TODD KIM
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

GUILLERMO A. MONTERO
Assistant Section Chief
SEAN C. DUFFY (NY Bar No. 4103131)
FRANK J. SINGER (CA Bar No. 227459)
Trial Attorneys
Natural Resources Section
150 M Street NE
Washington, DC 20002
Tel: (202) 305-0445
sean.c.duffy@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al*.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-cv-1517-AA

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL (ECF No. 551)

INTRODUCTION

This Court's order granting Plaintiffs' leave to amend the complaint readily meets the standard for certification for interlocutory appeal. The Court's determinations on the effect of the Ninth Circuit mandate and the futility of amendment present controlling questions of law over which reasonable jurists can have a substantial difference of opinion, and an appeal is likely to materially advance the conclusion of this case. Plaintiffs fail to show that these standards are not met. Moreover, they do not explain how a denial of certification could be squared with the Court's prior grant of certification in this case. The Court should accordingly certify its order for interlocutory appeal.

I. The mandatory effect of the Ninth Circuit mandate and the futility of amendment present controlling questions of law.

The Ninth Circuit held that Plaintiffs' pursuit of declaratory and injunctive relief against the United States did not present an Article III case or controversy because those remedies would not redress their asserted injuries and Plaintiffs therefore lack standing. *Juliana v. United States*, 947 F.3d 1159, 1169-73 (9th Cir. 2020), *denying reh'g en banc*, 986 F.3d 1295 (Mem.) (9th Cir. 2021). The Ninth Circuit then mandated dismissal. Ninth Cir. Mandate, ECF No. 461. Following that, this Court allowed Plaintiffs to file a second amended complaint. June 1, 2023 Op. & Order 10-11 ("Amend Order"), ECF No. 540. For purposes of the present motion, the issue is whether this Court's interpretation of the mandate as allowing the Second Amended Complaint presents a controlling question of law. It unquestionably does, because if this Court was incorrect in its determination that the Ninth Circuit's mandate permitted filing of the Second Amended Complaint, this case will conclude. *See* 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930 (3d ed. 2005) ("[A] question is 'controlling' if its incorrect disposition would require reversal of a final judgment.").

In opposing leave to amend, the United States also argued that amendment was futile because the proposed amendment failed to cure the Article III defects identified in the Ninth Circuit's holding. Defs.' Opp'n to Leave to Amend to File Sec. Am. Compl. 11-17, ECF No. 468. This Court disagreed. Amend Order 17. Here again, whether the Second Amended Complaint is futile unquestionably presents a controlling question of law, because the litigation will conclude if the Ninth Circuit determines that Plaintiffs continue to lack standing.

Plaintiffs do not rebut the above arguments. Pls.' Opp'n to Defs.' Mot. to Certify Order for Interlocutory Appeal ("Pls.' Opp'n") 5, ECF No. 555. Instead, they urge that certification should be denied because the issues of mandate and futility present "mixed" questions of law and fact, rather than "pure" questions of law. *Id.* at 4-5. But this is the same argument Plaintiffs made in their previous unsuccessful efforts to oppose interlocutory appeal. Pls.' Resp. in Opp'n to Defs.' Mot. to Reconsider Denial of Requests to Certify Orders for Interlocutory Appeal 22, ECF No. 428. The argument should be rejected now, as it was then. The determination whether to grant leave to amend is a purely legal judgment, as are the issues presented for certification. The proper interpretation of the mandate presents legal questions—not factual questions—that require the Court of Appeals to look no further than its previous decision. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) ("it is for this court to construe its own mandate, and to act accordingly"); *see also Pineda v. United States*, 178 F.3d 1300 (9th Cir. 1999) (district court's interpretation of an appellate court's mandate "raises questions of law" and is appropriately reviewed de novo). And the issue of futility similarly presents a pure question of law. While Plaintiffs insist that the new allegations in the Second Amended Complaint show their injuries would be redressed by a declaratory judgment, *see* Pls.' Opp'n 8-9, those allegations either present "legal conclusion[s] couched as . . . factual allegation[s]," which courts may reject as a

matter of law, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or they express disagreement with the Ninth Circuit's holding that a declaration of rights would not redress Plaintiffs' climate-related injuries—a tack barred by the rule of mandate. Even to the extent the Second Amended Complaint includes properly pled new factual allegations, however, the sufficiency of those allegations following the Ninth Circuit's ruling is a question of law under Federal Rules 12(b)(6) and 15, which is amenable to resolution on certified appeal under 28 U.S.C. § 1292(b).

II. There is substantial ground for difference of opinion on the effect of the mandate and the futility of amendment.

The second requirement for certification is also met because "a substantial ground for difference of opinion exists" with respect to the issues of mandate and futility "where reasonable jurists might disagree on an issue's resolution." *Reese v. BP Exploration (Alaska), Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). In response, Plaintiffs first attack a strawman – they argue that Ninth Circuit precedent requires that dismissals for lack of Article III jurisdiction be entered without prejudice. Pls.' Opp'n 6. But Defendants have not questioned "that a defect warranting an instruction to dismiss sometimes can be cured through amendment." Defs.' Mot. to Certify Order for Interlocutory Appeal 11, ECF No. 551. The question here is "whether *this* mandate foreclosed *this* amendment." *Id*. And the answer to that question is "yes," because the Second Amended Complaint is functionally identical to the earlier complaint, and thus presents the same jurisdictional defects.[1]

[1] Plaintiffs contend that Defendants, by failing to discuss case law addressing whether jurisdictional flaws can be a basis for dismissal with prejudice, violated their duty to disclose "controlling authority directly adverse to the position advocated." Pls.' Opp'n 6 n.2 (citing *Transamerica Leasing, Inc. v. Compania Anonima Venezolana de Navegacion*, 93 F.3d 675, 675-76 (9th Cir. 1996)). The contention is unfounded because the Motion at issue does not contend that a jurisdictional flaw requires dismissal with prejudice. As Plaintiffs themselves recognize, *see id*. at 6, Defendants' argument instead is that the Second Amended Complaint is foreclosed by the Ninth Circuit's mandate and the rule of futility because it is functionally identical to the earlier complaint.

Plaintiffs next insist that the Second Amended Complaint is meaningfully different from the earlier complaint because it alleges new facts to illustrate "how Plaintiffs are concretely injured by Defendants' conduct in ways that would be redressed by declaratory relief." Pls.' Opp'n 8, 11. But each new allegation merely elaborates on Plaintiffs' alleged climate-based injuries or states without any support that a declaratory judgment would help redress those climate-based injuries. *See* Sec. Am. Compl. ¶¶ 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, ECF No. 542. Because the new allegations are not really new and the Ninth Circuit has already addressed what is required to redress Plaintiffs' asserted climate-based injuries and concluded that the declaratory judgment they sought (and still seek) will not suffice, reasonable jurists can disagree with this Court's conclusion that any of the new allegations in the Second Amended Complaint corrected the earlier complaint's jurisdictional defects. And while Plaintiffs insist that any scrutiny of their new allegations should be avoided at this stage because it would amount to resolving mixed questions of law and fact, the case law is clear that the adequacy of "a legal conclusion couched as a factual allegation" can be resolved as a matter of law. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan*, 478 U.S. at 286).

Finally, Plaintiffs point to the "discretionary nature of a district court's decision on a motion requesting leave to amend" as grounds for arguing that such an order is "generally inapposite for interlocutory appeal." Pls.' Opp'n 9. But Plaintiffs fail to cite any controlling authority supporting that argument. *Id*. Section 1292(b) says nothing about orders granting leave to amend and Plaintiffs offer no sound reason why such an order should not be subject to interlocutory appeal. And most of the cases Plaintiffs rely upon are simply inapposite. *See Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1304-05 (9th Cir. 1981) (finding

that order denying amendment is not immediately appealable as of right because it is not *final* within the meaning of 28 U.S.C. § 1291); *Sinick v. Cnty. of Summit*, 76 F. App'x 675, 685 (6th Cir. 2003) (finding that order allowing amended complaint did not "qualify for immediate appeal under 28 U.S.C. § 1291"). Moreover, while the court in *Bridges v. Department of Maryland State Police* opined—without discussion—that a denial of a motion to amend a complaint is not an appealable interlocutory or collateral order, the court did not purport to interpret 28 U.S.C. § 1292(b), and its statement was dicta in any event. 441 F.3d 197, 206-07 (4th Cir. 2006) (finding that because "would-be plaintiffs never became parties to the action, they have no standing to appeal . . . [an] order denying the plaintiffs' motion to amend" to add them as parties to the action). But even if Plaintiffs were correct that an order granting leave to amend is not *generally* appealable on an interlocutory basis due to the broad discretion afforded under Federal Rule of Civil Procedure 15, the argument has no weight here because the Court's discretion here was constrained by the Ninth Circuit's mandate, and Defendants contend that this Court violated that mandate as a controlling matter of law.

III. Immediate appeal of the order granting leave to amend may materially advance the conclusion of this case.

An immediate appeal may also "materially advance the ultimate termination of the litigation" given the substantial burdens that would be posed by further discovery, additional merits briefing, trial preparations, and trial. 28 U.S.C. § 1292(b). Plaintiffs nonetheless dispute that interlocutory appeal is merited because the case was stayed in 2018 only ten days before trial, and because (they contend) any remaining discovery would require mere "updating and refinement." Pls.' Opp'n 12 (quoting Pls.' Reply to Mot. to Set Pretrial Conf. 2, ECF No. 550). But both this Court and the Ninth Circuit concluded that interlocutory appeal was merited under identical circumstances in 2018, and Plaintiffs offer no reason why now should be any different.

And while no trial of any length would be appropriate in a case where the Court lacks jurisdiction, Plaintiffs' contention that "it is feasible to complete a trial on these issues well within a normal timeframe," *id.*, should hold no sway here, as Plaintiffs have sought a six-to-eight week trial on the issue of liability (which Defendants anticipate would more realistically last ten-to-twelve weeks considering the number of witnesses), Aug. 27, 2018 Hr'g Tr. 11:15–12:1, ECF No. 392, to be followed by a separate trial to determine remedy, *see* Apr. 12, 2018 Hr'g Tr. 28:13–23, ECF No. 191; June 25, 2021 Hr'g Tr. 39:20–40:9. ECF No. 504. Given as much, there is no reason to reconsider this Court's earlier conclusion that certification may materially advance the conclusion of this case.

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion for interlocutory appeal under 28 U.S.C. § 1292(b).

Dated: August 4, 2023

TODD KIM
Assistant Attorney General
GUILLERMO A. MONTERO
Assistant Section Chief

/s/ Sean C. Duffy
SEAN C. DUFFY (NY Bar No. 4103131)
FRANK J. SINGER (CA Bar No. 227459)
Trial Attorneys
Natural Resources Section
150 M Street NE
Washington, DC 20002
Tel: (202) 305-0445
Fax: (202) 305-0506
sean.c.duffy@usdoj.gov

Attorneys for Defendants