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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' OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL (ECF No. 551)

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INTRODUCTION

As Yogi Berra once quipped, "It's like déjà vu all over again." This Court understandably may experience a sense of déjà vu upon reading Defendants' Motion to Certify Order for Interlocutory Appeal ("Mot. to Certify"), Doc. 551. The arguments Defendants raise have already been briefed extensively both in their opposition to set a pretrial conference ("[T]his Court should certify the questions raised in that motion for interlocutory appeal because the questions are just as qualified for interlocutory appeal in 2023 as they were in 2018."), as well as in their recent motion to dismiss ("If the Court Denies Defendants' Motion to Dismiss, it Should Certify its Order for Interlocutory Appeal."). Defs.' Resp. to Pls.' Mot. to Set Pretrial Conf. ("Def. Opp. Trial") at 5, Doc. 548; Defs.' Mot. to Dismiss Second Am. Compl. ("MTD") at 32, Doc. 547.

This latest motion continues Defendants' pattern of endless stalling that Plaintiffs have called out in numerous prior responses. *See, e.g.*, Pls.' Reply in Support of Mot. to Set Pretrial Conf. at 1, Doc. 550 ("[I]t is obvious the Biden Administration intends to continue to bombard Plaintiffs and this Court with motions and requests to certify."); Pls.' Opp'n to Defs.' Mot. to Dismiss Second Am. Compl. ("MTD Opp.") at 1, Doc. 549 ("[The] DOJ has used every rare legal tool, more times than in any other case in history, to silence the constitutional claims of twenty-one of our nation's youth."). Defendants continue to willfully ignore this Court's determination that Plaintiffs' Second Amended Complaint resolves the redressability concerns Defendants seek to relitigate on yet another interlocutory appeal.

To spare the Court's time, Plaintiffs simply ask that, due to the absence of any novel assertions that this Court has not already heard numerous times, Defendants' Motion to Certify be denied. Eight years of waiting is long enough—it is time for Plaintiffs' evidence to be heard and judged on the merits, not byzantine legal procedure that exhausts judicial (and Plaintiffs') resources rather than promotes judicial economy.

ARGUMENT

I. This Court Should Not Countenance Endless Interlocutory Appeals

Generally speaking, an appeal may only be taken from decisions that are "final." *See* 28 U.S.C. § 1291. That means Defendants normally must raise all their claims of error in a single appeal following a final judgment. *Flanagan v. United States*, 465 U.S. 259, 263 (1984). This final-judgment rule is fundamental to our legal system. *See McLish v. Roff*, 141 U.S. 661, 665-66 (1891). In the present circumstances, the sole exception is 28 U.S.C. § 1292(b), which allows interlocutory appeals when the district judge certifies that the order meets three specific requirements: "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion [as to that question], and (3) that an immediate [resolution of that question] 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). If certified, the court of appeals may permit the appeal within its discretion. 28 U.S.C. § 1292(b).

By its terms, § 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). In seeking interlocutory appeal, Defendants must show that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Defendants fail to establish any of the necessary prerequisites to interlocutory appeal, notably a complete failure to show that "exceptional circumstances justify" certification. As a result, this Motion to Certify should be denied.

Defendants repeatedly state this Court "should" certify the Order for interlocutory review. Mot. to Certify at 1, 8, 14. Yet Defendants lose sight of the standard under 28 U.S.C. § 1292(b),

which allows certification of a case for interlocutory appeal *only* where the court is "of the opinion that" it involves a controlling question of law, as to which there is substantial ground for difference of opinion, and where an appeal may materially advance the outcome of litigation. *Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc.*, 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999) (cited in *Teem v. Doubravsky*, No. 3:15-cv-00210-ST, 2016 U.S. Dist. LEXIS 13452, at *3 (D. Or. Jan. 7, 2016)). There is no requirement for this Court to certify if an immediate appeal will not "promote judicial efficiency." *Juliana v. United States*, 949 F.3d 1125, 1126 (9th Cir. 2018) (Friedland, J., dissenting). On the contrary, there exists a well-established distaste for frequent interlocutory appeals, for "once the idea of piecemeal appeals takes root, it is difficult ever to get a case to trial." *United States v. Eccles*, 850 F.2d 1357, 1362 (9th Cir. 1988). To Defendants "piecemeal appeals" may be a feature rather than a bug, but such abuse of process should not be espoused by this Court.

This Court found Plaintiffs deserve to have their claims heard in a court of law when it granted leave to file the Second Amended Complaint. *See* Amend Order, Doc. 540. Since that order, there have been no material changes in the facts underlying this case that would warrant a change of direction on the part of this Court. Defendants do not even attempt to justify why this Court would need to come to a different conclusion today than it did a mere month ago, nor do Defendants respond to the many arguments raised in Plaintiffs' prior briefing that explain why certification should not be granted. *See, e.g.*, Pls.' Reply in Support of Mot. to Set Pretrial Conf. at 5-6; MTD Opp. at 22-26. Since this Court has already found the instant case would benefit from a trial on the merits, Amend Order at 8 ("[a] party should be allowed to test his claims on the merits rather than on a motion to amend . . . ."), no certification should be granted in this instance.

The crux of Defendants' argument is that, "[g]iven the Ninth Circuit's intervening mandate, the case for certification is even stronger now." Mot. to Certify at 14. The opposite is

true. The Supreme Court has repeatedly emphasized the limited scope interlocutory appeals should play, explaining that they should "never be allowed to swallow the general rule that a party is entitled to a single appeal." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (internal citations omitted). Permitting repetitive interlocutory review of questions that can and should properly be resolved after trial on appeal would hamper judicial efficiency and "undermine the independence of the district judge." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Defendants were already granted certification once, and Plaintiffs have amended their complaint in response to the resulting ruling of the Ninth Circuit panel. It would be a waste of judicial resources to now grant certification of minor questions without any development on the merits of the case, simply for the litigation to be later returned to this Court. If Defendants remain convinced there are important questions of law that require resolution, Defendants can raise those issues on appeal, like all other litigants, but with the benefit of a fully developed factual record. "It must be remembered that interlocutory review is the child of necessity. Given the availability of post-trial appellate review of district court orders . . . , there is no need for interlocutory review." *Eccles*, 850 F.2d at 1362. There is no such necessity present here. Defendants do not come close to meeting the test for certification.

II. There Are No Controlling Questions of Law with Substantial Grounds for Difference of Opinion

A "controlling question of law" under § 1292(b) exists only when the issues involve "a 'pure question of law' rather than a mixed question of law and fact or the application of law to a particular set of facts." *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, No. 09-CV-320-HU, 2010 WL 952273, at *3 (D. Or. Mar. 10, 2010). As this Court has previously adopted:

> We think [Congress] used "question of law" in much the same way a lay person might, as referring to a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure

> question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case.

Id. (quoting *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 675-77 (7th Cir. 2000)).[1] Moreover, "[t]o demonstrate 'a substantial ground for difference of opinion' on a question for § 1292(b) certification, a party must show more than its own disagreement with a court's ruling." *Marsall v. City of Portland*, No. CV-01-1014-ST, 2004 WL 1774532, at *5 (D. Or. Aug. 9, 2004) (citing *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996)). To satisfy this standard, this Court has previously required a moving party to demonstrate that a particular decision is in active conflict with decisions by other judicial bodies. *See Chehalem*, 2010 WL 952273, at *4 ("As noted, Defendant has not established the Court's decision in this case conflicts with the decisions of other courts. Defendant merely reiterates the arguments it made on summary judgment and in its Objections to the Findings and Recommendation.").

Here, Defendants have identified two issues, "the rule of mandate and futility," Mot. to Certify at 8, neither of which present controlling questions of law with substantial grounds for difference of opinion. Accordingly, Defendants fail in their burden to demonstrate the "exceptional circumstances" needed for interlocutory appeal. *In re Cement*, 673 F.2d at 1026.

[1] This Court went on to further explain in *Chehalem* that controlling questions of law should not involve legal issues "intertwined" with factual matters and cited the following tests or illustrative examples used by other courts, in the absence of a uniform Ninth Circuit test: *Oliner v. Kontrabecki*, 305 B.R. 510, 529 (N.D. Cal. 2004) ("Because the alleged 'controlling questions of law' raised by Kontrabecki are inextricably intertwined with the bankruptcy court's factual findings, an interlocutory appeal is not appropriate."); *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 239 (D.D.C. 2003) (When "the crux of an issue decided by the Court is fact-dependent, the Court has not decided a 'controlling question of law' justifying immediate appeal . . . .").

A. There are No Grounds For Difference of Opinion as to Whether this Court Has Fully Complied with the Rule of Mandate.

Defendants first argue this Court incorrectly granted leave to file the Second Amended Complaint, asserting the controlling question of law to be "whether the Ninth Circuit's mandate permitted the filing of the second amended complaint functionally identical to the one the Ninth Circuit ordered the district court to dismiss." Mot. to Certify at 8; *see also id.* at 9.

In raising this contention, Defendants walk face-first into the mountain of Ninth Circuit precedent blocking them on this very issue—and simply choose to ignore it.[2] It is black letter law, with no grounds for differing opinions, that "dismissals for lack of Article III jurisdiction ***must be entered without prejudice*** because a court that lacks jurisdiction 'is powerless to reach the merits.'" *Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (emphasis added) (quoting *Fleck & Assocs., Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100, 1106-07 (9th Cir. 2006)); *see also Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (same). This Court scrupulously followed the Ninth Circuit's mandate when it granted leave to amend.

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[2] Defendants' complete disregard of the long-standing precedent that dismissals for lack of Article III jurisdiction are *without* prejudice is made all the more pernicious by the fact that counsel for Plaintiffs specifically raised this precedent when meeting and conferring with Defendants about this very motion. Rodgers Decl. ¶¶ 2-3; *See S. Pac. Transp. Co. v. Pub. Utilities Comm'n of State of Cal.*, 716 F.2d 1285, 1291 (9th Cir. 1983) (noting the "dereliction of duty to the court" when counsel failed to mention adverse, controlling authority to the court in violation of the Code of Professional Responsibility); *Or. Nat. Res. Council Action v. U.S. Forest Serv.*, No. CIV. 03-613-KI, 2004 U.S. Dist. LEXIS 9643, at *6 (D. Or. May 10, 2004) ("Although [defendant] believes that the court extended [a prior ruling], they must acknowledge . . . adverse precedent."); *St. Charles Health Sys. v. Or. Fed'n of Nurses & Health Pros., Loc. 5017*, No. 6:21-CR-304-MC, 2021 U.S. Dist. LEXIS 241440, at *4 (D. Or. Dec. 16, 2021) (citing *Transamerica Leasing, Inc. v. Compania Anonima Venezolana de Navegacion*, 93 F.3d 675, 675-76 (9th Cir. 1996)) ("Rule 3.3(a)(3) prohibits an attorney from knowingly failing to disclose controlling authority directly adverse to the position advocated. The rule is an important one, especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of lawyers hiding the legal ball.").

The Ninth Circuit dismissed the Amended Complaint for lack of Article III standing, but was "silent" on whether dismissal was with or without leave to amend. Amend Order at 13; *see Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). Also, the Ninth Circuit panel never addressed the issue of leave to amend. *Id*. All relevant indications, including those that Defendants cite in their Motion to Certify, point to dismissal being without prejudice and with opportunity for leave to amend. First, dismissal by the Ninth Circuit was solely due to the final prong of Article III standing. Mot. to Certify at 9; *see also* Def. Opp. Trial at 2 ("The narrow issue of redressability was the only issue necessary to justify that mandate and, thus, the Ninth Circuit did not address other issues certified for interlocutory appeal, including the merits . . . ."). The merits of this case have never been adjudicated—as Defendants readily acknowledge—and thus dismissal was *without* prejudice.[3] *See* MTD at 19. This is black letter law the Defendants ignore.

Second, this Court has wide discretion to grant leave to amend, including when a higher court's mandate has not expressly provided for leave to amend in its order for dismissal. *See San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986)) ("The district court correctly determined that this Court's prior opinion did not prevent the Association from seeking leave to re-plead. 'Absent a mandate which explicitly directs to the contrary, a district court upon remand

[3] Speaking for a unanimous Supreme Court, Justice Scalia defined "dismissal without prejudice" as follows: "The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself. Thus, Black's Law Dictionary (7th ed. 1999) defines 'dismissed without prejudice' as 'removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim,' and defines 'dismissal without prejudice' as '[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.'" *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (citations omitted).

can permit the plaintiff to file additional pleadings . . . .'"). This Court was clearly authorized to grant leave to amend given the lack of any express mandate to the contrary, which the Ninth Circuit has declared must be present before foreclosing a district court's discretion. *See id.*; Amend Order at 9-10. The fact that this Court already determined Plaintiffs' Second Amended Complaint "cures the standing deficiencies identified by the Ninth Circuit," Amend Order at 19, indicates that a reversal of this Court's order would now be "improper." *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). There is no controlling question of law with substantial ground for difference of opinion here. This Court correctly followed the Ninth Circuit's mandate solely on standing grounds by permitting Plaintiffs to amend their complaint to cure any jurisdictional defects the Ninth Circuit believed existed.

By claiming within the same ostensibly controlling question that the Second Amended Complaint is "functionally identical" to the Amended Complaint, Defendants have also proposed what is, at its essence, a mixed question of law and fact—further making this issue inappropriate for interlocutory appeal. Mot. to Certify at 8. Once again, Defendants fixate exclusively on the amended relief sought by Plaintiffs, Mot. to Certify at 7, but they never acknowledge the myriad of new factual allegations showing how Plaintiffs are concretely injured by Defendants' conduct in ways that would be redressed by declaratory relief. *See* SAC, Doc. 542 ¶¶ 12-14, 19-A, 22-A, 30-A, 34-A, 39-A, 43-A, 46-A, 49-A, 52-A, 56-A, 59-A, 62-A, 64-A, 67-A, 70-A, 72-A, 76-A, 80-A, 85-A, 88-A, 90-A, 95-A to -D. These factual issues are matters for this Court to address at trial, as this Court already indicated "further factual development" is necessary to reach a fair resolution of the claims. *See Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) ("This Court stands by its prior rulings on jurisdictional and merits

issues, as well as its belief that this case would be better served by further factual development at trial.").

Additionally, Defendants incorrectly assert the relief sought by the Second Amended Complaint is "functionally identical" even standing on its own, as Plaintiffs have adequately amended the relevant portions of their Prayer for Relief to resolve the sole redressability issue identified by the Ninth Circuit. *See* MTD Opp. at 9-17, 23-24. Thus, the purported "controlling question" raised by Defendants is too broad and intertwined with factual issues for interlocutory appeal to apply. It is also one that Plaintiffs have already answered, *see id.*, without a sufficient response from Defendants to meet their burden of showing substantial grounds for difference based on clear conflicts between judicial bodies on *this* issue of redressability. *See Marsall*, 2004 WL 1774532, at *5.

Finally, other Circuits have indicated that the discretionary nature of a district court's decision on a motion requesting leave to amend makes the Amend Order generally inapposite for interlocutory appeal. *See, e.g.*, *Sinick v. Cnty. of Summit*, 76 F. App'x 675, 685 (6th Cir. 2003) (holding that the court of appeals did not have jurisdiction over interlocutory appeal of a district court order allowing plaintiffs to file an amended complaint); *Bridges v. Dep't of Maryland State Police*, 441 F.3d 197, 206 (4th Cir. 2006) ("Congress conferred jurisdiction on courts of appeals in 28 U.S.C. §§ 1291 and 1292, providing jurisdiction over only final orders and certain interlocutory and collateral orders. A denial of a motion to amend a complaint is not a final order, nor is it an appealable interlocutory or collateral order."). The Ninth Circuit has stated reasoning similar to that employed by other circuits should apply to this Amend Order. *See Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1304 (9th Cir. 1981) ("Such orders, as a class,

contemplate further proceedings in the district court, and this court has previously held that review is available after the final judgment, into which they merge.").

Without citation, Defendants repeatedly claim "reasonable jurists could disagree" over the filing of the Second Amended Complaint. Mot. to Certify at 10. While Defendants may personally disagree with the Amend Order, Defendants completely fail to show any meaningful disagreement in the Ninth Circuit (or any other circuit for that matter) nor do Defendants otherwise meet the burden that only "exceptional circumstances justify" certification for interlocutory appeal of an order granting a motion to amend a complaint to cure jurisdictional issues.

B. There are No Substantial Grounds For Difference of Opinion as to Whether the Second Amended Complaint Resolves Redressability Concerns and is Not Futile in Seeking Declaratory Relief for Constitutional Violations.

Next, Defendants erroneously posit the Amend Order raises a controlling question of law with substantial grounds of difference of opinion regarding "whether the amendments are futile because they fail to cure the Article III defects addressed in the Ninth Circuit's holding." Mot. to Certify at 8. The Amend Order does not present substantial grounds of difference of opinion. On this front, Defendants raise arguments in their Motion to Certify that are wholly repetitive of their briefs opposing the Second Amended Complaint. *See, e.g.*, MTD at 11-19; Def. Opp. Trial at 2, 5. Rather than relitigate these matters, Plaintiffs point this Court to both prior briefs which respond to these arguments at greater length and this Court's orders which have already decided these issues. *See* MTD Opp. at 9-17, 23-24; Pls.' Reply in Support of Mot. to Set Pretrial Conf. at 5; Amend Order at 13-19; *see also supra* Part II.A. (explaining the Second Amended Complaint and its alleged similarities with the Amended Complaint necessarily involve assessing new factual issues, not only legal ones).

As addressed in various prior briefings and court orders, Defendants continue to understate or outright ignore the new allegations and modified relief sought in the Second Amended Complaint, mischaracterize recent precedent surrounding declaratory relief and justiciability, ignore the Declaratory Judgment Act, and incorrectly assert their conclusion that the Second Amended Complaint is futile. *See* MTD at 11-14; Def. Opp. Trial at 4-5; Defs.' Mot. to Stay at 4-5, Doc. 552; Amend Order at 9, 11-19; MTD Opp. at 5, 9-13, 15-17, 25-28. Neither the Ninth Circuit's decision on Plaintiffs' First Amended Complaint nor the Supreme Court's denial of Defendants' application for stay on July 30, 2018, supports a conclusion of futility. Since the Second Amended Complaint has been modified and narrowed to address the reservations expressed by the Ninth Circuit as to redressability, prior guidance from the Ninth Circuit or the Supreme Court addressing only the allegations in the First Amended Complaint is not dispositive on the questions currently before this Court on the Second Amended Complaint. Defendants have not met their burden for certification for interlocutory appeal to bypass ordinary rules of procedure. Nor have Defendants demonstrated substantial grounds for disagreement as to this Court's accurate determination that "the declaration that plaintiffs seek would by itself guide the independent actions of the other branches of our government and cures the standing deficiencies identified by the Ninth Circuit." Amend Order at 19.

III. Interlocutory Appeal Will Delay the Conclusion of This 8-Year Long Litigation, Not Expedite It

A. Certification Would Not Materially Advance the Ultimate Termination of the Litigation.

Section 1292(b) requires that interlocutory appeal must "materially advance the ultimate termination of the litigation." Ignoring, among other issues, that a dismissal as to standing is without prejudice, Defendants adamantly assert a "successful appeal on the United States'

arguments that either the rule of mandate or futility require rejection of the second amended complaint would bring this case to a complete close." Mot. to Certify at 14. Yet as shown in this response, neither of those arguments are suitable to be resolved upon interlocutory appeal. *See supra* Part II. Hence, it is unclear what result Defendants expect from certification, aside from yet another lengthy delay in seeing this case come to trial.

Defendants caution that questions of law should be resolved "before the parties undertake the time and expense of further discovery, additional merits briefing, trial preparations, and trial." Mot. to Certify at 14. This argument simply fails to hold water. First, the burden of preparing for trial is not a basis to justify interlocutory appeal. *Renegotiation Bd v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" for the purposes of justifying an interlocutory appeal.).

Second, Plaintiffs have explained in numerous prior briefs that discovery had substantially concluded in 2018 before the case was stayed ten days before trial, and now would require mere "updating and refinement." *See* Pls.' Reply in Support of Mot. to Set Pretrial Conf. at 2. Defendants have never provided any factual support for their belief that further discovery will be cost-prohibitive and lengthy. In fact, their own statements directly contradict that assertion. If Defendants believe the "second amended complaint [to be] functionally identical" to the first, then it is hard to imagine why additional discovery would be so costly. Defendants offer no support for their cost-prohibitive assertion. Defendants further argue interlocutory appeal should be preferred because of "Plaintiffs' sweeping claims and the nature of the trial that they demand." Mot. to Certify at 14. This argument also rings hollow. Recent climate litigation in Montana has shown that it is feasible to complete a trial on these issues well within a normal timeframe. *See Held v.*

Montana, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. June 20, 2023) (bench trial completed in less than seven court days).

Lacking any supporting evidence and ignoring the last eight years of perpetual delay, Defendants ask this Court to take their word that certification will now hasten the conclusion of this trial. Plaintiffs respectfully submit that speed and efficiency have not been priorities for Defendants in the past, and this Court should be skeptical that speed and efficiency, rather than delay, now have become legitimate concerns for Defendants. The best way to materially advance the termination of this litigation remains to set an expedited trial date, to develop claims by hearing them on the merits, and to appeal only after all evidence has been heard in a court of law.

B. Any Delay Would Significantly Prejudice Plaintiffs.

Aside from squandering judicial resources and taxpayer money, granting certification would exacerbate the real harms experienced by Plaintiffs over the past eight years, injuries the Ninth Circuit found have been and are being caused by Defendants. Plaintiffs have briefed this Court on the worsening effects of climate change extensively, and will not repeat those arguments here. *See* MTD Opp. at 27; *see also Juliana*, 947 F.3d at 1168-69 ("The district court correctly found the injury requirement met. . . . The district court also correctly found the Article III causation requirement satisfied . . . ."). It is worth mentioning, however, that Defendants' Motion to Certify, as well as each of their pending motions, refuse to address the evidence of injury to young Plaintiffs and causation by Defendants. In fact, Defendants' Motion to Certify wholly fails to contest that interlocutory appeal would significantly prejudice Plaintiffs. In contrast, Defendants would suffer no prejudice if certification was denied. *See infra* Part IV. In the face of readily apparent significant prejudice to Plaintiffs, this Court should deny certification. *See Forces Action Project, LLC v. California*, 61 Fed. App'x. 472, 474 (9th Cir. 2003) (finding prejudice to the

opposing party a ground for denial of a motion); *United States v. Myers*, 930 F.3d 1113, 1119 (9th Cir. 2019) (finding that excessive delay can become presumptively prejudicial).[4]

IV. Defendants Will Not be Prejudiced by a Denial of Certification

Defendants have used every opportunity to forestall this litigation, perhaps more than any other case in U.S. history. *See* Pls.' Mot. to Set Pretrial Conf. at 5-6, Doc. 543 ("The legal claims and defenses raised in this case have been briefed multiple times in this Court, in the Ninth Circuit Court of Appeals on four petitions for writ of mandamus, and three times before the United States Supreme Court.") (citations omitted). If their current behavior serves as any indication, Defendants will continue to pursue many more delay tactics. *See* MTD Opp. at 17-19. Importantly, a decision by this Court to deny certification at this stage would have no detrimental impact on Defendants' ability to later seek an appeal of the final decision under § 1291—the normal procedure for seeking review. Defendants should also be well-prepared to go to trial after nearly eight years of working to craft their defense, as "the parties have extensively briefed the legal issues in this case on numerous occasions and largely have completed discovery." Pls.' Mot. to Set Pretrial Conf. at 9; *see also* Def. Opp. Trial (not disputing these facts). Defendants have repeatedly described the Second Amended Complaint as "congruent" with earlier pleadings and indicated that they may employ the same arguments Defendants developed over the past eight years in response. Pls.' Reply in Support of Mot. to Set Pretrial Conf. at 7. In sum, the Department of Justice is not prejudiced by having to take a case, especially this case, to trial or having to use the standard appeals process used by all other litigants after this case finally receives a decision on the merits.

[4] Although *Myers* is a criminal case, its analysis is pertinent to the delays in the case at hand. The injuries suffered by Youth Plaintiffs at the hands of their government are the equivalent to many forms of criminal injury.

CONCLUSION

For the foregoing reasons in this brief as well as in the many other briefs and court orders that have already addressed the issues raised by Defendants, this Court should deny Defendants' Motion to Certify Order for Interlocutory Appeal.

DATED this 21st day of July, 2023.

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