violated children's right to equal protection.[26] But even after invalidating the laws requiring the segregation of public schools, most public schools remained segregated in fact. Ultimately, the federal district courts supervised a court-led process of affirmative integration. The courts never found a fundamental right requiring the government to affirmatively provide children with a racially diverse education (just as they may or may not ever find that the government has an affirmative obligation to provide its citizens a stable climate). However they did find that government action had created the problem in the first place, and so government action could be ordered by the courts in order to remedy the problem.

Public Trust Doctrine

The public trust doctrine says that the government holds certain especially important natural resources in trust for the public, with the primary consequence that it cannot do anything to permanently alienate or squander them. Thus, Illinois could not sell the Chicago harbor to the railroads in the late 1800s, potentially curtailing public and economic access to Lake Michigan forevermore.[27] Nor could California allow Los Angeles to drain all the water out of Mono Lake in the 1980s, irreparably destroying a unique and valuable ecosystem.[28] But troubles abound in applying the public trust doctrine in the *Juliana* litigation: it has never been used with respect to the atmosphere, it has never been clearly used against the federal government, and, indeed, it has hardly ever been used at all.

The public trust doctrine is most clearly tied to the protection of navigable waterways. At a time in history when travel by water was the essential way in which almost all movement of people, commerce, and even communications took place, it was practically unthinkable that any people could delegate to the government the right to privatize or impair those waterways, nor that it could have the right to do so at the expense of future generations. A basic principle underlying the doctrine is that a core part of what it means to have sovereignty over a territory is to be the trustee for the public resources of that territory in perpetuity. The idea that this doctrine could cover similarly essential public resources other than navigable waterways is not so farfetched. However, Judge Aiken declined to determine the doctrine's applicability to the atmosphere, finding that the effect of climate change on the territorial seas (a classically navigable water) was enough to trigger the doctrine.[29]

More troublesomely, the public trust doctrine has never been used by a court to require the protection of a resource by the federal government. The Supreme Court has even stated that the public trust doctrine "remains a matter of state law."[30] Accordingly,

the D.C. Circuit recently held in an unpublished, three-page per curiam opinion that the doctrine really must not apply to the federal government — that it is a matter of state law only, and constrains the actions only of state governments.[31] Yet Judge Aiken found the D.C. Circuit's reasoning unpersuasive, finding in particular that it had taken the Supreme Court's statement out of context. She further reasoned that if the states take title to certain resources when they enter the Union subject to the public trust doctrine, they must acquire that trustee responsibility from the federal government. In other words, the federal government's title to certain public resources must be burdened by the public trust doctrine as well.[32]

Judge Aiken was not bothered by the rarity of the public trust doctrine. She described the doctrine as a tenet of sovereignty itself, a corollary of the Rousseauian social contract theory on which our republic is based. Thus, she concluded that it was best viewed as another unenumerated right of the people protected by the Constitution in the form of substantive due process.[33]

Conclusion

How likely are the *Juliana* plaintiffs to succeed, ultimately? What we have seen in the context of civil rights cases is typically a slow, iterative evolution toward the protection of broad new categories of rights by the judiciary. By contrast, if the plaintiffs in *Juliana* are successful, the expansion of the Constitution to encompass climate rights would be a sudden sea change. But one explanation for why other recent courts have been less receptive to climate change litigation is that they had perceived that a gradual and iterative process was occurring in the other branches — that the ship of the federal government was slowly turning toward action to protect the climate and that the federal courts did not need to worry about it. In the minds of many, that era has ended. Not only has Congress never enacted comprehensive climate change legislation, but the recent presidential election has put the executive branch on a path leading away from climate action.

The change in presidential administration will have a few effects directly on the dynamics of the *Juliana* litigation. First, Judge Aiken's assessment of whether the political question doctrine should bar the case from going forward relied in part on the progressive stance of the executive on climate change issues.[34] The new executive's nearly opposite stance will not necessarily move the courts to avoid a pro-climate rights ruling ex ante, however. The courts might instead anticipate a situation like the aftermath of *Brown v. Board of Education*, in which widespread state defiance of the Supreme Court's anti-segregation ruling led to the Court's much maligned "all

deliberate speed" approach, directing federal district courts to supervise a gradual desegregation process that would take decades to make headway.

Second, the long-term prospects for the case on appeal may be affected by new perceptions of whether Congress and agencies like the EPA have climate change under control, or are currently able to vindicate the public interest. Most notably, the standing doctrine over the past decade or two has trended toward denying environmental plaintiffs their day in court. If that trend continues, the standing doctrine could be one of the more significant hurdles for *Juliana* on appeal. However, there is reason to think the standing doctrine may start trending in the other direction. A court that believes climate rights plaintiffs are not getting a fair hearing in the political process is likely to be more sympathetic toward giving them a hearing before the judiciary.

In the wake of Judge Aiken's denial of the government's motion for interlocutory appeal, the government has filed a petition for writ of mandamus with the Ninth Circuit.[35] The petition requests review of the standing, substantive due process, and public trust doctrine issues presented in the motion to dismiss. It argues that Judge Aiken committed clear error with regard to each of these issues, and that immediate relief is necessary to protect the government from a "serious intrusion on the separation of powers." The major legal issues underlying the litigation may thus be heard on appeal very soon, before the case moves into factual development. The most immediate potential outcome of the petition is that the Ninth Circuit may stay the District Court litigation pending its own review.

Even if the *Juliana* plaintiffs ultimately lose this case, it may be on narrow grounds. Future climate rights cases, like civil rights cases, may come closer and closer to achieving the outcome the *Juliana* plaintiffs are seeking. Thus, even without elected representatives eager to enact new emissions regulations, or overhaul subsidies benefitting high-emission industries, a court-ordered process could eventually lead things in that direction. During the Obama administration, those interested in emerging climate change law did well to keep their eye on EPA. Today, they would do well to keep their eye on the courts.

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[1] *Juliana v. United States*, Order Denying Motion to Dismiss, Case No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016).

[2] *Juliana v. United States*, Order Adopting Recommended Denial of Interlocutory Appeal, Case No. 6:15-cv-01517-TC (D. Or. June 8, 2017); *Juliana v. United States*,

Findings & Recommendation re Interlocutory Appeal, Case No. 6:15-cv-01517-TC (D. Or. May 1, 2017).

[3] For an extensive overview of all climate change cases brought in the United States, see Columbia Law School Sabin Center for Climate Change Law & Arnold & Porter Kaye Scholer LLP, U.S. Climate Change Litigation.

[4] *See* William H. Rodgers, Jr. & Andrea K. Rodgers, Commentary, *The Revival of Climate Change Science in U.S. Courts*, 6 Wash. J. Envtl. L. & Pol'y 534 (2016).

[5] *See, e.g.*, Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 Wash. J. Envtl. L. & Pol'y 633 (2016).

[6] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[7] *See Juliana*, Findings & Recommendation, *supra* note 2.

[8] *Juliana v. United States*, Order Granting Motions to Withdraw, Case No. 6:15-cv-1517-TC (D. Or. June 28, 2017).

[9] *See Fairchild v. Hughes*, 258 U.S. 126 (1922).

[10] *See Allen v. Wright*, 468 U.S. 737 (1984).

[11] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[12] *See, e.g.*, Annie Sneed, *Yes, Some Extreme Weather Can Be Blamed on Climate Change*, Scientific American (Jan. 2, 2017). For an extensive catalog and map of events attributable to climate change, see ClimateSignals.org (currently in beta).

[13] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[14] Bethan Gilroy, *A New Hope for Climate Change Litigation: Holding Corporations to Account for their Greenhouse Gas Emissions*, G.U.L.S. L. Rev. (Feb. 16, 2017).

[15] *See, e.g.*, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012).

[16] *Lliuya v. RWE AG*, Case No. 2 O 285/15 Essen Regional Court (Dec. 15, 2016) (see unofficial English translation); *Climate suit against German utility RWE: Higher District Court will hear appeal on 13 November*, GermanWatch (May 13, 2017).

[17] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[18] *Id.*

[19] *Urgenda Foundation v. Kingdom of the Netherlands* [2015] HAZA C/09/00456689 (see English translation).

[20] *See Nixon v. United States*, 506 U.S. 224 (1993).

[21] *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996 (1979).

[22] *See Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (finding justiciable a statutory claim to list Israel as the passport birthplace without mentioning the traditional prudential inquiries); *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S.Ct. 1377 (2014) (reclassifying certain prudential standing tests as nonjurisdictional elements of the cause of action); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (reaffirming *Lexmark* and calling into question the prudential ripeness doctrine).

[23] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[24] *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

[25] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[26] *Brown v. Board of Ed. of Topeka, Shawnee County, Kan*., 347 U.S. 483 (1954).

[27] *Ill. Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

[28] *Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cnty*., 33 Cal.3d 419 (1983).

[29] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[30] *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012).

[31] *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014).

[32] *Juliana*, Order Denying Motion to Dismiss, *supra* note 1.

[33] *Id.*

[34] *Id.*

[35] *United States v. U.S. Dist. Ct.*, Petition for Writ of Mandamus, Case No. 17-71692 (9th Cir. June 9, 2017).

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