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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER DENIAL OF REQUESTS TO CERTIFY ORDERS FOR INTERLOCUTORY REVIEW

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INTRODUCTION

Defendants have repeatedly squandered valuable time and resources of the judiciary and the parties through countless "exceedingly rare" requests for interlocutory review and mandamus review on the precise issues presented again for reconsideration here. As Plaintiffs have argued and the District Court has declared *ad nauseam*, this case is not appropriate for interlocutory review. *See, e.g.*, Magistrate Judge Coffin Findings & Recommendation for Denial of Certification for Interlocutory Appeal, Doc.[1] 146 at 9 (concluding that Plaintiffs' claims would be "aided by a full development of the record"); Order Denying Certification for Interlocutory Appeal, Doc. 172 at 4 ("I agree with Judge Coffin that certification for interlocutory appeal is not warranted in this case."); *In re United States*, 884 F.3d 830, 834 (9th Cir. 2018); *In re United States*, 895 F.3d 1101, 1106 (9th Cir. 2018) ("The merits of the case can be resolved by the district court or in a future appeal"); Opinion and Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings, Doc. 369 at 59–61 (declining to certify any issues for interlocutory appeal). This Motion should also be denied.

[1] Plaintiffs refer to the District Court docket, *Juliana v. United States*, No. 6:15-cv-0157-AA (D. Or.), as "Doc."; the docket from the Government's First Ninth Circuit Petition for writ of mandamus, *In re United States*, No. 17-71692 (9th Cir.), as "Ct. App. I Doc."; the docket for the Government's Second Ninth Circuit Petition for writ of mandamus, *In re United States*, No. 18-71928 (9th Cir.), as "Ct. App. II Doc."; the docket for the Government's Third Ninth Circuit Petition, *In re United States*, No. 18-72776 (9th Cir.), as "Ct. App. III Doc."; the Supreme Court docket for the Government's first application for stay, *U.S. v. U.S. Dist. Court for Dist. of Oregon*, No. 18A65, as "S. Ct. I Doc."; the Supreme Court docket for the Government's Second Application for stay, *In re United States*, No. 18A410, as "S. Ct. II. Doc."; and the docket for the Government's Fourth Ninth Circuit Petition, *In re United States*, No. 18-7304, as "Ct. App. IV. Doc."

Granting Defendants' Motion for Reconsideration would sanction Defendants' practice of continually doubting and defying determinations made by this Court and the Ninth Circuit in violation of firmly rooted notions of finality and appellate practice. Even accounting for the Supreme Court's statements on *one* of the *three* mandatory requirements for interlocutory review, interlocutory review is not appropriate because no new circumstances call into question this Court's conclusions as to the other two requirements for interlocutory review.

Further, as this Court previously noted, the Supreme Court's language regarding substantial grounds for differences of opinion "does not . . . remove[] the Court's discretion to deny the request for interlocutory appeal." Doc. 369 at 61 n. 20. This Court is intimately familiar with the legal arguments, the urgent circumstances, the various issues presented in this case, and the need to decide those issues in the light of a full factual record. Accordingly, this Court has twice exercised its "unfettered discretion" to deny certification for interlocutory appeal. *See Mowat Const. Co. v. Dorena Hydro, LLC*, No. 6:14-CV-00094-AA, 2015 WL 5665302, at *5 (D. Or. September 23, 2015) (Aiken, C.J.) ("[D]istrict Court judges have unfettered discretion to deny certification.") (quotations and citations omitted). That discretion is "unreviewable." *Exec. Software N. Am., Inc. v. United States Dist. Ct. for the Cent. Dist. Of Cal.*, 24 F.3d 1545, 1550 (9th Cir. 1994) (district court's certification decision is "unreviewable"), *overruled on other grounds by Cal. Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008); *see also, In re Gugliuzza*, 852 F.3d 884, 898 (9th Cir. 2017) ("We also lack jurisdiction under § 1292 because the district court did not certify its decision for interlocutory review."); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) ("Concurrence of both the district court and the appellate court is necessary and we are without power to assume unilaterally an appeal under section 1292(b)."); *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35,

47 (1995) (citing to § 1292(b) and stating: "Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals." (footnote omitted)).

The Ninth Circuit has also squarely held that it will not review a District Court's decision not to certify an issue for interlocutory review on a writ of mandamus. *Occidental Petroleum Corp.*, 541 F.2d at 1338 (mandamus is not an "appropriate remedy" to direct a district court to exercise its discretion to certify a question for interlocutory review); *Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977) ("We hold that mandamus to direct the district judge to exercise his [or her] discretion to certify the question is not an appropriate remedy." (citations omitted)).

Defendants' Motion for Reconsideration should be denied.

I. Procedural History

Plaintiffs are loath to once again recount this issue's tortured procedural history for this Court. The history, however, bears emphasis in light of the sheer number of times this Court and the Ninth Circuit have already considered, and rejected, the same arguments that Defendants demand this Court to reconsider here.

On November 17, 2015, Defendants filed a motion to dismiss, asserting that: (1) Plaintiffs lacked Article III standing; (2) Plaintiffs had not properly pled a due process violation; (3) Plaintiffs had not properly pled an Equal Protection claim; and (4) Plaintiffs had failed to state a claim under the Public Trust Doctrine. Doc. 27.[2] On April 10, 2016, Magistrate Judge Coffin issued an Order and Findings & Recommendation, recommending denial of the Motions

[2] Three trade organizations collectively representing the United States' fossil fuel industry successfully moved to intervene. Doc. 14. On November 12, 2015, these Intervenors moved to dismiss Plaintiffs' claims, arguing, among other things, that Plaintiffs' claims present non-justiciable political questions barred by the separation of powers. Doc. 20.

to Dismiss. Doc. 68. On November 10, 2016, Judge Aiken issued an Opinion and Order Denying the Motions to Dismiss (the "MTD Order"). *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016). In its MTD Order, this Court denied the Motions to Dismiss and rejected the arguments of Defendants and Intervenors regarding: (1) the political question doctrine under the separation of powers; (2) Article III standing; (3) an alleged failure to state a claim under the Due Process clause; and (4) an alleged failure to state a claim under the Public Trust Doctrine. *Id*.

On March 7, 2017, four months after this Court issued its MTD Order, Defendants moved this Court to certify for interlocutory review. Doc. 120-1. Defendants argued that the issues of standing, the fundamental right to a climate system capable of sustaining human life, and the Public Trust Doctrine constituted controlling questions of law appropriate for interlocutory review, the resolution of which would materially advance the litigation. *See* Doc. 120-1 at i.

On May 1, 2017, Magistrate Judge Coffin issued his Findings & Recommendation denying Defendants' motion for interlocutory appeal. Doc. 146. Magistrate Judge Coffin concluded, among other things, that:

> [A]ny appellate review of the Order of the District Court allowing plaintiffs to proceed on their public trust and due process constitutional claims will only be aided by a full development of the record regarding the contours of those asserted rights and the extent of any harm being posed by the defendants' actions/inactions regarding human-induced global warming. This case, the issues herein, and the fundamental constitutional rights presented are not well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings.

Doc. 146 at 9. Judge Coffin further found that any separation of powers concerns were "purely hypothetical and ignore[d] the court's ability to fashion reasonable remedies based on the evidence and findings after trial." *Id.* at 9.

Defendants objected to Magistrate Judge Coffin's Findings & Recommendation, arguing once again that the issues of standing, the fundamental right to a climate system capable of sustaining human life, and the Public Trust Doctrine warranted certification for interlocutory review. Doc. 149. On June 8, 2017, this Court denied Defendants' request to certify its MTD Order for interlocutory review, adopting the reasoning of Magistrate Judge Coffin in full. Doc. 172.

Defendants next sought mandamus relief at the Ninth Circuit, claiming that discovery and trial itself violate the separation of powers, and seeking dismissal of Plaintiffs' claims on the basis of standing, an alleged failure to identify a cause of action (for instance, as Defendants' suggested, the Administrative Procedure Act ("APA")), separation of powers, and the merits of Plaintiffs' constitutional and public trust claims. Ct. App. I Doc. 1. On July 25, 2017, the Ninth Circuit stayed proceedings for seven months while it considered Defendants' petition. Ct. App. I Doc. 7. At oral argument, Judge Berzon described this petition as, in essence, "an objection to the fact that [the Court] didn't certify it — the interlocutory appeal." Oral Arg. Recording at 5:41-5:53, *United States v. U.S. Dist. Court for Dist. of Or.*, No. 17-71692 (9th Cir. Dec. 11, 2017), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012816.

On March 7, 2018, Chief Judge Thomas, writing for the Ninth Circuit panel, denied Defendants' petition, finding Defendants failed to satisfy any of the factors for mandamus. *In re United States*, 884 F.3d 830. The panel held that "the absence of controlling precedent in this case weighs strongly against a finding of clear error[,]" that any potential merits errors were correctable through the ordinary course of litigation, and that the district court's denial of Defendants' motion to dismiss did not present the possibility that the issues raised would evade appellate review. *Id.* at 836–37. The panel concluded that the issues raised by Defendants were

better addressed through the ordinary course of litigation and emphasized that mandamus is not to be "used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Id.* at 834 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)). Finally, the panel was "not persuaded" by Defendants' argument, repeated here, that "holding a trial on the plaintiffs' claims and allowing the district court potentially to grant relief would threaten separation of powers," concluding that "simply allowing the usual legal process to go forward will [not] have that effect in a way that is not correctable on appellate review." *Id*. at 836. The Ninth Circuit panel noted: "There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of the issues by the trial courts." *Id*. at 837.

Defendants then filed a series of duplicative motions, largely recycling arguments already rejected in this Court's MTD Order. First, on May 9, 2018, Defendants filed a Rule 12(c) Motion for Judgment on the Pleadings. Doc. 195. Defendants acknowledged that a Rule 12(c) motion is governed by the same standard as a Rule 12(b)(6) motion, yet "reassert[ed] their earlier arguments" along with other previously rejected defenses repackaged with slightly different arguments. *Id.* at 1, 14. For instance, Defendants reargued separation of powers concerns and repackaged a theory, similar to their arguments in the Ninth Circuit, that the APA provides the exclusive cause of action to challenge agency conduct. Defendants' Rule 12(c) Motion, for the first time, requested dismissal of the President as an unnecessary party. *Id.* That same day, Defendants moved for a protective order and stay of all discovery pending resolution of their Rule 12(c) Motion, making identical arguments regarding the APA and separation of powers. Doc. 196.

Then, on May 22, 2018, Defendants filed a motion for partial summary judgment, reasserting their arguments as to standing, the federal Public Trust Doctrine, the APA, separation of powers, and the merits of two of Plaintiffs' constitutional claims. Doc. 207. Defendants did not move for summary judgment on: (1) Plaintiffs' Fifth Amendment substantive Due Process claims for government infringement of Plaintiffs' enumerated rights of life and property and already recognized implicit liberties; (2) Plaintiffs' Fifth Amendment Equal Protection claim for systemic government discrimination against Plaintiffs with respect to the exercise of fundamental rights; or (3) Plaintiffs' Fifth Amendment Substantive Due Process Equal Protection Claim for government discrimination against Plaintiffs as a class of children entitled to heightened scrutiny. Doc. 207. Defendants requested that this Court certify any adverse decision for interlocutory appeal under 28 U.S.C. § 1292(b). Doc. 207 at 30.

On July 5, 2017, Defendants filed their second petition for writ of mandamus to the Ninth Circuit. Ct. App. II Doc. 1. Defendants again argued that Plaintiffs' claims should be dismissed on the basis of standing, separation of powers concerns, the merits of two of Plaintiffs' Due Process claims, that Plaintiffs' claims must be pled under the APA, and alleging unsubstantiated separation of powers harms from engaging in ordinary discovery and trial processes. *Id.* In filing their second petition, Defendants requested an emergency stay from the Ninth Circuit, requesting a stay of proceedings in this Court while the Ninth Circuit considered Defendants' petition, citing the "emergency" as "being forced to proceed with burdensome discovery in advance of an imminent 50-day trial . . . ." *Id.* at 52–53. Defendants simultaneously sought a stay from this Court. Doc. 317. On July 16, 2018, both the Ninth Circuit and this Court denied Defendants' stay requests. Ct. App. II Doc. 9; Doc. 307.

On July 17, 2018, Defendants filed their first application for a stay with the Supreme Court, suggesting that the application could be construed as a petition for writ of mandamus directing the District Court to dismiss the lawsuit or a writ of certiorari to review the Ninth Circuit's first mandamus decision. S. Ct. I Doc. 1.

On July 20, 2018, the Ninth Circuit panel denied Defendants' second mandamus petition, concluding that Defendants again failed to satisfy any of the requirements justifying mandamus. *In re United* States, 895 F.3d 1101 (9th Cir. 2018). The Ninth Circuit panel found that "no new circumstances justify this second petition" and that it "remains the case that the issues the government raises in its petition are better addressed through the ordinary course of litigation." *In re United States*, 895 F.3d at 1104. Addressing Defendants' contention that "proceeding with discovery and trial will violate the separation of powers," the Ninth Circuit panel reiterated that "allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal." *Id.* at 1106.

On July 30, 2018, the Supreme Court denied Defendants' application for a stay, declining to construe Defendants' application as a petition for writ of mandamus or certiorari. *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018). In denying the application, the Supreme Court found Defendants' petition "premature" and noted that "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion." *Id.* The Supreme Court advised this Court to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Id.*

On October 5, 2018, Defendants filed another stay request with this Court, asking this Court to stay proceedings while Defendants once again sought relief from the Ninth Circuit and

Supreme Court. Doc. 361. In their motion for a stay, Defendants reiterated their arguments that Plaintiffs' claims are not a "case or controversy" within Article III, that Plaintiffs cannot bring their claims outside of the APA, that Plaintiffs had not pled a Due Process violation, and that Plaintiffs' claim under the Public Trust Doctrine was unfounded. *Id.* This Court denied the request on October 15, 2018. Doc. 374.

On October 12, 2018, Defendants once again petitioned the Ninth Circuit to stay discovery and trial while Defendants sought relief from the Supreme Court. Ct. App. III Doc. 1-2. Defendants fashioned this motion as a "mandamus petition, because this Court has indicated it lacks jurisdiction to consider a motion for a stay pending Supreme Court review after this Court has denied a mandamus petition[.]" *Id.* at 2. The Petition itself, however, contained all of the same arguments raised in Defendants' previous two petitions, including arguments as to standing, the justiciability of the case under Article III, whether the case should be brought under the APA, and claimed irreparable harm from standard discovery and trial processes. *See id.* at iv.

On October 15, 2018, this Court issued an opinion denying in part and granting in part Defendants' motions for summary judgment and judgment on the pleadings ("MSJ Order"). Doc. 369. This Court dismissed the President as a party without prejudice, granted summary judgment in favor of Defendants on Plaintiffs' Ninth Amendment claim, and rejected Plaintiffs' arguments that children are a suspect class under the Equal Protection Clause. *Id.* This Court allowed all other claims to progress, concluding that issues related to standing and the merits of Plaintiffs' claims would be better addressed by this Court and any appellate court with a fully developed factual record. *Id.*

This Court declined to certify its MSJ Order for interlocutory review, construing its decisions set forth in its MTD Order for interlocutory review as "the law of the case" and finding

that any arguments not covered by the MTD Order did not satisfy the requirements for interlocutory certification. *Id.* at 59–60. This Court acknowledged the Supreme Court's language in its July 20 Order denying Defendants' request for a stay, but concluded: "The Court has considered the concerns raised in the one paragraph order, both in this order and previous orders. The Court does not find that Order removes the Court's discretion to deny the request for interlocutory appeal." *Id.* at 61 n.20.

On November 2, 2018, the Ninth Circuit denied Defendants' third petition, interpreting it as a "non-substantive emergency motion for a stay." *In re United States of America, et al.*, No. 18-72776, at 2 (Nov. 2, 2018).

Also on November 2, 2018, the Supreme Court denied Defendants' request for a stay of proceedings in the District Court. *In re U.S.*, No. 18A410, 2018 WL 5778259, at *1 (U.S. Nov. 2, 2018).

On November 5, 2018, Defendants petitioned the Ninth Circuit for a writ of mandamus for the *fourth* time. Doc. 420-1; *In re United States of America, et al.*, No. 18-73014 (Nov. 5, 2018). The fourth petition raises the arguments materially identical for all relevant purposes to those featured in all of Defendants' prior motions and petitions detailed above, including standing, the APA, the merits of Plaintiffs' Due Process and Public Trust claims, and arguing, again, that a stay is warranted. *Id.* at ii. Once again, Defendants offered no evidence of harm in support of their petition, generally referencing the burden of participating in the normal aspects of the litigation process as a violation of separation of powers[3] and acknowledging they can raise

[3] In their latest petition to the Ninth Circuit, as in each of their previous applications, Defendants misrepresent this Court's previous statements regarding redressability and remedy, wholly disregarding this Court's careful attention to separation of powers concerns. For instance, in their latest petition, Defendants state: "The district court has repeatedly assumed that it has the

their arguments in a later appeal. *Id.* at 28 ("To be sure, the government might be able to raise some of the arguments asserted here after a 10-week liability-phase trial, after a finding that the federal government is liable for the harms of climate change, and after further proceedings to impose an unprecedented invasive remedy.").

On November 8, 2018, the Ninth Circuit granted in part Defendants' motion for a temporary stay, staying trial "pending this court's consideration of this petition for writ of mandamus," requesting this Court to promptly rule on the instant Motion. *In re United States of America, et al.*, No. 18-73014 (Nov. 8, 2018).

II. Standard of Review for a Motion for Reconsideration

A motion for reconsideration is an "extraordinary remedy," "generally disfavored," and "to be used sparingly in the interests of finality and conservation of judicial resources." *Am. Rivers v. NOAA Fisheries*, No. CV-04-00061-RE, 2006 WL 1983178, at *2 (D. Or. July 14, 2006). Courts may grant a motion for reconsideration of interlocutory orders if:

> (1) there are material differences in fact or law from that presented to the court and, at the time of the court's decision, the party moving for reconsideration could not have known the factual or legal differences through reasonable diligence;
> (2) there are new material facts that happened after the Court's decision;
> (3) there has been a change in law that was decided or enacted after the court's decision; or
> (4) the movant makes a convincing showing that the court failed to consider material facts that were presented to the court before the court's decision.

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authority to order the government to 'prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2.'" Ct. App. IV Doc. 1. However, as this Court has made clear throughout this litigation, and more specifically, in its latest order on Defendants' motions for judgment on the pleadings and summary judgment, "should the Court find a constitution violation, then it would exercise great care in fashioning a remedy determined by the nature and scope of that violation." Doc. 369 at 46; *see also Juliana*, 217 F.Supp.3d at 1242 (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962) ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial.")).

Id. "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (denying reconsideration under Fed. R. Civ. Proc. 59(e)).

III. Reconsideration is Not Warranted Based on Statements Made in the Supreme Court's Stay Denials as to a Single Element of a Three-Part Test in a Matter Over Which this Court Retains Ultimate Discretion

Reconsideration is not warranted here, where the only arguable change in circumstances are statements made in the Supreme Court's stay denials with respect to a single element of a three-part test governing certification for interlocutory appeal, the concerns of which this Court has already addressed, and over which this Court retains unfettered discretion. Defendants do not explicitly ground their motion in any of the factors that might warrant reconsideration, instead relying on a court's "inherent power" to reconsider prior decisions. Doc. 418 at 8. Nor do Defendants even attempt to argue that the statements made in the Supreme Court's Orders qualify as a change in law. Nonetheless, Defendants appear to argue that statements made in the Supreme Court's first and second stay denials somehow qualify as bases for reconsideration. *See id.* at 4. The *only* purported changes in law to which Defendants cite are two brief Supreme Court orders denying stays, but even those orders expressly do not address the merits of the case.

Aside from the statements accompanying the Supreme Court's denials of Defendants' stay requests addressing one of the three factors necessary for interlocutory review—the concerns of which this Court has already addressed in denying Defendants' request for interlocutory review of its MSJ Order, Doc. 369 at 61 n.20—Defendants do not argue that there are any other changes in law or material facts that warrant reconsideration. Accordingly, there

are no grounds warranting reconsideration of this Court's denial to certify its MTD Order or MSJ Order for interlocutory review.

IV. Any Changes in Circumstances That Might Otherwise Support Reconsideration Still Do Not Support Certifying for Interlocutory Review

Even assuming the Supreme Court's statements in its stay orders regarding one of the three requirements for interlocutory review qualified as a "change in law" warranting reconsideration—a point Defendants do not even attempt to argue—Defendants still fail to carry their burden of demonstrating that interlocutory appeal is appropriate, negating any value to reconsideration. Despite the Supreme Court's generalized statements suggesting that "substantial grounds for difference of opinion" exist as to Plaintiffs' claims, Defendants still cannot demonstrate that the other two mandatory requirements for interlocutory appeal have been satisfied. Certifying either or even both Orders for interlocutory appeal would not "materially advance the litigation" because neither of the Orders encompasses all of Plaintiffs' claims and the claims addressed by the Orders are not "controlling questions of law" because they require further factual development. *See* 28 U.S.C. § 1292(b) (standard for interlocutory review); *see also* Plaintiffs' Resp. in Opp. to Defs. Mot. to Certify Order for Interlocutory Appeal, Doc. 133 at 7. In addition, even if Defendants could satisfy the other two elements, they cannot demonstrate that the Supreme Court's language somehow constrains this Court's discretionary authority to certify a matter for interlocutory appeal or negates the fact that a decision not to certify for interlocutory review is "unreviewable." *Mowat Const. Co.*, 2015 WL 5665302, at * 5; *Exec. Software N. Am., Inc.*, 24 F.3d at 1550. As such, any reconsideration of Defendants' requests to certify orders for interlocutory review must fail.

A. This Court Correctly Determined that the Law of the Case Doctrine Precludes Defendants' Request for Interlocutory Review of Issues Decided at the Motion to Dismiss Stage

The District Court correctly determined that the law of the case doctrine governs its denial of interlocutory review of issues decided in the MTD Order. Doc. 369 at 59. The law of the case doctrine consequently precludes review of questions of "standing [under the motion to dismiss standard[4]], the political question doctrine, the viability of public trust claims against the federal government, and the existence of a fundamental right to a climate system capable of sustaining human life." Doc. 369 at 60. The remaining issues not precluded by the law of the case doctrine are (1) whether the President should be dismissed; (2) whether Plaintiffs' claims must be brought under the APA; and (3) whether Plaintiffs properly pled standing under the motion for summary judgment standard. *See* Doc. 369 at 59–61. As a result, any interlocutory review of the MSJ Order would be piecemeal, a result the final judgment rule (to which interlocutory review is a narrow exception) is designed to prevent. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Interlocutory review continues to be inappropriate as to the Court's MTD Order, which was issued two years ago, and therefore reconsideration would merely be a further waste of judicial resources. *See* Doc. 172 at 3 n.2 ("Courts generally reject motions for certification as untimely when they are filed after a delay longer than three

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[4] In the MSJ Order, the Court separately analyzed the issue of standing as decided in the MTD Order from standing under the Fed. Rule Civ. Proc. 56(a) summary judgment standard, and did not apply the law of the case doctrine to standing under the latter. *See* Doc. 369 at 60. Nonetheless, as this Court previously determined, standing is a mixed question of law and fact that necessarily fails the "controlling question of law" requirement for interlocutory review. Doc. 369 at 60; *see, e.g.*, *Nutrishare, Inc. v. Conn. Gen. Life Ins. Co.*, No. 2:13-cv-02378-JAM-AC (E.D. Cal. June 11, 2014) (denying motion for certification where claimant argued that standing is a controlling question of law; discovery might establish standing making certification inappropriate); *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 641 (B.A.P. 9th Cir. 1992) ("The issue of standing is a mixed question of fact and law.").

months."); *cf. Abbey v. United States*, 89 Fed. Cl. 425, 430 (2009) (collecting cases on reasonable delay for certification).

The law of the case doctrine precludes courts "from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013). The doctrine works to preserve "finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotations and citation omitted). As then-Circuit Judge Neil Gorsuch has cautioned about the importance of the doctrine:

> Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. It's a pretty important thing too. Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve. All of which would gradually undermine public confidence in the judiciary.

Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1240–41 (10th Cir. 2016) (Gorsuch, J.) (internal quotations, alterations, and citations omitted).

The doctrine applies if an issue was "decided explicitly or by necessary implication in the previous disposition." *Id.* (internal quotations, alterations, and citation omitted). The doctrine "is not an absolute bar to reconsideration of matters previously decided" but rather "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir. 1995) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *Gonzalez*, 677 F.3d at 390. Courts may exercise discretion to reconsider issues when: "(1) the decision is clearly erroneous and its

enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Gonzalez*, 677 F.3d at 390.

The Court properly applied the law of the case doctrine to conclusions made in its MTD Order. Doc. 369 at 59–60. This Court twice declined to certify the issues therein for interlocutory review, first upon request directly to the MTD Order and second upon renewed request in Defendants' motions for summary judgment and judgment on the pleadings. The Ninth Circuit twice declined to grant Defendants' petitions for mandamus involving the conclusions of the MTD Order. Permitting reconsideration of these issues at this point would allow Defendants to "take a mulligan" and would be in direct conflict with the principles underlying the law of the case doctrine: preserving judicial resources, preventing delay, and maintaining public confidence in the judiciary. *See Entek*, 840 F.3d at 1240–41.

Any exceptions to the law of the case doctrine are inapplicable. First, the Ninth Circuit has already implicitly determined that the MTD Order would not "work a manifest injustice" by holding that Defendants did not even face "damage or prejudice not correctable on appeal" under the second mandamus factor, *In re United States*, 884 F.3d at 835–36, a determination that necessarily precludes Defendants' alleged harms from meeting the threshold of a "manifest injustice." Second, this Court has already considered any concerns raised by the Supreme Court's statements about the "substantial grounds for difference of opinion" requirement for interlocutory review. Doc. 369 at 61 n.20. This Court was correct in determining that the law of the case doctrine applies to its MTD Order and no exceptions to the doctrine apply here. As this Court noted, the "law of the case" bars interlocutory review of this Court's decisions as to "standing [under the motion to dismiss standard], the political question doctrine, the viability of

public trust claims against the federal government, and the existence of a fundamental right to a climate system capable of sustaining human life." Doc. 369 at 60. Interlocutory review of these issues remains inappropriate, and reconsideration is consequently not warranted.

B. Interlocutory Review is Still Not Appropriate for this Court's Decision Not to Certify its Order on Summary Judgment and Judgment on the Pleadings for Interlocutory Review

This Court should not certify its MSJ Order for interlocutory review, let alone reconsider its prior denials of interlocutory appeal, when doing so would encourage litigants to endlessly recycle arguments at all three levels of the judiciary hoping something sticks. Doing so would be in direct conflict with the intended role of reconsideration. *Am. Rivers v. NOAA Fisheries*, 2006 WL 1983178, at *2 (reconsideration "to be used sparingly in the interests of finality and conservation of judicial resources"). It would equally conflict with the intended role of interlocutory review in our judiciary's appeals process. *Coopers & Lybrand*, 437 U.S. at 471 (describing finality requirement set forth in 28 U.S.C. § 1291 as avoiding the "debilitating effect on judicial administration caused by piecemeal appeal[.]"). Certifying the MSJ Order would result in piecemeal litigation as this Court would be left to consider Plaintiffs' claims not addressed in either the MTD or MSJ order, including claims as to the violation of their implicit rights to personal security, bodily integrity, and family autonomy. *See* Plaintiffs' Resp. in Opp. to Defs. Mot. to Certify Order for Interlocutory Appeal, Doc. 133 at 7; *see also Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 18-15068, slip op. at 37 n.8 (9th Cir. Nov. 8, 2018) (noting that even if judicial review of government actions was foreclosed under the APA that "bar does not affect a plaintiff's ability to bring freestanding constitutional claims") (citations omitted). And, further, the only issues not barred by the law of the case doctrine are (1) whether the President is a proper party (an issue that is now moot); (2) whether the case is barred

by the APA (an argument the Court has already rejected and the Ninth Circuit has already had an opportunity to consider on mandamus); and (3) whether Plaintiffs have standing (a mixed question of law and fact that fails the interlocutory review's requirement for a "controlling question of law"). *See* Doc. 369 at 11, 19 n.5, 28, 60. No new circumstances warrant a different outcome of this Court's prior analyses and exercise of discretion as to the propriety of interlocutory review.

1. Applicable Standard

The final judgment rule set forth in 28 U.S.C. § 1291 is intended to preserve judicial resources by preventing piecemeal appeals without adequate development of the record. *Coopers & Lybrand*, 437 U.S. at 475. Under a narrow exception to the final judgment rule, a district judge may certify an order for interlocutory appeal when "of the opinion that such order involves:" (1) "a controlling question of law" (2) for which "there is substantial ground for difference of opinion"; **and** (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Defendants pretend that only one of these three factors needs to be present in order to justify interlocutory appeal.

Seeking to prevent "the debilitating effect on judicial administration caused by piecemeal appeal" of cases, Congress "carefully confined the availability" of review under Section 1292(b) to exceedingly rare circumstances. *Coopers & Lybrand*, 437 U.S. at 471; *U.S. v. Woodbury*, 263 F.2d 784, 799 n. 11 (9th Cir. 1929) (Section 1292(b) to be applied "only in exceptional circumstances"); *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (Section 1292(b) "not merely intended to provide review of difficult rulings in hard cases"); *see also Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) ("Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare"); *see also Lawson v. FMR*

LLC, 724 F.Supp.2d 167 (D. Mass. 2010) ("after twenty-four years as a District Judge within this Circuit, I cannot recall an occasion in which I have been willing to make a § 1292(b) certification").

These requirements are jurisdictional; a court *cannot* certify its decision for interlocutory review unless *all three* of these prerequisites are established. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). "[T]he party pursuing the interlocutory appeal bears the burden of . . . demonstrating" that all three requirements have been met. *Id.* at 633. Moreover, "[c]ertification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met." *Id*. "Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002).

Yet, even if all three prerequisites are met, "district court judges have unfettered discretion to deny certification." *Mowat Const. Co.*, 2015 WL 5665302, at * 5 (quotations and citation omitted); *see also Exec. Software N. Am., Inc.*, 24 F.3d at 1550 (district court's certification decision is "unreviewable" on mandamus); *United States v. Riddick*, 669 Fed. Appx. 613, n.2 (3rd Cir. 2016); *Rodriguez v. Banco Cent.*, 790 F.2d 172, n.8 (1st Cir. 1986). And even if a district court grants certification, the appellate court still has the "independent duty to confirm," *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318–19 (9th Cir. 1996), whether the appellant met its burden establishing that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Coopers & Lybrand*, 437 U.S. at 475. "Because the requirements of § 1292(b) are jurisdictional, if this appeal does not present circumstances satisfying the statutory prerequisites for granting certification, this court cannot allow the appeal." *Couch*, 611 F.3d at 633 (quotations omitted).

2. The Litigation Would Only Be Further Delayed, Not Materially Advanced, if this Court Certified Any Issues Addressed by MSJ Order for Interlocutory Appeal

Defendants base their entire argument supporting the mandatory requirement that interlocutory appeal "may materially advance the litigation" on an assumption that they would receive a favorable decision from the Ninth Circuit. *See, e.g.*, Doc. 418 at 11. As illustrated by the procedural history provided above, the Ninth Circuit has twice determined that "[t]he merits of the case can be resolved by the district court or in a future appeal." *In re United States*, 895 F.3d at 1106; *In re United States*, 884 F.3d 830. There are no circumstances present here that would change the analysis that the Ninth Circuit already conducted, concluding that standard appellate procedure is the appropriate route for review in this case. Certifying either the MTD Order or MSJ Order for interlocutory review would not "materially advance the litigation"; it would only advance Defendants' increasingly absurd dilatory campaign that defending this constitutional case is somehow at odds with our federal judiciary's well-established rules of civil procedure and appellate practice. *See Mowat Const. Co.*, 2015 WL 5665302, at *5 (denying certification for interlocutory review "given the protracted and antagonistic nature of this lawsuit, in conjunction with the fact that the parties are on the precipice of proceeding with phase one of trial.").

Several of the circumstances presented by Defendants as burdens now no longer exist as a result of the "ordinary course of litigation." *In re United States*, 895 F.3d at 1104. Discovery is almost complete, the President has been dismissed as a party to the lawsuit, and certain of Plaintiffs' claims have been dismissed in the Court's ruling on summary judgment and motion for judgment on the pleadings. Doc. 369. Defendants' tenuous attempts to formulate any remaining burden warranting mandamus relief do not warrant reconsideration. *See* Doc. 420-1

(claiming an emergency "because [the government] faces a trial that Plaintiffs seek to commence as early as 'the latter part of the week of November 12' (i.e., next week) and that is estimated to last approximately 50 trial days, or 10 full weeks.").[5] Not only are there no changed circumstances warranting reconsideration, these new advances in the litigation only make Defendants' recycled arguments even *less* compelling. *See Kuehner*, 84 F.3d at 318–19 (appellate court has independent duty to confirm that interlocutory review is appropriate after district court certifies).

3. Certifying the MSJ Order Would Necessarily Result in Piecemeal Adjudication of Plaintiffs' Claims and Consequently Would Not Materially Advance the Litigation

Because this Court has treated certain matters as "law of the case," because neither the Court's MTD Order nor MSJ Order address all of Plaintiffs' claims, and because certain of Plaintiffs' claims require further factual development, certification for interlocutory appeal would necessarily result in piecemeal litigation, a result contrary to principles of interlocutory review. *See Coopers & Lybrand*, 437 U.S. at 475. "The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012) (footnote omitted). A question of law is not controlling if additional claims would remain with the trial court after appeal, particularly if those claims involve similar evidence. *See, e.g.*, *U.S. Rubber Co.*, 359 F.2d at 785 (denying certification since question of law was only relevant to one of several causes of action alleged); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1120–22

[5] The parties have spent far more than the equivalent of 50 trial days briefing and arguing Defendants' ceaseless motions for stays, interlocutory appeals, and mandamus. Indeed, tomorrow will be two years since the motions to dismiss were decided.

(E.D. Pa. 1979) (claim involving substantially the same evidence would remain to be tried in any event); *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438, 440 (D. Me. 1994) (same issues would remain no matter outcome of appeal, since other legal theories were also advanced); *In re Magic Marker Securities Litig.*, 472 F. Supp. 436 (E.D. Pa. 1979) (elimination of issues did not support certification in view of overlap of issues with remaining claim). To state the obvious, a "controlling question of law" is a purely legal consideration, not one that necessitates factual development. *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 WL 952273, at *3 (D. Or. March 10, 2010) (collecting cases). "[A] mixed question of law and fact," by itself, is not appropriate for permissive interlocutory review. *Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993).

As explained above, this Court has rightfully treated "standing [under the motion to dismiss standard], the political question doctrine, the viability of public trust claims against the federal government, and the existence of a fundamental right to a climate system capable of sustaining human life" as law of the case, negating the propriety of interlocutory review on those issues. Doc. 369 at 60. To certify its MSJ Order for interlocutory review to the Ninth Circuit, this Court would necessarily be left to evaluate at trial those considerations established in the MTD Order, the claims to which Defendants did not move for summary judgment, and those of Plaintiffs' claims not addressed in any of these orders, including the violation of their implicit rights to personal security, bodily integrity, and family autonomy. *See* Plaintiffs' Resp. in Opp. to Defs. Mot. to Certify Order for Interlocutory Appeal, Doc. 133 at 7. Even standalone certification of Defendants' argument that Plaintiffs' claims must be brought under the APA would not prevent these claims from proceeding to trial because, as the Ninth Circuit recently held, even if judicial review of government actions was foreclosed under the APA, that "bar does

not affect a plaintiff's ability to bring freestanding constitutional claims." *Regents of the Univ. of Cal.*, No. 18-15068, slip op. at 37 n.8 (citations omitted). All of those issues involve the same evidence as Plaintiffs' other claims, such as Plaintiffs' substantive Due Process, state-created danger, and Equal Protection claims, and thus the litigation would proceed in exactly the same manner, a result not contemplated by 28 U.S.C. § 1292. *See McNulty*, 474 F. Supp. at 1120–22.

Regardless of the outcome due to the law of the case doctrine, many of Plaintiffs' claims are simply not "controlling questions of law" warranting interlocutory review in that they are either mixed questions of law and fact or depend on further factual development for meaningful appellate review. *See Steering Comm.*, 6 F.3d at 575. This fact was affirmed by this Court when it denied Defendants' request for interlocutory review of both the MTD Order and the MSJ Order and Defendants have not identified new circumstances that warrant this Court to revisit that analysis. *See generally* Doc. 146 (finding Plaintiffs' claims raised questions of fact and warranted further factual development); Doc. 369 at 59–61 ("As genuine issues of material fact remain, this case would benefit from the further factual record both for this Court and any reviewing court on final appeal."). For example, as this Court has observed, standing is a mixed question of law and fact. Doc. 369 at 60; *see, e.g.*, *Nutrishare, Inc.*, No. 2:13-cv-02378-JAM-AC (denying motion for certification where claimant argued that standing is a controlling question of law; discovery might establish standing making certification inappropriate); *In re Anchorage Nautical Tours, Inc.*, 145 B.R. at 641 ("The issue of standing is a mixed question of fact and law."). And evaluation of whether Plaintiffs have demonstrated that they have a fundamental right to a climate system capable of sustaining human life requires a factual inquiry into the "history and tradition" of this nation and a full evaluation of the factual record to determine whether "new insight [that] reveals discord between the Constitution's central protections and a

received legal stricture" such that "a claim to liberty must be addressed." *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). Additionally, Defendants' APA arguments would require further factual development in light of Plaintiffs' arguments that limiting their claims to the APA would violate their procedural due process rights. *See* Plaintiffs' Resp. to Defs. Mot. for Summary Judgment, Doc. 255 at 33–36. Addressing any pure questions of law while leaving these integral aspects of the case behind would also result in piecemeal litigation. The disarray of this piecemeal litigation would be exacerbated by the fact that most of Plaintiffs' claims involve the same evidence and factual narrative. Interlocutory review remains inappropriate and would not materially advance this lawsuit.

4. The Supreme Court's Statements on the "Substantial Grounds for Difference of Opinion" Requirement Does Not Change the Analysis for the Other Two Mandatory Factors for Interlocutory Review

"To determine if a 'substantial ground for difference of opinion' exists under § 1292(b), courts must examine to what extent the controlling law is unclear." *Id.* Common grounds for difference of opinion upon which district courts certify interlocutory decisions include (1) "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point"; (2) "complicated questions arise under foreign law"; or (3) "novel and difficult questions of first impression are presented." *Id.*

Although the Supreme Court has opined that "the justiciability of [Plaintiffs'] claims presents substantial grounds for difference of opinion," *United States v. U.S. Dist. Court*, No. 18A65, 2018 WL 3615551, at *1 (July 30, 2018); *In re U.S.*, 2018 WL 5778259, at *1, this is but one of three requirements for interlocutory review. Just as conspicuous as the Supreme Court's use of the § 1292(b) language regarding differences of opinion is the absence of any comment on

the other two factors required for interlocutory review.[6] As explained above, neither of these two requirements have been met and interlocutory review is still not appropriate. Despite the Supreme Court's commentary that the Ninth Circuit's prior reasons for declining Defendants' petitions are "to a large extent, no longer pertinent," *In re U.S.*, 2018 WL 5778259, at *2, Defendants have not and cannot demonstrate that anything has changed to alter the analysis under the other two requirements for interlocutory review. This Court has already considered the concerns raised by the Supreme Court's language and still determined that interlocutory appeal is inappropriate, suggesting that this Court does not believe that the other two factors have been satisfied. *See* Doc. 369 at 61 n.20. While the Supreme Court's second stay denial was issued after this Court's decision not to certify its summary judgment decision for interlocutory appeal, the language of the second stay denial does not alter this analysis.

CONCLUSION

This Court and the Ninth Circuit have unambiguously and repeatedly determined that this case may proceed with further development of the factual record prior to review by an appellate court. *See* Doc. 146 (finding that the case would "be aided by a full development of the record."); Doc. 369 ("[T]his case would benefit from the further development of the factual record both for this Court and any reviewing court on final appeal."); *In re United States*, 884 F.3d at 837 ("[A]ppellate review is aided by a developed record and full consideration of issues by the trial courts."). There is no reason for this Court to reconsider that decision one more time. *In re United States*, 895 F.3d at 1106 ("No new circumstances give us cause to reevaluate these

[6] The Supreme Court's statement about substantial grounds for difference of opinion also weighs in favor of the Ninth Circuit and the Supreme Court denying mandamus because it signals there has been no indisputable error in this Court's orders.

conclusions."). For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Reconsider Denial of Requests to Certify Orders for Interlocutory Review.

DATED this 9th day of November, 2018.

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