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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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

INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL

Intervenor-Defendants the National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, and American Petroleum Institute (collectively, "the intervenor-defendants") respectfully submit this memorandum in support of their motion for certification of the Court's November 10, 2016 Opinion and Order ("Order") for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) due to its holding on the political question doctrine.[1] *See* Dkt. 83.

INTRODUCTION AND SUMMARY

The intervenor-defendants move for certification of this Court's Order because its holding that "the political question doctrine is not a barrier to plaintiffs' claims," Order at 17, "involves a controlling question of law" upon "which there is a substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Moreover, an appeal at this stage will likely "materially advance the ultimate termination of the litigation." *Id.* Finally, a contrary ruling from the United States Court of Appeals for the Ninth Circuit—that the political question doctrine does bar plaintiffs' claims—will conserve not only party resources but also scarce judicial resources.

The Order's holding and discussion regarding the political question doctrine satisfy the requirements of 28 U.S.C. § 1292(b). First, the issue of whether the political question doctrine bars the plaintiffs' claims is "a controlling question of law." *Id.* If the claims present non-justiciable political questions, the Court lacks subject matter jurisdiction to evaluate them, and

[1] In their Memorandum in Support of Motion to Dismiss, the intervenor-defendants also argued that the Court should dismiss this case for two other independent reasons—(1) the complaint's failure to allege a valid federal cause of action or implicate a federal question subject to federal jurisdiction and (2) the plaintiffs' failure to satisfy Article III standing requirements. *See* Dkt. 20 at 6-11, 16-21. The intervenor-defendants are joining the federal defendants' Motion to Certify Order for Interlocutory Appeal on those arguments and thus are not independently briefing them. *See* Dkt. 120, 120-1. The intervenor-defendants also join the federal defendants' Motion to Stay Litigation. *See* Dkt. 121. Finally, the intervenor-defendants join the federal defendants' request for expedited review. *See* Dkt. 120, 121.

the case cannot proceed. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). Second, "there is substantial ground for difference of opinion" concerning whether the political question doctrine bars the plaintiffs' claims. 28 U.S.C. § 1292(b). Indeed, in an earlier case brought against many of the federal defendant agencies in this case by plaintiffs represented by two of the same counsel as in this case, the district court acknowledged that the political question doctrine was "clearly implicated by the totality of the relief sought by the Plaintiffs," before dismissing the case on alternative grounds. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 n.5 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014).

Finally, resolution of this legal issue will "materially advance the ultimate termination of th[is] litigation." 28 U.S.C. § 1292(b). If the Ninth Circuit rules that this case is barred by the political question doctrine, that will resolve the litigation early, before trial. Likewise, if the Ninth Circuit rules that the political question doctrine bars some of the plaintiffs' claims, but not all, that could dramatically reduce the scope of issues for trial in this immensely complex case, which would not only conserve party resources, but also reduce the burden on this Court.

Because the resolution of this controlling legal issue, prior to extensive fact and expert discovery and trial, would almost certainly expedite resolution of this case, the intervenor-defendants respectfully move this Court to certify its Order for interlocutory review by the United States Court of Appeals for the Ninth Circuit.

BACKGROUND

The plaintiffs' amended complaint asserts that the President of the United States and numerous other federal officials and agencies—including the Departments of Agriculture, Commerce, Defense, Energy, Interior, State, and Transportation, as well as the Environmental Protection Agency—have "failed to preserve a habitable climate system …, and instead have

created dangerous levels of atmospheric CO_2 concentrations" by "authorizing, permitting, and incentivizing fossil fuel production, consumption, transportation, and combustion, causing the atmospheric [carbon dioxide] concentration to increase." Dkt. 7 at ¶ 130 (the "complaint"). The complaint alleges that as a result, risks to the worldwide population and to the plaintiffs in this case are increasing. These risks, according to the complaint, infringe upon the plaintiffs' constitutional rights under the Due Process Clause, Equal Protection Clause, and Ninth Amendment, and also violate federal governmental responsibilities under the alleged federal "public trust" doctrine. *Id.* at 84, 88, 91, 92.

For relief, the complaint demands, *inter alia*, a Court order enjoining the federal defendants "from further violations of the Constitution," enjoining the federal defendants "from violating the public trust doctrine," and directing the federal defendants "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]" and "to restore Earth's energy balance." *Id.* at 5, 94. This "plan"—which would be contrary to existing statutes and without any apparent congressional authorization—would require the federal government to "cease the[ ] permitting, authorizing, and subsidizing of fossil fuels and … move to swiftly phase out [carbon dioxide] emissions, as well as take such other action as necessary to ensure that atmospheric [carbon dioxide] is no more concentrated than 350 [parts per million] by 2100." *Id.* ¶ 12 (emphasis omitted). The complaint asserts that the Court should "[r]etain jurisdiction over this action to monitor and enforce [the] Defendants' compliance with the national remedial plan." *Id.* at 94.

Citing, among other justifications, the fact that the relief the plaintiffs seek "would adversely impact and may even eliminate the very businesses of [their] members," the intervenor-defendants moved to intervene. Dkt. 15 at 11. The Court granted the motion to

intervene. Dkt. 50.

The federal defendants and the intervenor-defendants filed motions to dismiss, arguing that the claims could not proceed for a number of reasons. For example, the federal and intervenor-defendants argued that the "public trust" doctrine does not apply to the federal government and that even if a federal public trust doctrine did exist, the plaintiffs' allegations failed to establish any such claim. The federal and intervenor-defendants also argued that the plaintiffs failed to state valid claims under existing Equal Protection Clause, Due Process Clause, and Ninth Amendment jurisprudence, and that in any event any such claims or any potential public trust claims have been displaced by the Clean Air Act. The federal and intervenor-defendants also asserted that the plaintiffs lack Article III standing to bring their claims. Dkt. 20 at 6-11, 16-21; Dkt. 27-1 at 7-29. The motions emphasized that a prior case, *Alec L.*, raising materially identical claims against the federal government under the "public trust" doctrine, had recently been dismissed in the United States District Court for the District of Columbia, a decision affirmed on appeal by the United States Court of Appeals for the D.C. Circuit, and which the U.S. Supreme Court declined to review. Dkt. 20 at 1, 3-4, 5, 7; Dkt. 27-1 at 28-29.

The intervenor-defendants also presented a third independent ground for dismissal in their motion to dismiss: that the plaintiffs' claims present nonjusticiable political questions. That doctrine bars adjudication of issues that: (i) are "textually . . . commit[ted]" to another branch by the Constitution; (ii) are not subject to "judicially discoverable and manageable standards"; or (iii) could not be resolved without "expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The intervenor-defendants argued that the claims in this case implicate all of these concerns. Dkt. 20 at 11-16.

Following a hearing, the magistrate judge recommended that the motions be denied.

Dkt. 68 at 24. On the issue of the political question doctrine, the magistrate judge observed that "courts cannot intervene to assert 'better' policy" and that "the amended complaint's broad request for relief does implicate some unmanageable issues." *Id.* at 13,14. The magistrate judge, however, concluded that "it is too early in the proceedings to determine whether the issue can be resolved without expressing lack of respect due to the executive branch." *Id.* at 14. The magistrate judge's report did not mention *Alec L.* or distinguish it from the instant case. *Id.* at 18-21.

The federal defendants and the intervenor-defendants filed objections to the magistrate judge's report, and a hearing on the motions to dismiss was held before the Court. Dkt. 73; Dkt. 74; Dkt. 82. The Court subsequently issued the Order, in which it denied both the federal defendants' and the intervenor-defendants' motions to dismiss. On the issue of whether the political question doctrine barred the plaintiffs' claims, the Court found that the case was "squarely within the purview of the judiciary" and that "no *Baker* factor is inextricable from the merits of this case." Order at 16, 17. The Court did acknowledge, however, that "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy." *Id.* at 17.

QUESTION PRESENTED

Whether the political question doctrine bars the plaintiffs' claims that the federal government has violated their constitutional rights through alleged action or inaction concerning climate change for which the plaintiffs request wide-ranging injunctive relief that would reshape the United States' climate change and energy policies without legislative or statutory authority.

ARGUMENT

The Court should certify an order for interlocutory appeal when, as here, three requirements are met: "(1)…there be a controlling question of law, (2)…there be substantial grounds for difference of opinion, and (3)…an immediate appeal from the order may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litig.(MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *see also Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). The Ninth Circuit has recognized that Section 1292(b) appeals are appropriate in "exceptional situations" when they "would avoid protracted and expensive litigation." *In re Cement*, 673 F.2d at 1026. Other district courts have certified, and circuit courts of appeals have heard, interlocutory appeals concerning the application of the political question doctrine. *See Lamont v. Woods*, 948 F.2d 825, 827 (2d Cir. 1991) (district court certified, and Second Circuit accepted review on, question of whether federal taxpayers' Establishment Clause challenge to the use of federal grant funds for the construction and operation of foreign religious schools raised nonjusticiable political questions).

Certification under 28 U.S.C. § 1292(b) is particularly appropriate here because, as the Court itself acknowledged in its Order, this is no standard case. *See, e.g.*, Order at 52 (describing this case as "of a different order than the typical environmental case"). If anything, the Court's comments on the breadth of the plaintiffs' claims in this case are understated. As the intervenor-defendants noted in their objections to the magistrate judge's report, this case is "extraordinary" in scope, both due to the breadth of the claims involved and the vast scope of the relief sought, which would involve the commandeering of federal agencies who "share regulatory and

enforcement responsibilities over millions of enterprises, across every sector of the economy." Dkt. 73 at 1. Given the vast expanse and complexity of this case, it is even more important than usual to narrow the legal issues in an effort to materially advance the ultimate termination of the litigation.

I. THE QUESTION PRESENTED IS A CONTROLLING QUESTION OF LAW.

Whether the political question doctrine bars the plaintiffs' claims is a prototypical controlling question of law. As an initial matter, the question presented is a "question of law." While the Ninth Circuit appears to have not defined question of law in the Section 1292(b) context, multiple district courts in the Ninth Circuit, including this one, have cited to the Seventh Circuit's decision in *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000), which defined "question of law" as "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *See, e.g.*, *United States v. Wen-Bing Soong*, No. C-13-4088, 2014 WL 988632, at *1 (N.D. Cal. Mar. 10, 2014); *Schoenborn v. Stryker Corp.*, No. 08-1419, 2011 WL 5881647, at *2 (D. Or. Nov. 21, 2011) (Aiken, C.J.); *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1089 (E.D. Cal. 2008) (all citing *Ahrenholz*).

A "question of law" is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement*, 673 F.2d at 1026. The standard does not "require that reversal of the district court's order terminate the litigation." *Id.* The Ninth Circuit has determined that "questions … relating to jurisdiction" are controlling. *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959); *see also Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) ("[A]n order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no

power to decide the matter.").

Here, the Court is dealing with a purely legal question implicating constitutional separation of powers—the scope of the Article III judicial power. *Baker*, 369 U.S. at 210. Moreover, as this Court recognized, the Ninth Circuit has unambiguously held "that if a case presents a political question, we lack subject matter jurisdiction to decide that question." *Corrie*, 503 F.3d at 982; Order at 6. Thus, if the political question doctrine bars the plaintiffs' claims, moving forward to a trial at this time would involve "litigating an entire case in a forum that has no power to decide the matter." *Kuehner*, 84 F.3d at 319. For those reasons, the question presented in this motion is a controlling question of law.

II. THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION CONCERNING THE APPLICATION OF THE POLITICAL QUESTION DOCTRINE TO THE CLAIMS IN THIS CASE.

The Order's holding regarding the application of the political question doctrine to this case clearly provides substantial ground for difference of opinion. This prong of 28 U.S.C. § 1292(b) is satisfied "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Substantial ground for difference of opinion can exist even if there has not yet been "development of contradictory precedent," as long as the above standard is met. *Id.*

As noted above, in its Order, the Court held that "the political question doctrine is not a barrier to plaintiffs' claims." Order at 17. The Court first acknowledged that it would not have subject matter jurisdiction over a political question, a doctrine which it observed was closely connected to the separation of powers doctrine. *Id.* at 6. The Court then analyzed the *Baker* factors for identifying nonjusticiable political questions. *Id.* First, the Court determined that the case did not involve "a textually demonstrable constitutional commitment of the issue to a

coordinate political department" because "the constitutional provisions cited here contain nothing approaching a clear reference to the subject matter of th[e] case." Order at 10; *Baker*, 369 U.S. at 217. Second, the Court concluded that there were sufficient "judicially discoverable and manageable standards" to adjudicate the plaintiffs' constitutional claims since "[e]very day, federal courts apply the legal standards governing due process claims to new sets of facts." Order at 13; *Baker*, 369 U.S. at 217. Finally, the Court stated that it could decide the case "without expressing lack of the respect due coordinate branches of government" since the political question doctrine does not bar "a court from determining whether the federal government has violated a plaintiff's constitutional rights [simply because] the government has taken some steps to mitigate the damage." Order at 14; *Baker*, 369 U.S. at 217.[2] Substantial ground for a difference of opinion exists concerning the Court's political question analysis.

First, the possibility of a difference of opinion here is far from hypothetical: other district courts have *already* determined that the political question doctrine either *could* or *does* bar litigation involving claims by plaintiffs alleging harm suffered from climate change, indicating that a difference of opinion on the applicability of the political question doctrine here *in fact exists*. *See Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) ("The Court finds that the claims presented by the plaintiffs constitute nonjusticiable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the Court to make initial policy determinations that have been entrusted to the EPA by Congress."), *aff'd on other grounds*, 718

[2] In its Order, the Court also discussed three other *Baker* factors. *See* Order at 13, 15-16. Because the intervenor-defendants did not address those factors in their motion to dismiss, they will not address them here.

F.3d 460 (5th Cir. 2013); *Alec L.*, 863 F. Supp. 2d at 13 n.5 (observing that the political question defense is "clearly implicated by the totality of the relief sought by the Plaintiffs"); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874-77 (N.D. Cal. 2009) (finding that several *Baker* factors "militate[] in favor of dismissal" of the plaintiffs' federal common law nuisance claims for alleged climate change-caused harms), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012); *People of State of California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) ("Because each of the identified *Baker* indicators is inextricable from Plaintiff's federal common law global warning nuisance claim, the Court finds that the claim presents a non-justiciable political question…."). That this Court has taken a contrary view from other courts should be enough by itself to permit appellate review at this time.

Second, the intervenor-defendants respectfully disagree with the Court's analysis of the *Baker* factors and believe that other fair-minded jurists might reach a contradictory conclusion as well.[3] While it is true that no constitutional provision mentions climate change, the plaintiffs' claims still involve issues which are "constitutional[ly] commit[ed]…to a coordinate political department." *Baker*, 369 U.S. at 217. For example, the plaintiffs explicitly seek as relief a court order requiring federal agencies "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions." Dkt. 7 at 94. As the intervenor-defendants have noted, this relief cannot avoid requiring the Court to "commandeer[]…agencies" and to exercise affirmative legislative power, which is barred by binding Supreme Court precedent. Dkt. 73 at 22, 23; *see,*

[3] While they summarize their position here, the intervenor-defendants' full position on the applicability of the political question doctrine to this case can be found in their earlier briefing on the topic. *See* Dkt. 20 at 11-16; Dkt. 59 at 10-14; Dkt. 73 at 21-28.

e.g., *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (rejecting as nonjusticiable a "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard"). And, as Judge Wilkins observed in the *Alec L.* case, "Ultimately, Plaintiffs are effectively seeking to have the Court mandate that federal agencies undertake specific regulatory activity, even if such regulatory activity is not required by any statute enacted by Congress." *Alec L.*, 863 F. Supp. 2d at 17. Indeed, Congress has declined to legislate the remedy plaintiffs seek in this case.

Additionally, the Court's view that "judicially discoverable and manageable standards" govern this case since the Court can apply well-known standards for evaluating constitutional claims obscures the real issue, which is that the adjudication of the plaintiffs' claims on the merits will necessarily depend on a policy evaluation of the federal government's past approach toward climate change. Dkt. 73 at 25-26; *cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427-28 (2011) ("*AEP*") (arguing against "setting emissions standards by judicial decree under federal tort law"). Likewise, any substantive court order attempting to manage climate change in this case would "express[] lack of the respect due" other branches of government since it is well-known that Congress "designated an expert agency, … EPA, as best suited to serve as primary regulator of greenhouse gas emissions." *AEP*, 564 U.S. at 428; *Baker*, 369 U.S. at 217.

Finally, while discussing the political question doctrine, the Order itself acknowledged the novelty of the plaintiffs' claims several times, observing that "[t]his is not a typical environmental case," the "theory of plaintiffs' case is much broader," the "facts in this case [are] *novel*," and the "science may well be complex." Order at 12, 13-14 (emphasis added). The Court also recognized that "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a

remedy." *Id.* at 17. As the Ninth Circuit held in *Reese*, "when *novel* legal issues are presented, on which fair-minded jurists might reach contradictory conclusions," there is a substantial ground for a difference of opinion. *Reese*, 643 F.3d at 688 (emphasis added); *see also Couch*, 611 F.3d at 633 (quoting 3 FEDERAL PROCEDURE, LAWYERS ED. § 3:212 (2010) ("Courts traditionally will find that a substantial ground for difference of opinion exists where . . . 'novel and difficult questions of first impression are presented.'").

For the above reasons, there is substantial ground for a difference of opinion concerning the Court's political question doctrine holding.

III. IMMEDIATE RESOLUTION OF THE COURT'S HOLDING ON THE POLITICAL QUESTION DOCTRINE MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS CASE.

Immediate appellate resolution of the Order's holding on the political question doctrine will advance the ultimate termination of this case. The "may materially advance" requirement of 28 U.S.C. § 1292(b) does not require that the Ninth Circuit's decision on interlocutory appeal will necessarily "have a final, dispositive effect on the litigation." *Reese*, 643 F.3d at 688. Rather, this prong is satisfied by a lesser showing—that a Ninth Circuit ruling on interlocutory appeal "'may materially advance' the litigation." *Id.* Simply demonstrating that the Ninth Circuit *may* narrow the claims left for trial satisfies this standard. *Id.* Moreover, while the intervenor-defendants believe that the political question doctrine bars *all* of the plaintiffs' claims and *all* of the relief they seek, it is enough to satisfy the "materially advance" prong even if only *some* of those claims or *some* of that relief may implicate a political question.

Here, if the Ninth Circuit adopts the approach taken by the district courts cited *supra* Section II, it would result in the dismissal of all of the plaintiffs' claims. Likewise, the Ninth Circuit could determine that only a subset of those claims involved the political question

doctrine, or that only a subset of the relief the plaintiffs are seeking is improper. In either scenario, an interlocutory appeal would narrow the scope of the issues for trial. In this lawsuit, which the magistrate judge acknowledges is "relatively unprecedented" and involves "a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit," and which the Order describes as "of a different order than the typical environmental case," such an approach would surely advance the ultimate termination of the litigation. Dkt. 68 at 1, 3; Order at 52.

As highlighted in the federal defendants' memorandum in support of their motion to certify the Order for interlocutory appeal, not only are the articulated claims and the relief sought extraordinary, but the discovery presently being sought by the plaintiffs "is virtually limitless in its scope and unprecedented." Dkt. 120-1 at 27. Based on the discovery propounded thus far, the plaintiffs seek to probe into decades of information, which they assert is related to climate change policy and regulation, regardless of whether the information is actually relevant to their claims. If the case proceeds to expert discovery, that phase will certainly be complicated and protracted, given the complex scientific debate that swirls around the issues raised by the plaintiffs' lawsuit. The resources required to engage in fact and expert discovery will be enormous, and those resources will be preserved if the intervenor-defendants prevail on interlocutory appeal.

CONCLUSION

For all of the foregoing reasons, as well as those stated in the federal defendants' Motion to Certify Order for Interlocutory Appeal, the intervenor-defendants request that the Court certify its holdings for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 10th day of March 2017.

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by the following indicated method or methods on the date set forth below:

☒ **CM/ECF system transmission.**

DATED this 10th of March 2017.

/s/ Benjamin E. Tannen
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Of Attorneys for Intervenor-Defendants National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, and American Petroleum Institute