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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.,
Federal Defendants.

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

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Expedited Hearing Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Introduction

In its Opinion and Order of November 10, 2016, denying Federal Defendants' dispositive motion, the Court decided several controlling legal questions. ECF No. 83. ("Op."). These include whether the Plaintiffs have adequately alleged an injury that was caused by the Federal Defendants and that is redressable in a court of law such that there is a case or controversy within the meaning of Article III. In addition, the Court decided the legal question as to whether Plaintiffs have a constitutionally-protected fundamental life, liberty, or property interest in a climate system with a particular atmospheric concentration of CO_2 and whether Federal Defendants have a duty to protect that interest. Finally, the Court decided whether Plaintiffs have stated a cognizable claim under a public trust theory for protection of the atmosphere or coastal regions from CO_2 emissions. On each of these points, there is a substantial ground for a difference of opinion. An immediate appeal to the Ninth Circuit very well may materially advance the ultimate termination of this litigation. The Federal Defendants accordingly request that the Court certify the Order for interlocutory appeal.

I. The November Order unquestionably decided controlling questions of law.

A. Legal questions govern whether Plaintiffs' complaint can survive the Federal Defendants' dismissal motion.

If resolution of the issue presented in the appeal could terminate or materially affect the outcome of the litigation in the district court, it is "controlling" for purposes of 28 U.S.C. § 1292(b). *Cement Antitrust Litig. (MDL No. 296) v. Ideal Basic Indus.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982), *aff'd by Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990). "There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-

court proceedings." 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3930 (3d. ed. 2012) ("WRIGHT & MILLER") (footnote omitted). In other words, if the appellate court would be required to reverse if it determines that the legal question was wrongly decided, the question is controlling. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (en banc). Moreover, an issue may still be "controlling" even if a favorable decision would not necessarily "terminate the litigation," so long as the court's ruling, "'if erroneous, would be reversible error on final appeal.'" *Cement Antitrust Litig.*, 673 F.2d at 1026 (quoting *Katz*, 496 F.2d at 755).

The Court's determinations that Plaintiffs have adequately alleged Article III standing, that the Fifth Amendment Due Process clause protects a fundamental right to a "climate system capable of sustaining human life," Op. 32, and that there is a federal public trust cause of action against the United States present pure questions of law and are controlling. *See, e.g.*, *Edwards v. First Am. Corp.*, 610 F.3d 514, 515-16 (9th Cir. 2010) (accepting jurisdiction where controlling issue is denial of motion to dismiss for lack of standing); Op. 30 (it "is clear . . . that defendants' affirmative actions would survive rational basis review."). Indeed, Plaintiffs themselves recognize that where a claimant fails to allege any actual injury and the sole question is whether standing has been conferred by statute, as in *Edwards*, the standing inquiry involves a pure legal question. Pls.' Resp. in Opp'n to Fed. Defs' Mot. to Cert. Order for Interlocutory Appeal 6, ECF No. 133 ("Resp.").[1]

A contrary ruling by the court of appeals would terminate the litigation in the case of standing and lead to the dismissal of the Due Process and public trust claims. And while

[1] Plaintiffs seek to distinguish the present case from *Edwards* on the basis that here, "the standing inquiry . . . requires further factual development prior to any appellate review." Resp. 6. But as discussed below, Plaintiffs offer no support for this proposition.

Plaintiffs contend there is no controlling question of law where additional claims would remain to be tried after appeal, Resp. 4, this observation is inapt for several reasons: (1) a contrary ruling on Article III standing would deprive the court of jurisdiction; (2) the controlling merits questions (Due Process and public trust) together constitute the entirety of the claims that the Court determined could go forward; and (3) either ruling, "'if erroneous, would be reversible error on final appeal.'" *Cement Antitrust Litig.*, 673 F.2d at 1026 (quoting *Katz*, 496 F.2d at 755).

Moreover, none of the cases Plaintiffs cite for this proposition provide support for its application in this case. In *United States Rubber Co. v. Wright*, the court of appeals determined that interlocutory review was improvidently granted in an unexceptional contract action where interlocutory appeal was sought on "only one of several causes of action . . ." and thus "no disposition [the circuit court] might make of [the] appeal on its merits could materially affect the course of the litigation in the district court." 359 F.2d 784, 785 (9th Cir. 1966). In *Ashmore v. Northeast Petroleum*, the court denied a motion to dismiss one count of a complaint. The court found that its ruling was not controlling because even if it were resolved in the defendant's favor, "no factual issue or litigant would be removed from the case." 855 F. Supp. 438 (D. Me. 1994). *In re Magic Marker Sec. Litig.* also provides no support for Plaintiffs' argument. There, the court denied a motion to dismiss a section 10b-5 securities class action on the basis that section 9(e) of the 1934 Act provides the exclusive remedy for the wrongs alleged in the complaint. 472 F. Supp. 436, 437 (E.D. Pa. 1979). Contrary to Plaintiffs' assertion, there the court found that its order "plainly involves a controlling question of law." *Id.* at 438 (internal quotation marks omitted). It ultimately refused to certify the order because Plaintiffs amended their complaint to "add section 9(e) as an alternative basis of liability, so that a reversal on final appeal might not

require a new trial." *Id.* *McNulty v Borden, Inc.*, a case involving claims arising from an allegedly wrongful employment termination, does not appear to involve any interlocutory appeal issue at all. 474 F. Supp. 1111 (E.D. Pa. 1979). Here, unlike all of the cases Plaintiffs cite, if the court of appeals reaches an opposite conclusion on interlocutory appeal, the complaint will be dismissed.

B. The court of appeals will not need additional facts to resolve the legal questions.

To resolve the dispositive legal questions for which certification is sought, the court of appeals will not, as this Court did not, need to look beyond the face of the complaint.[2] Whether Plaintiffs have adequately pleaded standing, have stated a cognizable Due Process claim, or have stated a public trust claim are pure legal questions. Plaintiffs nonetheless contend that this "case has not yet developed far enough to permit considered appellate disposition of the questions presented." Resp. 5 (quoting 16 WRIGHT & MILLER § 3930). They contend that determinations on standing are unfit for interlocutory review "because factual development in the discovery stage may add color to general standing allegations." Resp. 5. They further contend that appellate review of the Due Process and public trust claims "will benefit from a full record of facts." *Id.* at 7, 9.

But Plaintiffs' argument overlooks their burden to make an affirmative showing of standing, even at the pleading stage. The constitutional elements of Article III standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each [of which] must be supported in the same way as any other matter on which the plaintiff bears the

[2] In their response, Plaintiffs refer repeatedly to the Federal Defendants' Answer, ECF No. 98. Resp. 1, 12, 13, 17, 25. The Answer is irrelevant to resolving the issues for which interlocutory appeal is sought.

burden of proof." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this means that Plaintiffs must provide sufficient "factual specificity" to plausibly support their assertions of standing. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107-08 (9th Cir. 2013) (en banc); *see also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954-555 & n.9 (9th Cir. 2011). If Plaintiffs' factual allegations are too vague to establish standing, as their own argument posits, then that is grounds for dismissing the complaint, not proceeding to discovery.

None of the cases Plaintiffs cite arose where, as here, a plaintiff asserted fundamentally novel legal theories which, if incorrect, would require dismissal. Two of these cases, *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, No. 09-cv-320-HU, 2010 WL 952273 (D. Or. Mar. 10, 2010) and *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251 (11th Cir. 2004), involved the courts' rulings on *summary judgment* for breach of contract claims that, contrary to this case, depended upon mixed questions of fact and law. These cases merely establish that rulings at the summary judgment stage in fact-intensive cases involving breach of contract claims do not present the kind of controlling questions of law appropriate for interlocutory review.[3]

[3] Likewise, in *Keystone Tobacco Co. v. United States Tobacco Co.*, a putative class of plaintiffs sought interlocutory review of a motion denying their request to prevent the defendants from approaching putative class members prior to the court ruling on a class certification motion and entering into settlement agreements of allegedly insufficient consideration and based on inaccurate information. 217 F.R.D. 235 (D.D.C. 2003). After "careful consideration of the briefs filed and the evidentiary material submitted by both parties regarding the communications at issue, the Court concluded that plaintiffs had not presented a clear record of abuses that would justify precluding settlement discussions with direct purchasers." *Id.* at 236-37 (internal quotation marks and citation omitted). In denying plaintiffs' motion for certification of the order, the Court noted that "the question at the heart of the . . . Order was one of fact, and not of law." *Id.* at 238.

Plaintiffs' reliance on a district court order in *Nutrishare Inc. v. Connecticut General Life Insurance Co.*, No. 2:13-cv-2378-JAM-AC, 2014 WL 2624981 (E.D. Cal. June 12, 2014), ECF No. 41, is similarly misplaced; in fact, the order supports certification here. Resp. 10, 26; No. 2:13-cv-23778-JAM-AC (June 12, 2014 Order), ECF No. 41.[4] There, a district court declined to certify a finding that a health insurance company had standing to bring counter-claims in an ERISA action based on its capacity as a fiduciary. The Court found that because the insurance company's standing to assert an ERISA claim turned on whether it qualified as a fiduciary under Employee Retirement Income Security Act ("ERISA"), a fact that would be determined only when it specifically identified the plans at issue, certification of the order would "not materially advance the ultimate termination of the litigation; in fact it would do quite the opposite." Ex. A at 6 (internal quotation marks and citation omitted). *Nutrishare* clearly does not stand for a general principle favoring factual development in order to determine standing. Rather it should be interpreted on its facts: whether the insurance company had a statutory right of action under ERISA turned exclusively on whether it was a fiduciary on the plans it identifies. Moreover, Plaintiffs are wrong when they state that the court denied the motion to certify. In fact, the court *granted* the motion for certify on the issue of whether the insurance company's state law claims are preempted under ERISA, which it found is "certainly a controlling issue of law." Ex. A at 7. Notably, the court also stayed the litigation in its entirety pending a decision by the Ninth Circuit, *id.* at 10, which Federal Defendants seek in this case by separate motion. *See* Fed. Defs' Mot. to Stay Lit., ECF No. 121.

[4] The *Nutrishare* order that Plaintiffs rely upon is not available on any commercial database. And Plaintiffs failed to provide a copy with their response. Federal Defendants attach a copy of the order as Exhibit A herein.

C. The legal deficiencies in Plaintiffs' complaint will not be remedied by amendment.

Plaintiffs argue that "rulings on the sufficiency of pleadings generally are unsuitable for interlocutory appeal because of the ready availability of amendment." Resp. 5, 25 (citing16 WRIGHT & MILLER § 3930 n.21). But the authority on which Plaintiffs purportedly rely does not assert this proposition and instead asserts a very different one. It states that "[r]ulings on the sufficiency of pleading a claim *lying within a recognized body of law* commonly are found unsuitable for interlocutory appeal because of the ready availability of amendment." 16 WRIGHT & MILLER § 3930 n. 21 (emphasis added). In other words, the denial of a motion to dismiss a complaint due to the Plaintiffs' alleged technical failure to plead facts sufficient to satisfy a recognized legal standard is ordinarily unsuitable for interlocutory review. *See e.g. Gottesman v. Gen. Motors Corp.*, 268 F.2d 194, 195 (2d Cir. 1959) (denying motion to dismiss in a shareholder derivative suit based on alleged failure in "rather lengthy allegations . . . as failing to meet the requirements of F.R. 23(b) as to a demand on the shareholders of General Motors or an excuse for a failure to make one."). The issue in such cases is a plaintiff's failure to allege facts, not a question of law. And the solution, if the complaint is deficient in this way, is for a plaintiff to file an amended complaint that pleads the requisite facts. By contrast, the present case involves pure questions of law as to whether Plaintiffs have alleged standing and whether they have stated cognizable Due Process or public trust claims under the theory that the Court has endorsed. If the Federal Defendants' position on these points is correct, Plaintiffs will not be able to proceed merely by amending the factual allegations in the complaint.

D. Contrary to Plaintiffs' assertions, no claims would remain open to litigation if interlocutory appeal is granted.

In their motions to dismiss, both Federal Defendants and Intervenor-Defendants moved to dismiss the complaint for lack of jurisdiction and failure to state a claim. Fed. Defs' Mot. to

Dismiss, ECF No. 27; Intervenor-Defs' Mot. to Dismiss, ECF No. 19. The Complaint states four claims for relief under (1) the Due Process clause, (2) equal protection principled embedded in the Fifth Amendment, (3) the Ninth Amendment, and (4) the public trust doctrine. First Am. Compl. ¶¶ 277-310, ECF No. 7. In its briefing on the equal protection claim, the United States has shown that although the Supreme Court has not definitively decided the question of whether youth could be considered a suspect class, its decisions in other cases very strongly imply that if presented with the question it would likely conclude that youth are not a suspect class. *See* Fed. Defs' Reply in Supp. of Mot. to Dismiss 14-18 ("MTD Reply"); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (elderly are not a "discrete and insular group" because "[old age] marks a stage that each of us will reach if we live out our normal life-span"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 446 (1985) (declining to categorize developmentally disabled persons as a quasi-suspect class despite "instances of discrimination . . . that are in fact invidious, and that are properly subject to judicial correction under constitutional norms"). No court has found youth to be a suspect class and the claim itself is foreclosed by Ninth Circuit case-law. *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) ("Because age is not a suspect classification, distinctions based on age are subject to rational basis review." (citation omitted)). And in its briefing on the Ninth Amendment claim, the United States has shown that the Ninth Amendment guarantees no substantive right. MTD Reply 19-20. Neither the equal protection nor the Ninth Amendment claims have any merit or support in the case law.

In the Findings and Recommendation, the magistrate did not discuss either of these two claims. Order and Findings & Recommendation, ECF No. 68. Federal Defendants' objections to the Findings and Recommendation accordingly mention those claims only in passing in a

footnote, noting their lack of viability. Fed. Def's Objections to Finding & Recommendation 8 n.11, ECF No. 68. Despite having the opportunity to address these fatal flaws in their equal protection and Ninth Amendment claims, Plaintiffs did not do so. *See* Pls.' Mem. in Resp. to Fed. Objections, ECF No. 75.

In the November Order, the Court indicated that "Plaintiffs' due process claims encompass asserted equal protection violations and violations of enumerated rights secured by the Ninth Amendment." Op. 28 n.6. For simplicity's sake, the Order "refers to these claims collectively as 'due process claims.'" *Id.* Among the rulings for which Federal Defendants seek interlocutory appeal is the Court's ruling on the due process claim, which encompasses various due process, equal protection, and Ninth Amendment violations alleged. Notwithstanding the plain language of the Order, Plaintiffs claim that the November Order "did not dispose of Plaintiffs' claims of infringement of their enumerated Due Process rights to life, liberty, and property and previously recognized unenumerated rights implied thereunder." Resp. 7; *see also id.* 26. Plaintiffs also contend that the Order did not dispose of their "Equal Protection claims of discrimination with respect to such rights or Plaintiffs' claims of discrimination against them as a suspect class." Plaintiffs warn that interlocutory review at this stage would create a risk of piecemeal litigation. While the Court did not decide whether the Ninth Amendment and equal protection claims, standing alone, could survive a motion to dismiss, it plainly treated those claims, as well as the Due Process claim, as a single claim. And that single claim is the one for which Federal Defendants seek certification for interlocutory review. Plaintiffs' concerns about piecemeal litigation in this case are thus unwarranted.

II. There are substantial grounds for differences of opinion.

A "substantial ground for difference of opinion exists where . . . novel and difficult questions of first impression are presented." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quoting 3 FEDERAL PROCEDURE, LAWYERS ED. § 3:212 (2010)). There need not already be disagreement among jurists. Rather, if "novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese v. BP Expl. (Alaska), Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (footnote omitted).

A. There are substantial grounds for differences of opinion as to whether Plaintiffs have adequately pleaded standing.

The Court's determinations that Plaintiffs carried their burden of alleging the injury-in-fact, causation, and redressability elements of standing conflict with Supreme Court standing jurisprudence in ways that raise significant separation of powers concerns, warranting certification for interlocutory appeal. For that reason, there are substantial grounds for differences of opinion among reasonable jurists as to whether Plaintiffs have adequately pleaded standing.

1. Injury in Fact

Plaintiffs argue that interlocutory review of the Court's threshold standing analysis is not yet ripe for appellate review. Resp. 6, 10, 21. However, standing is jurisdictional and "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 598 n.4 (1992) (quoting *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 830 (1989)). They quote Wright & Miller for the proposition that "interlocutory appeal is not appropriate when 'the case has not yet developed far enough to permit considered appellate disposition of the question presented." Resp. 10 (quoting 16 WRIGHT & MILLER § 3930). Plaintiffs take this quote out of context and misread it as to require

additional factual development. A fair reading of the quote in the context in which it was written shows that the authors of the treatise were referring not to motions seeking interlocutory appeal on the basis of standing, but instead to ripeness concerns over interlocutory appeals for preliminary procedural matters such as orders to exclude evidence. The sentence following the one Plaintiffs repeatedly quote makes it clear: "Pretrial rulings *excluding possible evidence* from trial have been found not ripe for review, on the grounds both that trial events may lead to a different ruling, and that it is not possible to assess the prejudicial impact of any error prior to trial." 16 WRIGHT & MILLER § 3930 (emphasis added). Moreover, ripeness in this context does not denote a special form of ripeness applicable only in the appellate context; rather it refers to ripeness in the sense that an issue must be ripe for judicial determination generally and that a federal court is not called upon to issue an advisory opinion.[5] *See e.g. Oneida Indian Nation of N.Y. State v. Oneida Cty.*, 622 F.2d 624 (2d. Cir. 1980) ("although the question certified assumes finality, the argument now raised by the Oneida Nations does raise a serious question as to the finality of the ICC decision. Inherent in the requirements of section 1292(b) is that the issue certified be *ripe for judicial determination*." (emphasis added) (citation omitted)).

The Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and the Ninth Circuit's decision in *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), illustrate the substantial hurdles that Plaintiffs cannot overcome to establish Article III standing in this case and illustrate why there can be substantial disagreement among

[5] The primary case that Plaintiffs rely upon for this proposition, *Molybdenum Corp. of Am. v. Kasey*, provides literally no analysis of ripeness. 279 F.2d 216 (1960); *see* Resp. 6-8, 14. The ripeness analysis in that case consists entirely of the following passage: "After briefing and oral argument, the court is of the opinion that it is unwise now to establish here in this case the law of the case, or a portion thereof. In short: we hold the case is not ripe enough." *Molybdenum*, 279 F.3d at 217.

reasonable jurists as to whether Plaintiffs have standing to bring their claims in this case. In *Massachusetts v. EPA*, the State was given "special solicitude" to pursue a claim involving an alleged failure to comply with a specific provision of the Clean Air Act because it had a "stake in protecting its quasi-sovereign interests" through the exercise of a "procedural right" provided in that statute. 549 U.S. at 520. And in *Bellon*, the Ninth Circuit determined that the standing Massachusetts could establish in its case does not apply in a case that, like the present one, "neither implicates a procedural right nor involves a sovereign state." 732 F.3d at 1145. Plaintiffs respond that *Massachusetts v. EPA* is "not limited to claims involving quasi-sovereign interests," Resp. 12, but that argument cannot be reconciled with the Court's opinion. 549 U.S. at 516 (recognizing that Congress's statutory authorization of the lawsuit brought in that case "is of critical importance to the standing inquiry"); *id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in Lujan, a private individual"). It also misses the point, because the parties' dueling interpretations of those cases can be resolved as a purely legal matter and, accordingly, no further factual development is needed. Similarly, while Plaintiffs attempt to distinguish the holding in *Bellon* on grounds that the case was decided at summary judgment, Resp. 12 n.2, the legal principles that Federal Defendants rely on from that case are purely legal and did not require any factual development. And nothing in *Bellon* suggests (as Plaintiffs do) that standing should not be addressed until after a factual record is developed. Resp. 13-15. That is because "Article III standing is a prerequisite to federal court jurisdiction," which can be raised by a party at any time in a proceeding or by the court *sua sponte*. *Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005) (citation omitted). Indeed, in *Bellon* the defendants contended "for the first time on appeal that [the] case must be dismissed for lack of Article III standing." 732 F.3d at 1138-39. Nowhere in that

opinion does the Ninth Circuit suggest that a factual record is necessary for a court to make the threshold determination that it has jurisdiction. For these reasons, reasonable jurists have a substantial basis to disagree as to the application of those precedents to this case.

2. Causation

There are substantial grounds for differences of opinion as to whether Plaintiffs have pleaded a causal chain from particular acts of the Federal Defendants that is fairly traceable to particularized injuries suffered by Plaintiffs. Critically, Plaintiffs do not identify with particularity a government failure that can be shown to be a meaningful cause of their injury and there is no way to determine from the complaint what role particular actions of each Defendant agency has played or will play in the creation of the alleged injuries, as opposed to the role played by third parties not before the court. Instead, Plaintiffs argue that there is no reason to do so because the pleading standards in Rule 8 "requires only 'short and plain statements," Resp. 14, and because it is "not the function of a complaint to establish such detailed factual matters." Resp. 15 (internal quotation marks omitted).[6] However, as the Supreme Court has emphasized, "standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Plaintiffs, in other words, must identify the particular government action that causes the harm they complain of and trace the

[6] Plaintiffs claim that "neither [*Massachusetts*] *v. EPA* nor *Bellon* require that a plaintiff identify particular government projects for challenge in pleadings." Resp. 15. This argument is misplaced because in both cases, plaintiffs *did* identify specific government inactions in the complaint. In *Massachusetts v. EPA* petitioners challenged EPA's failure to regulate four greenhouse gases under Section 202(a)(1) of the Clean Air Act. 549 U.S. at 506. And in *Bellon*, Plaintiffs brought suit to compel the Washington State Department of Ecology to regulate greenhouse gases from five oil refineries under the Clean Air Act. 732 F.3d at 1135.

harm to that action. Reasonable jurists have a substantial basis from which to conclude that Plaintiffs failed to satisfy this requirement.

In *Allen v. Wright*, 468 U.S. 737 (1984) the Supreme Court explained why the requirement that a plaintiff trace his or her injury to *particular* actions of defendants is an essential component of the Article III limitations on the authority of federal courts. The Court observed that to allow standing where the injury could not fairly be traced to a particular government action "would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." 468 U.S. at 759-60. That observation applies with even greater force here, where Plaintiffs attempt to challenge the entire course of federal government decision-making relating to activities that are associated with the emission of CO_2. Plaintiffs claim that "systemwide relief is appropriate here because . . . Plaintiffs' injuries are causally related to systemwide actions and inadequacies." Resp. 15. But claims seeking injunctive relief directed at systemwide practices, as opposed to specific practices that cause identifiable harm to a plaintiff are precisely the type of claims where the Supreme Court has found standing to be lacking. *Allen*, 468 U.S. at 760; *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Los Angeles v. Lyons*, 461 U.S. 95 (1983). And this fundamental defect is not something that could be cured by additional factual development.

The Court in *Allen* also cautioned that "[c]arried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action." 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). That is the result Plaintiffs seek here, through an order directing the federal government

to reduce CO_2 emissions while retaining jurisdiction to police the Government's compliance with that order. "[S]uch a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.'" *Id.* (quoting *Laird*, 408 at 15).

3. Redressability

With respect to the Court's determination of redressability, there are substantial grounds for differences of opinion because the Court assumed that Plaintiffs can "aggregate" all sources of CO_2 emissions and reduce that aggregate quantity via some sort of relief directed at the federal government. Op. 22, 27. A reasonable jurist could conclude that this approach is at odds with Supreme Court precedents that affirm that standing allows redress of *particular* administrative deficiencies, rather than "confer[ing] the right to complain of *all* administrative deficiencies," since otherwise "any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis v. Casey*, 518 U.S. at 358 n.6. "The actual-injury requirement would hardly serve the purpose … of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." *Id.* at 357; *see also Lujan*, 504 U.S. at 560 ("plaintiff must have suffered . . . an invasion of a legally protected interest which is . . . concrete and particularized" (citations omitted)).

And a reasonable jurist could conclude that Plaintiffs' redressability theory fails to recognize that the agency Defendants are creatures of statute and have only the legal authority that their organic statutes provide. Under the Constitution's framework of separation of powers the Court cannot compel Congress to enact additional authority that would be needed to provide

the requested relief. Plaintiffs brush aside these concerns, stating that Federal Defendants could use unspecified "*existing* authority" and claim that "[t]o the extent any statute or regulation compels Federal Defendants to take actions that infringe Plaintiffs' rights, such a statute would be unconstitutional as applied." Resp. 18. Comments such as these underscore the complete disregard for separation of powers principles inherent in the remedies Plaintiffs seek.

Because Plaintiffs fail to identify specific agency actions or inactions that could be addressed by a federal court and fail to identify any statutory authority for an order directing the Federal Defendants to broadly roll back the aggregate amount of CO_2, Plaintiffs' redressability allegations fail to establish an Article III controversy.

B. There are substantial grounds for differences of opinion as to the United States' sovereign immunity.

Reasonable jurists could disagree as to whether Plaintiffs' claims are precluded by the sovereign immunity. The Court presumed, as do Plaintiffs, that a due process claim can be brought against the United States, absent a statutory right of action or waiver of sovereign immunity, apparently inferring a private cause of action in the Constitution itself. Plaintiffs claim that "sovereign immunity is inapplicable" in this case because it "does not apply in a suit against a sovereign trustee by the citizen beneficiaries" and because there is a statutory waiver of sovereign immunity in Section 702 of the Administrative Procedure Act ("APA"). Resp. 18; 5 U.S.C. § 702. For the former proposition, Plaintiffs rely on a wholly-inapplicable California state law case that neither involves the United States nor discusses sovereign immunity. *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008). And Plaintiffs are surely wrong in their assertion that sovereign immunity does not apply, for it is well established that "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 474-75 (1994) (citations omitted).

Section 702 of the APA is one such waiver, but not one Plaintiffs have ever sought to rely upon. Plaintiffs have deliberately chosen not to bring any claims pursuant to the APA. *See e.g.* Tr. of Sept. 13, 2016 at 59:21-22 (Plaintiffs' counsel describing Federal Defendants' argument that Plaintiffs should challenge specific projects under the APA or similar statutes as "playing Whack-A-Mole"); Resp. 28 ("to litigate under the APA is undeserving of further consideration as the limitation of review to an administrative record for claims brought thereunder has no applicability to this case.").

And even if the APA were understood to provide the requisite waiver of sovereign immunity here, *see Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523-24 (9th Cir. 1989) (finding APA waived sovereign immunity for constitutional claims), Plaintiffs can demonstrate no basis for the equitable relief they seek. Plaintiffs can't have it both ways: seeking on the one hand to invoke the APA's waiver of sovereign immunity, Resp. 18, while refusing on the other hand to obey the conditions (such as record review) that come with that waiver. Resp. 28.

In its motion for interlocutory review, Federal Defendants' explained that no relief in this case could be obtained against the President.[7] Plaintiffs claim that Presidential immunity "is substantially similar" to a line of reasoning "flatly rejected by the Ninth Circuit" in *Washington*

[7] *See, e.g.*, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties"); *Newdow v. Bush*, 355 F. Supp. 2d 265, 280-82 (D.D.C. 2005) (declining to carve an exception to Presidential immunity "where [the President] is claimed to have violated the Constitution"); *see also Clinton v. Jones*, 520 U.S. 681, 718-19 (1997) (Breyer, J., concurring) (acknowledging "the 'apparently unbroken historical tradition . . . implicit in the separation of powers' that a President may not be ordered by the Judiciary to perform particular Executive acts" (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring))); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other.").

v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017). Resp. 18-19. But that ruling, which affirmed a preliminary injunction in still-pending litigation that enjoined the enforcement of one specific executive order, never addressed whether an injunction could run against the President.[8] The decision thus in no way supports Plaintiffs' theory that the court may issue an affirmative or mandatory injunction to direct the President in fulfilling his executive duties. Under long-standing precedent, such an injunction is plainly impermissible.

C. Reasonable jurists could disagree as to whether the Due Process Clause protects a fundamental right to a climate system capable of sustaining human life.

As the Court recognized, its finding of a fundamental right to a "climate system capable of sustaining human life," is novel. Op. 29-32. There are substantial grounds for a difference of opinion as to whether the Due Process clause protects this novel right. Plaintiffs contend that to believe otherwise "is nonsensical and a point to which no reasonable jurist could subscribe" and argue that "[n]o reasonable grounds exist upon which *anyone* could disagree that the baseline conditions necessary for preserving life underlie each of our Constitutionally protected rights . . . ."). Resp. 20. They contend that "[r]ecognition of a right to these baseline conditions does not announce a 'new' fundamental right." *Id.* However, prior to the November Order, no federal court had ever found such a right, and many jurists had dismissed similar arguments asserting constitutionally-protected rights to a healthy environment. Mem. in Supp. of Fed. Defs' Mot. to Certify Order for Interlocutory Appeal 18, ECF No. 120-1 ("Mot. to Cert.") (collecting cases).

The long-standing refusal of other courts to accept a Due Process right to environmental quality is consistent with the Supreme Court's cautious approach in considering novel Due

[8] Indeed, the issue had no practical significance in that case because an injunction against the other federal officials named as defendants in that suit would be fully effective in providing the relief ordered: preventing the implementation of the Executive Order at issue.

Process claims and its "insistence that the asserted liberty interest be rooted in history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). The Court has emphasized that federal courts must "exercise the utmost care whenever [they] are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into" judicial policy preferences, and important issues be placed "outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). A determination that there is a fundamental right to a climate system of a certain kind or quality would divest the arena of public debate and legislative action as the primary forum for devising environmental policy and make the courts the arbiters of what steps the government is required to take to avoid violations of this alleged right. As the Supreme Court has recently emphasized, under established separation-of-powers principles, Congress, through legislation, defines the EPA's authorities and duties regarding the control of greenhouse gas emissions, while the Executive executes them. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (quoting U.S. Const., art. II, § 3). There is no room in the constitutional structure for a federal court to take on the role of overseeing the propriety of all governmental actions that may be viewed as contributing to the buildup of CO_2 in the atmosphere. *Am. Elec. Power ("AEP") v. Connecticut*, 564 U.S. 410, 425 (2011) ("We see no room for a parallel track.").

The November Order relies in part on *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)—where the Supreme Court identified a "new" fundamental right to same-sex marriage. Op. 30-31. *Obergefell* arose from prior decisions establishing that "[t]he fundamental liberties protected by [the Due Process] Clause include . . . certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." 135 S. Ct. at 2597. *See Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374,

384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). While *Obergefell* extended that existing line of cases to recognize a fundamental right to marry for same-sex couples, the "fundamental right" established by the November Order has no relation to any subject that has previously been afforded heightened constitutional protection by the Supreme Court, and Plaintiffs' labeling of that right as a "baseline condition" does nothing to change this fact. *See* Resp. 20. It also is not a right that is individualized and touching upon intensely personal choices and liberty interests in the way the fundamental rights the Supreme Court has recognized are. Rather, it is an interest that could be advanced by any person in the Nation, or indeed on the planet. Reasonable jurists may therefore disagree that the Due Process Clause protects such an asserted right.

There are also substantial grounds for a difference of opinion about the November Order's conclusion that Plaintiffs have a cognizable claim based on allegations that Federal Defendants knowingly created "dangers" to Plaintiffs' asserted fundamental right and failed to undertake the measures necessary to abate those dangers. "With limited exceptions, the Due Process Clause does not impose on the government an affirmative obligation to act, even when 'such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" Op. 33 (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)). However, the Court invoked an exception to the *Deshaney* "no-affirmative-obligation" rule, which has been reserved in the Ninth Circuit for situations where state agents intentionally place a person in a dangerous situation short of actual custody. *See Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). It found that the United States would be liable under the Due Process Clause if Plaintiffs can show that the government's actions created danger to Plaintiffs, that the government knew that its acts caused danger, and that with deliberate indifference, it failed to act to prevent the harm.

Application of the exception in this case presents substantial grounds for a difference of opinion among reasonable jurists. Under the relevant Ninth Circuit cases, a plaintiff invoking the exception must show that the state affirmatively subjected him to "an actual, particularized danger," which necessarily would exclude the generalized risks created by not taking more aggressive action to reduce emissions of CO_2 to the atmosphere. *Id.* (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006)). In each of the Ninth Circuit cases, a plaintiff sued a state actor who facilitated a substantial invasion of a plaintiff's rights. *Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989) (bodily harm); *L.W. v. Grubbs*, 974 F.2d 119, 120 (9th Cir. 1992) (bodily harm); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1084-85 (9th Cir. 2000) (life). None of these cases suggest that there is a protectable Due Process right in the atmosphere, or that the Due Process Clause provides a cause of action to challenge whether the federal government abridged such a right in the generalized context of this case.

D. Reasonable jurists disagree as to whether a Plaintiff may state a "public trust" claim against the Federal Government over climate change.

Because reasonable jurists have already reached contrary conclusions as to the viability of Plaintiffs' public trust claim, and whether, even if there is such a claim, it is displaced by statute, there are substantial grounds for difference of opinion as to that claim. Reasonable jurists could also disagree with the Court's treatment of *PPL Montana* and specifically the Supreme Court's statements, repeated by the Ninth Circuit in *32.42 Acres of Land*, that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Montana LLC v. Montana*, 565 U.S. 576, 604 (2012); *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012). Reasonable jurists could also disagree as to whether any claims with regard to emissions of CO_2 could be brought pursuant to a public trust, in light of Supreme Court and Ninth Circuit case-law holding that

common law claims have been displaced by the Clean Air Act. *See AEP*, 564 U.S. at 423-24; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856-58 (9th Cir. 2012).

Plaintiffs' argument as to substantial disagreement between this Court and the district and appeals courts in D.C. over the public trust claim turns entirely on two propositions: (1) that the Court of Appeals for the District of Columbia's opinion rejecting Plaintiffs' public trust claim in *Alec L.* is not "precedential authority" because it is an unpublished opinion, and (2) Plaintiffs' continued disagreement with the District Court for the District of Columbia's rejection of Plaintiffs' public trust claim.[9] Resp. 22 (citing *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom., Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014)). However, both of those opinions, regardless of their precedential weight or Plaintiffs' disagreement with them, conflict with this Court's opinion and show that reasonable jurists disagree as to the public trust claim. This Court's statement that it is "not persuaded by the reasoning of the *Alec L.* courts" establishes that there is substantial disagreement among reasonable jurists. Op. 46.

Plaintiffs' contention that the D.C. Circuit's decision is not "precedential authority" because the court decided not to publish its opinion rejecting Plaintiffs' public trust claim is misplaced. Plaintiffs imply that the D.C. Circuit determined not to publish its opinion because

[9] In their critique of the two opinions, Plaintiffs describe the Court of Appeals opinion as an "unreflective affirmance" and the District Court's opinion as an "unreflective and superficial analysis." Resp. 22. Elsewhere, Plaintiffs imply that the District Court did not conduct "reasoned and careful analysis." Resp. 23. In advancing these criticisms Plaintiffs overlook the fact that the theories they advance here have long been viewed skeptically, *see, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 710 (1986) (arguing that the public trust doctrine is of limited relevance to modern environmental issues and "unjustifiably relies on the judiciary to further its environmental goals"). In light of the novelty of Plaintiffs' claims, and longstanding and serious scholarly objections to the expansion of the doctrine, criticisms of these opinions as superficial are unwarranted.

the opinion was, in Plaintiffs' words, "unreflective." Resp. 22. But Plaintiffs ignore D.C. Circuit rules that provide the criteria that panels in the D.C. Circuit apply in determining whether an opinion will be designated as "for publication." These include whether it is a "case of first impression" with "regard to a substantial issue," whether "it alters, modifies, or significantly clarifies a rule of law," whether it "calls attention to an existing rule of law that appears to have been generally overlooked," whether it "criticizes or questions existing law," or "resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit," or whether "it warrants publication in light of other factors that give it general public interest." D.C. Cir. Rule 36(c)(2). Moreover, the D.C. Circuit rules provide that an opinion, though unpublished, "will nonetheless be circulated to all judges on the court prior to issuance." D.C. Cir. Rule 36(e)(1). While *Alec L.* has not been designated for publication, it is still a unanimous decision by a three-judge panel in the D.C. Circuit that squarely addresses, and rejects, the public trust claim that Plaintiffs raise in this case.[10] Without doubt, reasonable jurists have disagreed as to whether Plaintiffs' stated a valid public trust claim.

Plaintiffs disagree with *Alec L.* because it reached a different conclusion than this Court as to the scope of the public trust doctrine. Resp. 22 ("the *Alec L.* case mispronounced the law as to the scope of the public trust doctrine"). And they disagree with *Alec L.* as to whether, if the public trust applies to the federal government, it has been displaced by statute. Resp. 23 ("*Alec L.* fundamentally erred in its displacement analysis"). From this disagreement, they argue that *Alec L.* lacks "sufficiency" for there to be substantial grounds for differences of opinion. However, it

[10] *See also* Fed. R. App. P. 32.1(a) ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like . . . .").

is precisely because different federal courts reach different conclusions on these two points of law that there are substantial grounds for differences of opinion.

Even setting aside the *Alec L.* decisions, reasonable jurists could disagree as to whether there is a federal public trust in light of the Supreme Court's statement in *PPL Montana* that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Montana, LLC*, 565 U.S. at 603-04. In *32.42 Acres of Land*, the Ninth Circuit repeated this language in determining that the public trust does not survive the federal government's condemnation of state land. Plaintiffs argue that these decisions are "wholly inapplicable to this case" because they do not "speak to the existence of a separate federal public trust."[11] Resp. 25. But this critique misses the mark. The relevant question on this motion is whether reasonable jurists could disagree as to whether the quoted language from the Supreme Court and Ninth Circuit opinions means that the public trust doctrine is exclusively a matter of state law, as Federal Defendants contend.

Finally, reasonable jurists could disagree with respect to the Court's rejection of Federal Defendant's alternative ground for dismissing the public trust claim on the basis that it is displaced by statutes and delegations to regulatory agencies. Here, the Court found that "[p]ublic trust claims are unique because they concern inherent attributes of sovereignty" and thus "displacement analysis simply does not apply." Op. 49. In *AEP* and in *Native Village of Kivalina*, the Supreme Court and the Ninth Circuit respectively found common law nuisance

[11] As noted in our opening brief, the district court in *32.42 Acres of Land* issued an order prior to the Supreme Court's decision *PPL Montana* that accepted a federal public trust theory. Mot. to Cert. 24. Plaintiffs argue that this fact is "important" and note that the "ruling was not overturned on appeal." Resp. 25. The ruling was not "overturned" because it was not appealed. For purposes of determining the scope of subsequent pronouncements by the Supreme Court and Ninth Circuit on the public trust doctrine, the ruling is of no relevance.

claims to be displaced by the Clean Air Act and EPA's regulations under that Act. *AEP*, 564 U.S. at 423-24; *Native Vill. of Kivalina* 696 F.3d at 856-58. Plaintiffs argue that these cases are distinguishable because they concern nuisance claims and involve private party defendants, but they offer no reason why this is a distinction with a difference and offer only the conclusory statement that "public trust claims are inherently different from nuisance and other similar purely common law claims." Resp. 23.

III. Immediate appeal may advance the ultimate determination of the litigation.

Because the issues in this case are clearly controlling, an "immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). This third prong is a pragmatic inquiry that focuses on whether an interlocutory appeal "might save time for the district court, and time and expense for the litigants." 16 WRIGHT & MILLER § 3930 (citing, inter alia, *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318-19 (9th Cir. 1996)). That standard is readily met here.

Plaintiffs argue that, even if they were reversed on appeal, the specter of piecemeal litigation means that interlocutory appeal would not appreciably shorten the time, effort, or expense of litigation. This argument, once again, ignores the fact that the Court indicated that "Plaintiffs' due process claims encompass asserted equal protection violations and violations of enumerated rights secured by the Ninth Amendment." Op. 28 n.6.[12]

[12] Plaintiffs also offer improper reasons for the Court to ignore the criteria set forth in Section 1292(b) and deny the motion for certification, notwithstanding its validity. For example, they ask the Court to exercise "unfettered discretion to deny certification." Resp. 26. Elsewhere, they suggest that the Court should deny the motion because it was filed almost four months after the November Order. But Plaintiffs point to no prejudice to them due to the "delay" they complain of. And Section 1292(b) itself imposes no deadlines for seeking certification.

Were the claims reversed on appeal, there would be no remaining claims, and the time, effort, and expense would be dramatically shortened. This is true in part due to the extremely broad approach to discovery that Plaintiffs have chosen to take in this case. *See* Fed. Defs' Mot. to Stay Litig. 4-5, ECF No. 121. Contrary to Plaintiffs' assertions of their attempts to "narrowly tailor discovery," Resp. 28, Plaintiffs have, in the weeks since the opening brief on this issue was filed, served enormously burdensome requests for production of documents in the possession of *any employee, past or present*, that are related to climate change or energy policy, in some cases dating back more than fifty years. Fed. Defs' Reply in Supp. of Mot. to Stay 5-6. Such production, if actually conducted, would likely produce over hundreds of terabytes of data and require hundreds of thousands of dedicated man-hours by agency staff to search for and review responsive documents. As Plaintiffs serve ever more unduly burdensome document production requests on federal agencies, it has become increasingly clear that the Plaintiffs are steering this case into a prohibitively costly, time-consuming, and disruptive direction. An interlocutory review allows the Court and the Federal Defendants to avoid this debilitating drain on the public fisc.

Conclusion

For all of the foregoing reasons, the United States respectfully requests that the Court certify the five questions listed in the accompanying motion to certify the order for interlocutory appeal.

Dated: April 10, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that on April 10, 2017 I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

/s/ Sean C. Duffy
Sean C. Duffy

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