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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; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Federal Defendants.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR DEFENDANTS' MOTION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL

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INTRODUCTION

Plaintiffs oppose, and respectfully request that this Court deny, Intervenor Defendants' Motion for Certification of Order for Interlocutory Appeal (ECF No. 122) ("Motion to Certify"). Intervenor Defendants fail to meet their burden of showing that this Court's November 10, 2016 Opinion and Order denying Federal and Intervenor Defendants' Motions to Dismiss (ECF No. 83) (the "November 10 Order") satisfies the minimum requirements for interlocutory appeal under 28 U.S.C. § 1292(b).

Intervenor Defendants' contention that the political question doctrine presents a controlling question of law is premised entirely on their objections to this Court's ability to grant Plaintiffs' requested relief. Even in the absence of the existing clear precedent establishing this Court's authority to grant such relief, whether this Court can employ its broad authority to fashion an equitable remedy without running afoul of the political question doctrine is an issue unsuitable for appellate review at this stage in the litigation and therefore not controlling. Crucially, no substantial grounds for differences of opinion exist as to whether this case implicates the political question doctrine.[1] Intervenor Defendants allude to no cases in which the political question doctrine foreclosed adjudication of constitutional rights premised on the climate crisis. To the contrary, precedent establishes that the political question doctrine does not apply to such claims. Appellate consideration at this stage would unnecessarily protract these proceedings rather than advance their ultimate termination, because the record has not yet

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[1] Plaintiffs' previous briefing and arguments on whether their claims implicate the political question doctrine are set forth in Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss, ECF 56 at 9-22; Plaintiffs' Memorandum in Response to Federal Objections, ECF 75 at 22, 24; and the September 13, 2016 Transcript of Oral Argument, ECF 82 at 47:1-18, 58: 18-25, and 59: 1-11. Additionally, Plaintiffs join in the arguments and analysis of *amici* the League of Women Voters of Oregon and the League of Women Voters of the United States in their *Amici Curiae* Brief in Support of Plaintiffs. ECF 79-1.

developed far enough to permit considered appellate review. This Court has not yet even determined the scope of the violations of Plaintiffs' rights, upon which the scope of a remedy should be based. Therefore, there is no record from which an appellate court could surmise whether that remedy would run afoul of the political question doctrine.

Further, an appellate ruling that the political question doctrine bars some of Plaintiffs' claims, but not others, would not materially advance the ultimate termination of this litigation, as each of Plaintiffs' claims seeks similar relief, and while presenting different standards, requires similar and overlapping issues of discovery and presentation of evidence. Finally, Intervenor Defendants' considerable delay in requesting an interlocutory appeal counsels against certification. Here, interlocutory appeal will only waste valuable time and resources of the judiciary and the parties through piecemeal appellate review of an undeveloped factual record, needlessly lengthening and protracting this litigation. In keeping with this Court's projected trial scheduling for fall of 2017, the Ninth Circuit is likely to have a full factual record and final decision on the merits from this Court within a year to review under the preferred method of appeal. *See* November 28, 2016 Transcript, ECF 100 at 12:2-5. Further, appellate review at this stage would materially and irreversibly prejudice Plaintiffs by delaying prompt resolution of their claims amidst the urgency of the climate crisis upon which they are founded. Plaintiffs respectfully request this Court to exercise its unfettered discretion to deny Intervenor Defendants' Motion.

ARGUMENT

Pursuant to Section 1292(b), this Court may certify an order for interlocutory appeal only if that order: (1) involves a controlling question of law for which there is (2) substantial ground

for difference of opinion, *and* (3) an immediate appeal of the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

The party seeking the interlocutory appeal bears the burden of establishing that "all three § 1292(b) requirements are met." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Satisfaction of all three requirements is a "minimum" for certification. *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, 3 (D. Or. Jan. 7 2016)). "[E]ven when all three statutory criteria are satisfied, district court judges have unfettered discretion to deny certification." *Mowat Const. Co. v. Dorena Hydro, LLC,* No. 6:14-CV-00094-AA, 2015 WL 5665302, at * 5 (D. Or. September 23, 2015) (Aiken, C.J.) (quotations and citation omitted); *see also Exec. Software N. Am., Inc. v. United States Dist. Ct. for the Cent. Dist. Of Cal.*, 24 F.3d 1545, 1550 (9th Cir. 1994) (a district court's certification decision is "unreviewable") *overruled on other grounds by Cal. Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008). Even if the district court grants certification, the appellate court still has the "independent duty to confirm," *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318-19 (9th Cir. 1996), whether the appellant met its burden establishing that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Appellate courts may deny certification for any reason, including docket congestion. *Id.* at 475.

Seeking to prevent "the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy," Congress "carefully confined the availability" of review under Section 1292(b) to exceedingly rare circumstances. *Id.* at 471; *United States v. Woodbury*, 263 F.2d 784, 799 n. 11 (9th Cir. 1959)

(Section 1292(b) to be applied "only in exceptional circumstances"); *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (Section 1292(b) reserved for "extraordinary cases" and "not merely intended to provide review of difficult rulings in hard cases"); *see also Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) ("Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare"); *Lawson v. FMR LLC*, 724 F.Supp.2d 167 (D. Mass. 2010) ("after twenty-four years as a District Judge within this Circuit, I cannot recall an occasion in which I have been willing to make a § 1292(b) certification").

Intervenor Defendants fail to carry their burden to establish all three Section 1292(b) statutory criteria. Nor can they demonstrate that the November 10 Order and the circumstances of this case present the "hen's teeth rare" justification for departure from the strong policy preference against piecemeal appellate review. Disregarding the profound rarity of issues appropriate for interlocutory appeal, Federal and Intervenor Defendants employ an unnecessarily broad brush by collectively seeking to short circuit the ordinary appellate process as to *every* question addressed by the November 10 Order.[2]

I. <u>The Application of a Political Question Doctrine to this Case Does Not Present a Controlling Question of Law</u>

Contrary to Intervenor Defendants' assertions, the application of the political question doctrine at this stage of this litigation does not present a controlling question of law for purposes

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[2] Intervenor Defendants joined in Federal Defendants' Motion to Certify Order for Interlocutory Appeal, ECF 120, 120-1, and Federal Defendants' Motion to Stay Litigation, ECF 121. ECF 122-1 at 2 n. 1. Plaintiffs' responses in opposition to Federal Defendants' motions are set forth in separate briefing and are not repeated here, but are incorporated by reference. *See* Plaintiffs Response in Opposition to Federal Defendants' Motion to Certify Order for Interlocutory Appeal; Plaintiffs' Response in Opposition to Federal Defendants Motion to Stay Litigation.

of Section 1292(b). Intervenor Defendants have consistently and exclusively founded their political question arguments on their assertion that this Court is incapable of granting the remedy Plaintiffs seek without transgressing separation of powers concerns.[3] Although Intervenor Defendants assert that other district courts have certified, and circuit courts of appeals have heard, interlocutory appeals concerning the application of the political question doctrine," they cite to no cases from within the Ninth Circuit certifying or accepting interlocutory appeal premised upon the political question doctrine. ECF 122-1 at 7. A reasoned analysis of the procedural posture of this case establishes that resolution of whether relief provided in this case will implicate the political question doctrine is an inquiry intertwined with factual issues yet to be developed. Therefore, this issue does not present a "controlling question of law" for purposes of Section 1292(b).

A "controlling question of law" is one that presents a purely legal question, as opposed to a question of fact, a mixed question of law and fact, or a question for which additional factual development is necessary prior to ultimate disposition of an issue. *See Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, No 09-CV-320-HU, 2010 WL 952273, at *3 (D. Or. March 10, 2010) (denying certification of question of contract interpretation as mixed question of law and fact and collecting cases); *see also McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) ("§ 1292(b) appeals were intended, and should be reserved for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts"); *Keystone Tobacco Co. v.*

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[3] *See* Memorandum in Support of Intervenor Defendants' Motion to Dismiss, ECF 20 at 11-16; Reply in Support of Intervenor-Defendants' Motion to Dismiss, ECF 59 at 10-14; Intervenor Defendants Objections to Magistrate's Findings and Recommendations, ECF 21-28; and Intervenor-Defendants' Memorandum in Support of Motion for Certification of Order for Interlocutory Appeal, ECF 122-1.

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"); 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3930 (3d. ed. 2012) ("WRIGHT & MILLER") ("The statutory language naturally suggests an opposition between a question of law and a question of fact…") (quotations and footnote omitted).

In its quintessential exposition of the doctrine, the Supreme Court explicitly recognized that the analysis of a political question's presence calls for a "discriminating inquiry into the precise *facts* and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 199 (1962) (emphasis added). This Court acknowledged that it was conducting such an inquiry before embarking on an exhaustive and carefully reasoned, eleven-page analysis, concluding that "there is no reason to step outside the core role of the judiciary to decide this case." November 10 Order at 6-17, 8.

As this Court recognized, "federal courts retain broad authority 'to fashion practical remedies when confronted with complex and intractable constitutional violations.'" November 10 Order at 17 (quoting *Brown v. Plata*, 563 U.S. 493, 526 (2011) (statewide prison reform litigation)); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S.1, 15 (1971) (school desegregation) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Id.* at 30 (district courts have power to issue remedies "within the capacity" of the defendant). This Court's conclusions as to its ability to enforce a remedy without implicating separation of powers concerns finds an indisputable and independent basis in law

about which there are no substantial grounds for disagreement. *See* (in addition to authorities cited in this paragraph) Section II infra.

Notwithstanding that basis, the November 10 Order correctly recognized that "speculation about the difficulty of crafting a remedy could not support dismissal at this early stage." November 10 Order at 17 (quoting *Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial.")) Magistrate Judge Coffin similarly noted in his Findings and Recommendations on the motions to dismiss: "it is too early in the proceedings to determine…the issue" of relief that could be ordered without implicating a political question. ECF 68 at 14.

These conclusions are consistent with a clearly applicable principle: speculations as to whether the remedial stage of this case will implicate a political question are not suitable for interlocutory appeal because the "case has not yet developed far enough to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012). Inherent in the requirements for certification under Section 1292(b) is whether the record is adequate to resolve the questions presented for review. *Id.* at n. 5 (citing *Molybdenum Corp. of America v. Kasey*, 279 F.2d 216 (9th Cir. 1960) (vacating initial grant of certification for appeal as improvident where record was inadequate to resolve the questions presented for review of denial of motion to dismiss)). Because "the nature of the…remedy is to be determined by the nature and scope of the constitutional violation," *Milliken v.* Bradley, 433 U.S. 267, 280 (1977) (citing *Swann*, 402 U.S.at 16), this Court must first determine the "nature and scope" of Federal Defendants' infringements of Plaintiffs' constitutional rights before it, or an appellate court, can

properly assess the nature of the corresponding remedy. Consequently, assessment of whether any relief that may be provided by this Court could run afoul of the political question doctrine is a question for which this case has not yet "developed far enough to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012). Further, granting interlocutory appeal at this early stage would run contrary to Congress' intent in enacting Section 1292(b) of preventing piecemeal appeals without adequate development of the record. *Coopers & Lybrand*, 437 U.S. at 471 (1978); *see also Dept. of Economic Dev. V. Arthur Anderson & Co.*, 683 F.Supp. 1463, 1487 (S.D.N.Y. 1988) (declining to certify order where determination of question asserted as controlling depended on sufficiency of facts; "further discovery may turn up new facts relevant to the issue of subject matter jurisdiction, and these facts may in turn influence this Court's interpretation of facts already proffered by the parties."). Only after this Court has ordered a remedy based on factual information produced in discovery and established at summary judgment or trial will an appellate court have the necessary record before it to permit the "discriminating inquiry into the precise facts and posture of the particular case" mandated by the political question doctrine. *Baker v. Carr*, 369 U.S. 186, 199 (1962). Therefore, this issue does not present a "controlling question of law" for purposes of Section 1292(b).

Intervenor Defendants boldly assert that "the political question doctrine bars *all* of plaintiffs' claims and *all* of the relief they seek." ECF 122-1 at 13. However, they also posit that "the Ninth Circuit could determine that only a subset of those claims involved the political question doctrine, or that only a subset of the relief the plaintiffs are seeking is improper." *Id.* at 13-14. This is not enough to satisfy Intervenor Defendants' burden of establishing the presence of a "controlling question of law." 28 U.S.C. § 1292(b). "[T]here is little doubt that a question is

not controlling if the litigation would be conducted in the same way no matter how it were decided…Rejection of one theory may not be controlling when another theory remains available that may support the same result." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012). (Footnotes omitted). No controlling question of law is present if additional claims would remain to be tried after appeal, especially if those claims involve similar evidence and relief as those to which the question relates. *See, e.g., U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (denying certification since question of law was only relevant to one of several causes of action alleged); *McNulty v. Borden, Inc.*, 474 F.Supp. 1111, 1120-22 (E.D. Pa. 1979) (claim involving substantially the same evidence would remain to be tried in any event); *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.,* 855 F.Supp. 438, 440 (D. Me. 1994) (same issues would remain no matter outcome of appeal, since other legal theories were also advanced); *In re Magic Marker Securities Litig.*, 472 F.Supp. 436 (E.D. Pa. 1979) (elimination of issues did not support certification in view of overlap of issues with remaining claim). Each of Plaintiffs' claims seeks similar relief, and while presenting different standards, involves and requires similar overlapping factual development through discovery, argument, and presentation of evidence at trial. Therefore, even if interlocutory appeal could "narrow the claims left for trial," ECF 122-1 at 13, this litigation would proceed in much the same way. For the reasons set forth above, the question of whether the political question doctrine bars some, or all, of Plaintiffs' claims is not controlling for purposes of interlocutory appeal.

II. There Are No Substantial Grounds for Differences of Opinion as to Whether the Political Question Doctrine Bars Adjudication of This Case

Intervenor Defendants have similarly failed to carry their burden to show that substantial grounds for disagreement exist with respect to the November 10 Order's holdings as to the political question doctrine. Indeed, no such substantial grounds exist with respect to those

conclusions. Section 1292(b) is clear: the grounds for disagreement must be *substantial*, 28 U.S.C. § 1292(b); "a party's strong disagreement with the Court's ruling is not sufficient." *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

> To determine if a substantial ground for difference of opinion exists…courts must determine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented. *Id.* at 633 (citation and quotations omitted)

As an initial matter, Intervenor Defendants' references to this Court's statements regarding the nature of Plaintiffs' claims and the facts upon which they rest do not suffice to show that substantial grounds for disagreement are present. ECF 122-1 at 12, 14 (quoting November 10 Order at 12, 13-14, 52). In keeping with the principle that circumstances justifying interlocutory appeal are "hen's teeth rare," *Camacho*, 369 F.3d at 573, the Ninth Circuit has clearly stated: "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such substantial difference of opinion as will support an interlocutory appeal." *Couch*, 611 F.3d at 633 (citation and quotations omitted). "That settled law might be applied differently does not establish a substantial ground for difference of opinion." *Id.* (citations omitted). The November 10 Order's conclusion that "the political question doctrine is not a barrier to plaintiffs' claims" finds support in this Court's exhaustive and reasoned analysis of *each* of the political question doctrine's six formulations.[4] *Baker*, 369 U.S. at 217; November 10 Order at 6-17, 17. Intervenor Defendants' assertions to the contrary are founded upon cases which are either clearly inapposite

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[4] Intervenor Defendants acknowledge, they did not address the third, fifth, or six *Baker* formulations at the motion to dismiss stage and do not address them in their Motion. ECF 122-1 at 10 n. 2. Accordingly, Plaintiffs will not argue the issue of substantial grounds for disagreement as to the third, fifth, or six *Baker* formulations.

or actually *support* the challenged order's conclusions. Thus, Intervenor Defendants have failed to carry their burden of demonstrating substantial grounds for disagreement.

A. Intervenor Defendants' Reliance on Clearly Inapposite Cases Does Not Suffice to Show Substantial Grounds for Differences of Opinion

Intervenor Defendants' unwarranted assertion that the "possibility of a difference of opinion here is far from hypothetical" and "here *in fact exists*" relies wholly upon four clearly distinguishable cases founded upon harms from climate change – three of which are clearly inapposite and one that actually supports this Court's conclusions. ECF 122-1.

In *Native Village v. Kivalina*, the district court held the plaintiffs' *public nuisance* claims for damages against *private parties* were barred by the political question doctrine. 633 F.Supp.2d 683 (N.D. Cal. 2009). The Ninth Circuit affirmed solely on the basis of displacement, noting that it "need not, and [did] not, reach any other issue…." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012). Similarly, in *People of State of California v. Gen. Motors Corp.,* the district court, in an unpublished disposition, determined that plaintiffs' *public nuisance* claims against *private parties* implicated the political question doctrine. *People of State of California v. Gen. Motors Corp.,* No. C-06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). Likewise, the *Comer v. Murphy Oil USA, Inc.* (*Comer II*) court found that *public nuisance* claims against *private parties* involved a political question. *Comer v. Murphy Oil USA, Inc.*, 839 F.Supp.2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013). In none of these cases did the reviewing appellate courts uphold dismissal on political question grounds. In fact, there is no precedent at the appellate level for avoiding judicial review on political question grounds in a climate change case.

Moreover, the claims in each of these cases are clearly distinguishable from Plaintiffs' claims. The FAC does not allege common law *public nuisance* claims against *private parties*, but

rather claims of infringement of *individual constitutional rights* against government entities. The analyses of the political question doctrine in *Kivalina*, *People of State of California*, and *Comer II* by other district courts are therefore inapplicable here and do not establish grounds for disagreement with the holdings in the November 10 Order. *See Banaszak v. CitiMortgage, Inc.*, No. 13-cv-13710, 2014 WL 5361931 at *2 (E.D. Mich. Oct. 21, 2014) ("Because every case that Banaszak cites is either distinguishable or inapposite to the issue, he has not shown that there is 'substantial ground for difference of opinion.'").

Contrary to Intervenor Defendants' misplaced reliance on *Alec L. v. Jackson*, that case actually supports the Court's determination that this case does not implicate any political question. 863 F.Supp.2d 11 (D.D.C. 2012). In *Alec L.*, the D.C. district court erroneously concluded[5] that the public trust doctrine does not apply to the federal government and, alternatively, that the federal public trust is displaced by the Clean Air Act. *Id.* Importantly, where the plaintiffs in *Alec L.* had requested relief similar to that sought by Plaintiffs here, the court was clear to state that it could employ its inherent and broad equitable power to fashion a remedy such that the political question doctrine "would not be implicated." *Id.* at 13, n.5. Aside from the obvious distinction between the instant litigation and *Alec. L.* that Plaintiffs bring multiple accompanying constitutional claims in addition to their public trust claim, *Alec L.* clearly supports the November 10 Order's determination that no political question is present here.

Intervenor Defendants' reliance on *Comer II* is also misplaced because the complex procedural history of *Comer* indicates that even *public nuisance* cases against *private parties* founded upon harms arising from climate change *do not* implicate the political question doctrine.

[5] Plaintiffs' exposition of the errors of the *Alec L.* opinion are set forth in Plaintiffs' Response in Opposition to Federal Defendants' Motion to Certify Order for Interlocutory Appeal and are not repeated here.

As discussed in the Fifth Circuit's affirmance of *Comer II*, the plaintiffs had originally filed a suit premised on the same claims (*Comer I*) against the same defendant fossil fuel companies in the same district court. *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 464-66 (5th Cir. 2013) (detailing complex procedural history of case). In *Comer I*, the district court found plaintiffs' claims nonjusiticiable as implicating a political question, but a panel of the Fifth Circuit reversed that determination. *Id.* Before the panel's decision issued, "six of [the Fifth Circuit's] nine active unrecused judges--seven of [the circuit's] then-sixteen active judges were recused--voted to rehear the case en banc" thereby automatically vacating the panel's previous appellate determination. *Id.* at 465. "However, before the en banc court reheard the case, an additional judge was recused" and the remaining unrecused judges dismissed the case for lack of quorum. *Id.* The *Comer I* plaintiffs filed for a writ of mandamus from the Supreme Court seeking review of the Fifth Circuit's dismissal of their appeal, which was denied. *Id.* When the *Comer I* plaintiffs filed an identical action, the district court dismissed their claims, finding (among other reasons) that the claims were barred by *res judicata* and the political question doctrine. *Id.* at 466. The Fifth Circuit affirmed on the basis of *res judicata* and did not reach the other issues. *Id.* Hence, in the only occasion in which the Fifth Circuit was able to reach the issue of whether the *Comer* plaintiffs' claims implicated a political question, it found their claims justiciable. The conclusion that, contrary to Intervenor Defendants' assertions, even *public nuisance* claims against *private parties* involving climate change are justiciable is bolstered by the Supreme Court's jurisdictional determinations in *American Electric Power Company v. Connecticut*, addressed in Section II.B infra. *American Electric Power Company v. Connecticut,* 564 U.S. 410 (2011) ("*AEP*"). In any case, the justiciability of such clearly inapposite claims does not bear on

the existence of substantial grounds for disagreement as to the applicability of the political question doctrine to this case. *Banaszak,* 2014 WL 5361931 at *2.

B. Intervenor Defendants' Strong Disagreement with This Court's Conclusions Does Not Suffice to Establish Substantial Grounds for Differences of Opinion

Intervenor Defendants "disagree with the Court's analysis of the *Baker* factors and believe that other fair-minded jurists *might* reach a contradictory conclusion as well." ECF 122-1. This is plainly not enough to establish "*substantial* grounds for differences of opinion." 28 U.S.C. § 1292(b) (emphasis added). "[A] party's strong disagreement with the Court's ruling is not sufficient." *Couch*, 611 F.3d at 633.

Acknowledging that "no constitutional provision mentions climate change," Intervenor Defendants inharmoniously argue that "plaintiffs' claims still involve issues… 'constitutional[ly] committed…to a coordinate political department[,]'" ECF 122-1 at 12 (citing *Baker*, 369 U.S. at 217), conveniently glossing over the requirement that such constitutional commitment must be "textually demonstrable." *Baker*, 369 U.S. at 217. Further demonstrating that personal disagreement with this Court's conclusions is the primary basis of their position, Intervenor Defendants cite to their own argument previously proffered before this Court – that, as they claim, the relief Plaintiffs seek "cannot avoid requiring the Court to 'commandeer[]…agencies' and to exercise affirmative legislative power…." ECF 122-1 (quoting Intervenor Defendants' Objections to Magistrate's Findings and Recommendation, ECF 73 at 22, 23). This assertion grossly misconstrues the relief sought by Plaintiffs, which asks this Court only to direct Federal Defendants to craft a remedial plan of their own devisement adequate to address the constitutional violations determined at trial, not to dictate the specific content of such a plan.

Further, Intervenor Defendants' invocation of *Gilligan v. Morgan* to support its proposition here is misplaced. *Gilligan v. Morgan*, 413 U.S. 1 (1973). In *Gilligan*, students of

Kent State University who were present during the infamous Kent State shootings brought suit against the Ohio National Guard to prevent future civil rights violations. *Id.* The *Gilligan* Court found a textually demonstrable commitment of the issue of military training in Article 1, Section 8, clause 16 of the Constitution. *Id.* at 7. That provision is neither at issue here nor can Intervenor Defendants demonstrate that any other constitutional provision provides a textually demonstrable commitment of the issues implicated in this case. Further, in *Gilligan,* by the time appeal of the district court's grant of a motion to dismiss reached the Supreme Court, none of the named plaintiffs were still enrolled in Kent State and the Ohio National Guard had adopted a new policy regarding use of force. *Id.* at 4. The plaintiffs in that case acknowledged that if the National Guard continued to enforce the new policy it would provide the relief they sought. *Id.* at 14 n. 15. In contrast, Plaintiffs' claims here and the harms to which they are subject do not turn on their enrollment in a specific institution, and Federal Defendants have neither provided a policy by which to remedy Plaintiffs' injuries nor have Plaintiffs made any acknowledgments comparable to those of the plaintiffs in *Gilligan*. To the contrary, the Trump Administration is in the process of dismantling what little limitations on greenhouse gas emissions there were, while expanding fossil fuel extraction, infrastructure, and energy production full throttle.[6]

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[6] *See* Exec. Order ___, 82 Fed. Reg. ___ (March 28, 2017) (directing rollback of Clean Power Plan, rescinding moratorium on coal mining on federal lands, and rescinding six Obama administration executive orders aimed at curbing climate change and regulating emissions, including inclusion of climate change impacts in environmental reviews); Exec. Order 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (expediting environmental reviews and approvals for infrastructure projects"); Exec. Order 13778 82 Fed. Reg. 12497 (Feb. 28, 2017) (ordering a review of the "Waters of the United States" Rule); Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (Jan. 24, 2017), available at https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline (encouraging approval of Dakota Access Pipeline); Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), available at https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline; Media Note: Issuance of Presidential Permit to

That *Gilligan* rejected the justiciability of a "broad call on judicial power to assume continuing regulatory jurisdiction over activities of the Ohio National Guard" within the specific circumstances of that case, *Id.* at 5, does not detract from this Court's broad authority "to fashion remedies when confronted with complex and intractable constitutional violations." *Brown*, 563 U.S. 493, 526 (2011). As the *Gilligan* Court noted, "it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review…whether by way of damages of injunctive relief. We hold only that no such questions are presented in this case." *Id.* at 11-12. Despite Intervenor Defendants' erroneous argument that the political question doctrine prohibits assertion of continuing jurisdiction over Federal Defendants, Supreme Court precedent clearly establishes this Court's authority in that regard. *See, e.g., Allen v. Wright*, 468 U.S. 737, 760 (1984) ("[I]t is not the role of the judiciary" to serve as "*continuing monitors* of the wisdom and soundness of Executive action…*absent actual present or immediately threatened injury resulting from unlawful government action*.") (emphasis added); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S.1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of

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TransCanada for Keystone XL Pipeline (March 24, 2017), available at https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm; Reuters, "President Trump Prepares to Withdraw from Groundbreaking Climate Change Agreement, Transition Official Says" (Jan. 20, 2017) (Detailing possible withdrawal from Paris Climate Agreement); Coral Davenport, "E.P.A. Head Stacks Agency With Climate Change Skeptics," N.Y. Times (March 7, 2017) available at https://www.nytimes.com/2017/03/07/us/politics/scott-pruitt-environmental-protection-agency.html; Chris Mooney and Brady Dennis, "On Climate Change, Scott Pruitt Causes an Uproar – and contradicts the EPA's Own Website," Wash. Post (March 9, 2017) available at https://www.washingtonpost.com/news/energy-environment/wp/2017/03/09/on-climate-change-scott-pruitt-contradicts-the-epas-own-website/?utm_term=.b164bb28f26e.

course, was to diffuse power, the better to secure liberty"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury").

Likewise, Intervenor Defendants reliance on *Alec L.* to argue that climate change is constitutionally committed to a coordinate branch of government is, here again, misplaced. First, the statements from *Alec L.* quoted by Intervenor Defendants as supporting its political question argument were made within the context of the court's displacement analysis, not with respect to the political question doctrine. ECF 122-1 at 12 (quoting *Alec L.*, at 17). Second, as noted previously, in the only portion of the opinion addressing such matters, *Alec L.* explicitly stated that the political question doctrine did not provide a bar to resolution of plaintiffs' claims in that case. 863 F.Supp.2d at 13 n. 5. Thus, *Alec L.* dispels rather than creates any substantial grounds for disagreement as to the November 10 Order's conclusions as to the political question doctrine.

In support of their argument that this Court lacks "judicially discoverable and manageable standards" by which to decide Plaintiffs' claims, Intervenor Defendants again cite primarily to their own previously submitted filings, further demonstrating that their own disagreement with the Court's conclusions serves as their primary basis for the asserted substantial grounds for differences of opinion. ECF 122-1 at 12 (citing Intervenor Defendants' Objections to Magistrate's Findings and Recommendation, ECF 73 at 25-26).
Undermining rather than supporting their position on this issue, Intervenor Defendants rely secondarily on the Supreme Court's decision in *AEP*. Like those cases addressed previously, *AEP* involved claims of *public nuisance* against *private parties* (and one government owned corporation) as opposed to Plaintiffs' claims of infringement of *individual constitutional rights* against *government entities*. As with *Alec L.*, Intervenor Defendants improperly rely on the

language of the *AEP* Court from its discussion of displacement of claims, rather than the political question doctrine. ECF 122-1 at 12 (citing *AEP*, 564 U.S. at 427-28). Intervenor Defendants' reliance on *AEP* to support their assertion that "any substantive court order attempting to manage climate change in this case would express lack of respect due other branches of government" fails for identical reasons, namely reliance on *AEP*'s displacement analysis, and the instant litigation's clear distinction from the claims of that case.

Crucially, here again, *AEP* actually supports the holdings in the November 10 Order rather than providing substantial grounds for differences of opinion with respect thereto. The Supreme Court in *AEP* affirmed the Second Circuit's finding that the plaintiffs' public nuisance claims, which sought "a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually," *did not* implicate the political question doctrine. *Id.* at 415, 420; *see also Conn. v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 347 (2d Cir. 2009) *rev'd on other grounds*, *AEP*, 564 U.S. 410. Although the Supreme Court affirmed the Second Circuit's exercise of jurisdiction by "an equally divided Court," a close inspection of the Court's language suggests that a majority of the Justices were of the opinion that no political question was implicated by the case. *AEP,* 564 U.S. at 420. The Court noted that "[f]our members of the Court would hold that at least some Plaintiffs have Article III standing…and further that no other threshold obstacle bars review." *Id.* In a footnote, the Court made clear that such "other threshold obstacles" argued before the Court included "the political question argument made below." *Id.* at 420 n. 6. The Court then stated: "Four members of the Court…would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction…." *Id.* The Supreme Court's affirmance of jurisdiction, at the least, left intact the Second Circuit's conclusion that *AEP* did not implicate a political question.

Intervenor Defendants have provided no authority supporting their proposition that there are substantial grounds for differences of opinion as to the November 10 Order's conclusions on the political question doctrine. Each of the cases cited by Intervenor Defendants is either inapposite, clearly distinguishable, or actually supports this Court's conclusion that Plaintiffs' claims do not implicate any political question.

C. There Are No Substantial Grounds for Differences of Opinion that No *Baker* Formulation is "Inextricable" from Plaintiffs' Case

Intervenor Defendants failed to carry their burden to show that substantial grounds for disagreement exist with respect to the decision in the November 10 Order on the political question doctrine. Having addressed this issue at length, Plaintiffs emphasize the exceeding rarity of circumstances justifying interlocutory appeal under Section 1292(b). *See, e.g., United States Rubber Co.*, 359 F.2d at 785 (Section 1292(b) reserved for "extraordinary cases" and "not merely intended to provide review of difficult rulings in hard cases"). Similarly, the "judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotovsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012) (citation and quotations omitted). The "political question doctrine" is "a narrow exception to that rule." *Id.* Given the rarity of circumstances justifying interlocutory appeal and the scarcity of settings in which the political question doctrine will bar adjudication of a case, logic dictates that conditions justifying interlocutory appeal as to the application of the political question doctrine would be even more rare still. This case does not present those exceedingly unusual circumstances.

This conclusion is further demonstrated by the principle that one of the *Baker* formulations must be "*inextricable*" for a case to be nonjusticiable. 369 U.S. at 217. Surely, this Court's power "to fashion practical remedies when confronted with complex and intractable constitutional violations" allows provision of relief without implicating any separation of powers

concerns. *See Alec L.*, 863 F.Supp.2d at 13, n. 5; *Swann,* 402 U.S. at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Allen*, 468 U.S. at 760 ("[I]t is not the role of the judiciary" to serve as "*continuing monitors* of the wisdom and soundness of Executive action…*absent actual present or immediately threatened injury resulting from unlawful government action*.") (emphasis added); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power, the better to secure liberty"); *Marbury,* 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury").

III. Interlocutory Appeal Would Not Advance the Ultimate Termination of this Litigation

This delayed effort to appeal the November 10 Order would not materially advance ultimate termination of this litigation, but instead result in further protraction, contrary to the letter and spirit of Section 1292(b). "The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012) (footnote omitted). As explained in Section I, supra, the applicability of the political question doctrine to the facts of this case does not present a controlling issue of law.

Since "the nature of the…remedy is to be determined by the nature and scope of the constitutional violation," *Milliken*, 433 U.S. at 280 (1977) (citing, 402 U.S. at 16), this Court must first determine the "nature and scope" of Federal Defendants' infringements of Plaintiffs' constitutional rights before it, or an appellate court, can properly assess the nature of the corresponding remedy. Consequently, assessment of whether any relief that may be provided by

this Court will run afoul of the political question doctrine is a question for which case this has not yet "developed far enough to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012). Premature appellate consideration of this issue would therefore only prolong the proceedings rather than advance them.

Further, as explained above, even if appellate review resulted in an elimination of a subset of Plaintiffs' claims, this would not, as Intervenor Defendants claim, narrow the scope of issues for trial. Each of Plaintiffs' claims seeks similar relief and, while presenting different standards, requires similar factual development through discovery, argument, and presentation of evidence. This litigation will be conducted in much the same way no matter how the issue is decided. *See, e.g.*, *U.S. Rubber Co.*, 359 F.2d at 785; *White v. Nix*, 43 F.3d 374, 378-89 (9th Cir. 1994). Therefore disposition of this issue would not materially advance the ultimate termination of this litigation.

By demonstrating that interlocutory appeal would not narrow the scope of issues for trial, Plaintiffs do not wish to imply that they are insensitive or unreceptive to Federal and Intervenor Defendants' concerns regarding discovery in this case. Plaintiffs' objections to Federal Defendants' mischaracterizations of discovery in this case are set forth in Plaintiffs' Response in Opposition to Federal Defendants' Motion to Certify and are equally applicable to Intervenor Defendants' similar mischaracterizations. Plaintiffs' discovery efforts are aimed at prompt resolution of their claims in keeping with the urgent circumstances of this case. As reflected in the monthly status conferences and in keeping with the exigence of the dangers faced by Plaintiffs, counsel are constantly working with counsel for Federal and Intervenor Defendants and this Court to narrowly tailor discovery and identify the key documents and factual matters necessary to bring this case to as a prompt a resolution as possible.

To the extent this case may present discovery issues, many courts "cast doubt on the suitability of hardship as a basis for appeal." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012); *Id.* at n. 51. However, if this Court were to consider hardship in determining whether to grant certification, the potentially irreversible impacts of the climate crisis which are befalling Plaintiffs increase with every delay in resolution of this case, outweighing any relatively modest and necessarily temporary hardship to Defendants in collecting and producing documents, answering requests for admissions and interrogatories, and attending depositions.

Lastly, Intervenor Defendants' substantial, four-month delay in seeking certification, for which they offer no explanation, counsels strongly in favor of denial. *See, e.g., Richardson Elecs., Ltd. V. Panache Broad. Of Pa., Inc.,* 202 F.3d 957, 958-59 (7th Cir. 2000) ("district judge should not grant an inexcusable dilatory request" for certification) (citation omitted); *Scanlon v. M.V. Super Servant 3*, 429 F.3d 6, 8 (1st Cir. 2005) (motion filed four months after order); *Hypotherm, Inc. v. Am. Torch Tip Co.*, No 05-373, 2008 WL 1767062, at *1 (D.N.H. Apr. 15, 2008) (motion filed filed five months after order); 3 Fed. Procedure, Lawyers Ed. § 3:212 (2010) ("any delay in seeking certification for immediate appeal of an interlocutory order must be reasonable").

CONCLUSION

This Court should exercise its unfettered discretion to refuse short-circuiting the appeals process at the expense of Plaintiffs' constitutional rights. For all of the foregoing reasons, Plaintiffs respectfully request that this Court exercise its unfettered discretion to deny Intervenor Defendants Motion.

DATED this 3rd day of April, 2017, at Eugene, Oregon.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Supporting Memorandum complies with the applicable word-count limitation under LR 7-2(b) because it contains 22 pages and 7,097 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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