JULIA A. OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
WILD EARTH ADVOCATES
1216 Lincoln Street
Eugene, OR 97401
Tel: (415) 786-4825

DANIEL M. GALPERN (OR Bar 061950)
dan.galpern@gmail.com
LAW OFFICES OF DANIEL M. GALPERN
2495 Hilyard Street, Suite A
Eugene, OR 97405
Tel: (541) 968-7164

JOSEPH W. COTCHETT
jcotchett@cpmlegal.com
PHILIP L. GREGORY (*pro hac vice*)
pgregory@cpmlegal.com
PAUL N. MCCLOSKEY
pmccloskey@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

Attorneys for Plaintiffs

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 TO INTERVENOR DEFENDANTS' OBJECTIONS TO MAGISTRATE'S FINDINGS AND RECOMMENDATION

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INTRODUCTION

This Court should adopt the Findings and Recommendations (ECF 146) ("F&Rs") of Magistrate Judge Coffin and deny Intervenor Defendants' Motion for Certification of Order for Interlocutory Appeal (ECF 122) ("Motion to Certify"). Neither the arguments in Intervenor Defendants' Objections to Magistrate's Findings and Recommendation (ECF 152) ("Objections"), nor in their prior briefing on this matter, establish the propriety of early appellate consideration as to whether Plaintiffs' claims implicate the political question doctrine. Because the question for which certification is sought "fail[s] to satisfy the standards for interlocutory appeal," F&R, ECF 146 at 9, Magistrate Judge Coffin correctly concluded that "[t]he current posture of this case is such that any appeal would be premature." *Id.* at 11. Plaintiffs agree: "This case, the issues therein, and the fundamental constitutional rights presented are not well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings." *Id.* at 9.

As Magistrate Coffin concluded, the question presented by Intervenor Defendants is unsuitable for early appellate consideration.[1] Contrary to Intervenors Defendants' contention that

[1] Having fully set forth in prior briefing why this question fails to satisfy the standards for certification, Plaintiffs do not repeat those arguments here. Plaintiffs' rely on their previously submitted briefing, incorporated herein by reference. *See* Plaintiffs' Response in Opposition to Intervenor Defendants' Motion for Certification of Order for Interlocutory Appeal (ECF 132) ("Opp. to Motion"). This brief emphasizes and augments the key points therefrom in response to Intervenor Defendants' arguments in the Objections and in Intervenor Defendants' Reply in Support of Intervenor Defendants' Motion for Certification of Order for Interlocutory Appeal (ECF 138) ("Int. Reply"). Further, 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 joined and incorporate 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. *See* Opp. to Motion, ECF 132 at 1 n. 1.

Magistrate Coffin "confound[ed] the legal standards," Objections, ECF 152 at 3, the F&Rs demonstrate his engagement in the proper inquiry under 28 U.S.C. § 1292(b). Though Intervenor Defendants further contend that Magistrate Coffin did not "engage most of the intervenor-defendants' arguments," the F&Rs clearly address each of the criteria for interlocutory appeal, finding them lacking. Moreover, even had Magistrate Judge Coffin not addressed *each* of the Section 1292(b) requirements, failure to satisfy even *one* of them is fatal for purposes of certification. Plaintiffs have previously demonstrated that the question Intervenor Defendants seek to certify fails to satisfy *any* of the Section 1292(b) criteria as to any of Plaintiffs claims. Even were the political question doctrine to bar a subset of Plaintiffs' claims, which it does not, interlocutory appeal would still be improvident as Plaintiffs' remaining claims would dictate that this litigation proceed substantially unaffected.

In addition to the clear failure to satisfy the requirements of 28 U.S.C. § 1292(b), this Court should deny Intervenor Defendants' request to certify this Court's November 10, 2016 Opinion and Order denying Federal and Intervenor Defendants' Motions to Dismiss (ECF 83) ("November 10 Order") because any delay in resolving the merits of this case irreversibly prejudices Plaintiffs in securing and protecting their fundamental constitutional rights. 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. 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. Intervenor Defendants' four-month delay in filing their Motion to Certify, for which they offer no adequate justification, further demonstrates the impropriety of short-circuiting the

ordinary judicial policy of postponing appellate review until after final judgment. This Court should adopt the F&Rs, exercising its unfettered discretion to deny Intervenor Defendant's Motion to Certify.

STANDARD OF REVIEW

Under the Magistrate Act, 28 U.S.C. § 636(b)(1), "a magistrate's decision on a nondispositive issue will be reviewed by the district judge under the clearly erroneous [or contrary to law] standard." *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991) (citing *United States v. Raddatz*, 447 U.S. 667, 673 (1980)); *see also* Fed. R. Civ. P. 72(a). A magistrate's recommendation not to certify denial of a motion to dismiss for interlocutory appeal is a nondispositive matter. *Compressor Engineering Corp. v. Thomas*, No. 10-1059, 2014 WL4854989, at *2-3 (E.D. Mich. Sept. 30, 2014). As such, the "deferential 'clearly erroneous or contrary to law standard'" governs this Court's review of the F&Rs. *Shin v. United States*, No. 15-00377 SOM-RLP, 2016 WL 4385837, at * 12 (D. Hawaii April 15, 2016). Clear error is only present when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "[A] magistrate judge's decision is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Morgal v. Maricopa County Bd. Of Sup'rs*, 284 F.R.D. 452, 459 (D. Arizona 2012). While Intervenor Defendants misstated the applicable standard of review,[2] Magistrate Judge Coffin's conclusions in the F&Rs satisfy review under either the "clearly erroneous or contrary to law" standard or the *de novo* standard.

[2] Intervenor Defendants' citation to *McDonnel Douglas Corp. v. Commodore Bus. Machs. Inc.* concedes the point; the court clearly stated that Section 636(b) "calls for application of the clearly erroneous standard when a district court reviews the magistrate's report on certain pretrial, nondispositive motions." *McDonnel Douglas Corp. v. Commodore Bus. Machs. Inc*, 656 F.2d 1309, 1313 (9th Cir. 1981).

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. Philip 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).

These requirements are jurisdictional. *Couch*, 611 F.3d at 633. 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").

I. Intervenor Defendants' Withdrawal Would Obviate Review of the Objections

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.[3]

[3] Intervenor Defendants joined in Federal Defendants' Motion to Certify Order for Interlocutory Appeal, ECF 120, 120-1 ("Fed. Motion"), Federal Defendants' Motion to Stay Litigation, ECF 121 ("Stay Motion"), and in Federal Defendants' Objections to Findings and Recommendations of Magistrate Judge (ECF 149) (Fed. Objections). *See* Motion to Certify, ECF 122 at 2-3; Objections, ECF 152 at 5 (citing Fed. Objections, ECF 149). Plaintiffs' response to the Fed. Motion, Fed. Objections, and Stay Motion 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, ECF 133; Plaintiffs' Response to Federal Defendants' Objections Re: Motion to Certify Order for Interlocutory

Further underscoring their aggressive disregard for the ordinary judicial process, counsel for both Federal and Intervenor Defendants stated that their clients will seek writs of mandamus from the Ninth Circuit Court of Appeals, and if necessary, the Supreme Court, to keep this important litigation from moving to trial. Declaration of Julia A. Olson in Support of Pl.'s Opposition to Intervenor Def.'s Mot. For Extension of Time to Respond to Pl.'s Requests for Admissions ("Olson Dec."), ECF 155 at ¶ 7.

Further, on May 18, 2017, Counsel for Intervenor Defendants represented to Magistrate Judge Coffin that at least one of Intervenors intended to withdraw from this case, and "maybe all three." May 18, 2017 Transcript, ECF Dkt. at 33-18 – 34-11. Intervenor Defendant the National Association of Manufacturers moved to withdraw from this case on May 22, 2017. ECF 163. Intervenor Defendant the American Petroleum Institute moved to withdraw from this case on May 25, 2017. ECF 166. Intervenor Defendant American Fuel & Petrochemical Manufacturers moved to withdraw from this case on May 25, 2017. ECF 167. The withdrawal of any Intervenor Defendant from this case constitutes a withdrawal of the Motion to Certify respective to such Intervenor Defendant. Consequently withdrawal of all three Intervenor Defendants obviates the necessity of this Court's review of Intervenor Defendants' Objections to the F&Rs and moots their pending motions for certification and stay. As Intervenor Defendants' motions to withdraw have not yet been resolved, Plaintiffs submit this brief in opposition to their Objections.

Appeal, ECF 159 ("Pl.'s Fed. Obj. Resp."); Plaintiffs' Response in Opposition to Federal Defendants' Motion to Stay Litigation, ECF 134. Intervenor Defendants neither objected to the denial of the Stay Motion nor joined in Federal Defendants' objections thereto and the deadline for filing such objections has expired. Federal Defendants neither moved for certification as to the applicability of the political question doctrine to Plaintiffs' claims nor joined in Intervenor Defendants' Motion to Certify.

II. Magistrate Judge Coffin Properly Found that No Controlling Question of Law is Present

Magistrate Judge Coffin properly found that no controlling question of law is present here because "review of the Order of the District Court allowing plaintiffs to proceed on their public trust and due process constitutional claims will only be aided by a full development of the record…." F&Rs, ECF 146 at 9. Development of a factual record is often, as it is here, crucial "to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930 (3d. ed. 2012); *see* Pl.'s Fed. Obj. Resp., ECF 159 at 5-7. Consistent with this clear principle, Magistrate Judge Coffin's conclusion is sound: "This case, the issues herein, and the fundamental constitutional rights presented are not well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings." F&Rs, ECF 146 at 9. Intervenor Defendants' objections to the contrary are unfounded and unconvincing, premised upon a misunderstanding of the law and Plaintiffs' claims for relief.

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. *Chehalem Physical Therapy, Inc.*, NO. 09-CV-320-HU, 2010 WL 952273 at *3 (D. Or. 2010) (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. 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'").

A. Jurisdictional Questions Are Not *Per Se* Controlling Questions of Law

Contrary to Intervenor Defendants' contention, whether a question implicates a court's subject matter jurisdiction does not, in and of itself, determine the existence of a "controlling question of law." *See* Objections, ECF 152 at 3, 7-8. As a preliminary matter, the cases Intervenor Defendants cite in support of this argument involved neither interlocutory appeal nor whether the political question doctrine, or any other issue, constituted a "controlling question of law" thereunder. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991); *Custer Cty. Auction Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001). Ample authority establishes that issues of subject matter jurisdiction, including both standing and the application of the political question doctrine, do not *per se* constitute controlling questions of law. *See, e.g. Harris v. Kellog, Brown & Root Services, Inc.*, No. 08-563, 2009 WL 1248060 (W.D. Pa. April 30, 2009) (denial of motion to dismiss on political question grounds did not present controlling question of law); *Grand Lodge of Pennsylvania v. Peters*, No. 8:07-cv-479-T-26EAJ, 2008 WL 2790237, at *1 (M.D. Fla. July 18, 2008) ("Because the determination of standing required this Court to consider and apply the allegations and facts to the law, the issue of standing is not a controlling question of law for purposes of § 1292(b)."); *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, No. 91-1179, 1992 WL 2525, at * 3 (E.D. Pa. January 2, 1992) (indicating that standing "did not involve a controlling question of law" in denying certification under Section 1292(b)); *Heaton v. Social Finance, Inc.*, No. 14-cv-05191-THE, 2016 WL 232433, at * 6, (N.D. Cal. Jan. 20, 2016) ("standing issue is not a controlling question of law").

B. That Plaintiffs' Claims Do Not Implicate the Political Question Doctrine is Not a Controlling Question of Law

After a thorough and reasoned analysis of whether the political question doctrine applies to Plaintiffs' claims, this Court properly concluded that this case is "squarely within the purview of the judiciary," because "no *Baker* factor is inextricable from the *merits* of this case." November 10 Order, ECF 83 at 16, 17 (citing *Baker v. Carr,* 369 U.S. 186 (1962) (emphasis added). Plaintiffs agree that further factual development is not likely to "change the analysis," Objections, ECF 152 at 8; however, Intervenor Defendants are mistaken that the Ninth Circuit would not be well served by further factual development in its review of this jurisdictional inquiry. *See id.* at 8-9; Pl.'s Fed. Obj. Resp., ECF 159 at 5-7. In its quintessential exposition of the doctrine, the Supreme Court 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*, 369 U.S. at 199 (emphasis added). Here, the case is in the discovery phase and factual development will provide further support for the conclusion that the political question doctrine is not implicated in this case. The Ninth Circuit should have that factual record when it conducts its appellate review.

The principle that no controlling question of law is present where a case's factual record has not yet developed far enough to permit considered appellate review is clearly applicable to jurisdictional determinations such as whether a political question is inextricable from a case. *See. e.g., Harris,* 2009 WL 1248060 at *1 (denial of motion to dismiss on political question grounds did not present controlling question of law where "further factual development" might "illuminate[] the presence of political questions."); *Cf. Saldana v. Occidental Petrol. Corp.*, 774 F.3d 544, 551 (9th Cir. 2014) ("When determining whether a political question precludes jurisdiction, we may look beyond the complaint to facts properly in the record.") (citation and

quotations omitted); *see also Nutrishare, Inc. v. Conn. Gen. Life Ins. Co.*, No. 2:13-cv-02378-JAM-AC (E.D. Cal. June 11, 2014) (denying motion for certification where claimant argued that standing is a controlling question of law; discovery might establish standing making certification inappropriate). Numerous cases from the United States Courts of Appeals establish that sufficient factual development is crucial for proper review as to the presence of a political question. *See Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008) (reversing district court's dismissal on political question grounds, reasoning that "further factual development [was needed] before it can be shown whether the doctrine is actually an impediment."); *Zvitovsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 619-20 (D.C. Cir. 2006) (remanding to district court for further factual development to determine whether case presented a political question); *Al Shimanriv. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014) (same). As Magistrate Judge Coffin acknowledged, at present this case is "bereft of any factual record or any record at all beyond the pleadings." F&Rs, ECF 146 at 9. Accordingly, the Ninth Circuit would not be well served by certification of this issue at this time.

Intervenor Defendants cite two cases in which the Ninth Circuit accepted interlocutory appeals on the basis of the alleged presence of a political question. *See* Objections, ECF 152 at 2 (citing *Cooper v. Tokyo Elec. Power Co.*, 166 F. Supp. 3d 1103 (S.D. Cal. 2015) and *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972)).[4] Neither of these cases establish that the political question inquiry constitutes a controlling question of law in this case; in fact, they indicate the opposite. Crucially, in contrast to Plaintiffs' claims, which are premised on climate change and greenhouse gas emissions, the political question inquiry in both *Cooper* and *Mottola* turned on *specific*

[4] Intervenor Defendants cite to the Ninth Circuit's order in *Cooper* granting permission for interlocutory appeal. *Cooper v. Tokyo Elec. Power Co.*, No. 15-80110, Dkt. No. 6 (9th Cir. Sept. 16, 2015). The order granted permission without discussion of the Section 1292(b) criteria.

military and foreign policy decisions – issues which, in most cases, are constitutionally committed solely to the political branches. *Baker*, 369 U.S. at 211; *See Cooper*, 166 F.Supp.3d at 114 (claims might require "impermissible scrutiny of U.S. military's judgments regarding deployment of personnel" near Fukishimi-Daichi Nuclear Power Plant disaster area); *Mottola*, 464 F.2d at 183 (challenge to "legality of the United States military involvement in Indochina.")

Contrary to the holdings of these cases, Intervenor Defendants would have the Ninth Circuit declare all constitutional controversies regarding the phenomenon of climate change implicate the political question doctrine. *See* Objections, ECF 152 at 11 ("the political question doctrine either could or does bar litigation involving claims by plaintiffs alleging harm from climate change.") However, the doctrine strongly disfavors "sweeping statements to the effect that all questions touching" upon a subject are political questions. *See Baker*, 369 U.S. at 211. Though, "[t]he conduct of foreign relations of our government is committed by the Constitution to the executive and legislative – the 'political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision," *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), even this clear commitment is subject to significant exception. *Baker*, 369 U.S. at 211. Moreover, in cases, unlike the present one, where claims potentially implicate political questions of foreign and military policy, appellate courts will not decide the issue where adequate factual development is lacking. *Lane*, 529 F.3d 548 (remanding political question issue in military case for factual development); *Al Shimanri*, 758 F.3d 516 (same). Certification of the "sweeping" political question issue presented by Intervenor Defendants would not permit the Ninth Circuit to conduct the requisite "discriminating analysis of the particular question posed… [and] its susceptibility to

judicial handling in the light of its nature and posture in the specific case…." *Baker*, 369 U.S. at 211.

Magistrate Judge Coffin properly concluded that no controlling question of law is present and the cases Intervenor Defendants cite provide no support to the contrary:[5] "the issues presented…are too significant and far-reaching to be decided without the full evidentiary record." *Paschal v. Kansas City Star*, 605 F.2d 403, 411 (8th Cir. 1979).

C. Application of the Political Question Doctrine to the Remedial Phase is Not a Controlling Question of Law

Contrary to Intervenor Defendants' contentions, considering their predominant focus on remedy in arguing that this case implicates the political question doctrine,[6] Magistrate Judge Coffin's exposition on the topic was sound and entirely appropriate. F&Rs, ECF 146 at 7-8. Magistrate Judge Coffin correctly concluded that Intervenor Defendants' concerns are misplaced and without foundation: "Thus, the court, in fashioning equitable relief in this action should the plaintiffs prevail, need not micro manage federal agencies or make policy judgments that the

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[5] Further, *Mottola* did not reach the political question issue on appeal, 464 F.2d at 183, and the Ninth Circuit has yet to decide *Cooper*. Had the *Mottola* court engaged in the political question inquiry, it may have decided that additional factual development was necessary prior to disposition of the issue, as may *Cooper*. *See Lane*, 529 F.3d 548 (remanding political question issue in military case for factual development); *Al Shimanri*, 758 F.3d 516 (same). Similarly, *Saldana v. Occidental Petrol. Corp.*, 774 F.3d 544 (9th Cir. 2014), provides no support to Intervenor Defendants. In that case – an ordinary appeal from final judgment rather than an interlocutory appeal under Section 1292(b) – no additional facts could have removed the political question from the case. The court could not proclaim the impropriety of an oil company's support for a Colombian military brigade responsible for human rights violations without simultaneously condemning U.S. foreign policy decisions providing support to the same group. *Id.*

[6] *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 73 at 21-28; Intervenor Defendants' Memorandum in Support of Motion for Certification of Order for Interlocutory Appeal, ECF 122-1; Int. Reply, ECF 138 at 5-6; Objections, ECF 152 at 9-10.

Constitution leaves to the other branches." F&Rs, ECF 146 at 8. Intervenor Defendants' Objections as to this matter merely echo their oft-repeated mischaracterizations of the relief Plaintiffs request. ECF 152 at 9-10.[7] Moreover, this Court's ability to fashion relief in this case without implicating the political question doctrine is beyond doubt. "[F]ederal courts" are endowed with broad authority 'to fashion practical remedies when confronted with complex and intractable constitutional violations." *Brown v. Plata*, 563 U.S. 493, 526 (2011); *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.").

Further, as Plaintiffs demonstrated, even if there were a possibility that the remedial stage of this litigation may implicate a political question, the absence of a factual record establishes the impropriety of this issue for appellate review at this juncture. Opp. to Motion, ECF 132 at 7-8. This conclusion is consistent with a clearly applicable principle: "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 v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Because 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, 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."

[7] Plaintiffs continue to emphasize that they seek, not for this Court to mandate specific policies, but only an order directing Federal Defendants to desist from and remedy the violations of Plaintiffs' rights under the Constitution and Public Trust Doctrine. The contents and contours of that plan, and the policies by which to effectuate it, would be left to Federal Defendants.

16 WRIGHT & MILLER § 3930 (3d. ed. 2012) (district courts have power to issue remedies "within the capacity" of the defendant). 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 to permit the "discriminating inquiry into the precise facts and posture of the particular case" mandated by the political question doctrine. *Baker*, 369 U.S. at 199. Therefore, this issue does not present a "controlling question of law" for purposes of Section 1292(b).

Intervenor Defendants' reliance on *Bassidiji v. Goe* for the proposition that the political question issue is one "ripe for appellate review now rather than after discovery or a remedial stage decision from the Court" is misguided. Objections, ECF 152 at 8-9 (citing *Bassidiji v. Goe*, 413 F.3d 928, 932 (9th Cir. 2005). In *Bassidiji,* the district court determined that whether guaranty agreements violated a Clinton-era executive order and were therefore unenforceable illegal contracts was a "controlling question of law." *Id.* at 932. The plaintiff, opposing certification, argued that the *in pari delicto* defense precluded a finding of a controlling question of law. *Id.* That defense would have required factual development to show that the party seeking enforcement was not "equally at fault" such that the contracts "should be enforced despite their illegality…." *Id.* The court's ruling was narrow, finding a controlling question notwithstanding the factual dependency of the *in pari delicto* defense because, even if the facts substantiated the defense, enforcement of the contract would not be warranted in light of the purposes of the executive order. "The general rule that illegal contracts are not enforceable…is qualified if…enforcement would in fact best achieve the aims of the policy or law the contract violates." *Id.* (quotations omitted). Because the court found enforcement would strictly contradict the aims of the executive order, no additional factual development on the *in pari delicto* defense could

possibly affect the analysis as to whether the contract's illegality presented a controlling question of law. *Bassidiji* did not discuss the political question doctrine and does not stand for a general proposition that a controlling question of law is present despite the necessity for consideration of additional facts, as Intervenor Defendants erroneously imply.

Intervenor Defendants cite two other cases, neither of which support their assertion that the yet-to-be determined remedy in this case implicates a political question. In *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, the appellants sought "nothing short of the dismantling of OPEC," a multi-national allegiance of foreign states, which would necessitate the court's "manag[ement of] relations with foreign nations," thereby implicating the textual commitment of foreign policy to the executive and legislative branches. *Spectrum Stores, Inc. v. Citgo Petrol. Corp.,* 632 F.3d 938, 951, 952 (5th Cir. 2011). In *Barnett v. Obama*, "redress of Plaintiffs' alleged harm would require removal of President Obama," a power solely committed to Congress by the *Barnett v. Obama*, Constitution. NO. SACV09-0082, 2009 WL 3861788, at *14, 15 (C.D. Cal. Oct. 29, 2009). Neither of these cases establishes that the applicability of the political question inquiry to the remedial stage of this case presents a controlling question of law. In fact, neither of the cases even involved interlocutory appeal. Further, Plaintiffs' requested remedy would not require the unseating of elected officials nor the court's interference with foreign bodies; nothing in the prayer for relief requests this Court to engage in activities exclusively reserved to other branches by the Constitution. 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, interlocutory appeal of whether any relief to be afforded Plaintiffs would violate the political question doctrine would be improvident as the "case has not yet developed far enough to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER

§ 3930 (3d. ed. 2012). The applicability of the political question doctrine does not present a controlling question of law in this case.

III. Magistrate Judge Coffin Properly Concluded that No Substantial Grounds for Differences of Opinion Are Present

Magistrate Judge Coffin correctly concluded that the political question issue fails to satisfy the Section 1292(b) criteria because no substantial grounds for differences of opinion exist with respect to the November 10 Order's determinations on that issue. 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*, 611 F.3d at 633.

> 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.* (citation and quotations omitted).

The Ninth Circuit 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. *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 or actually *support* the challenged order's conclusions. Further, contrary

to Intervenor Defendants' contentions, Magistrate Judge Coffin engaged in the proper legal inquiry, revisiting the merits as to each of the *Baker* factors they argued.[8] Thus, Intervenor Defendants failed to carry their burden of demonstrating substantial grounds for disagreement.

A. Magistrate Judge Coffin Engaged in the Proper Legal Inquiry

Intervenor Defendants contend that Magistrate Judge Coffin "sidesteps the relevant legal standard" as to whether substantial grounds for differences of opinion exist. Objections, ECF 152 at 13. A fair reading of the F&Rs demonstrates that he engaged in the proper inquiry, revisiting the merits as to each of the *Baker* formulations advanced by Intervenor Defendants in light of the parties' briefing on the Motion to Certify, and finding no substantial grounds for disagreement as to this Court's conclusions. F&Rs, ECF 146 at 6-9.

As to whether there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department," under the first *Baker* formulation, 369 U.S. at 217, Magistrate Judge Coffin observed: "Nowhere in the Constitution is there a textual commitment of climate change related issues to a specific branch of government." *F&Rs*, ECF 146 at 7. While Intervenor Defendants are correct that such a commitment may be found in the text and structure of the Constitution, Objections, ECF 152 at 13-14 (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005) and *Schroder v. Bush*, 263 F.3d 1169 (10th Cir. 2001)), they fail to show how Magistrate Judge Coffin's analysis falls short. Nor do they offer any demonstration as to the satisfaction of that standard, suggesting only the bare assertion that "[t]hat is the case here." *Id.* Further, this Court made clear reference the "text and structure" inquiry under the first *Baker*

[8] 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 to Certify. 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.

factor, concluding, after a thorough analysis, that the "factor does not apply." November 10 Order, ECF 83 at 8-11. Intervenor Defendants have not established substantial grounds for disagreement otherwise.

Touching upon the second *Baker* formulation, a "lack of judicially discoverable and manageable standards for resolving" the issues, 369 U.S. at 217, the F&Rs noted that the existence, causation, and impacts of climate change are "quintessentially a subject of scientific study and methodology, not solely political debate," concluding that the "judicial forum is particularly well-suited for the resolution of factual and expert scientific disputes…." F&Rs, ECF 146 at 8-9. Although Intervenor Defendants object that they never contended otherwise, their submissions to this Court indicate the contrary. *See* Intervenor Defendants' Objections to Magistrate's Findings and Recommendation, ECF 73 at 24 ("Int. MTD Objections") (arguing that claims lack judicially discoverable and manageable standards, in part, because "the Court would need…to resolve the scientific likelihood of the various risks of climate change, and their likely impact on the Nation…."). Further addressing the second *Baker* factor, and the lack of substantial grounds for disagreement as to its implication, Magistrate Judge Coffin concluded that "the court, in fashioning equitable relief in this action should the plaintiffs prevail, need not micro manage federal agencies or make policy judgments that the Constitution leaves to the other branches." F&Rs, ECF 146 at 8.

With respect to the fourth *Baker* factor, Magistrate Judge Coffin accurately articulated why there can be no grounds for disagreement as to this issue: "Intervenors' argument that a ruling in plaintiffs' favor would be disrespectful to the steps taken by the Executive and Legislative branches to address climate change is an unprecedented effort to extend the political question doctrine to prevent a court from determining whether the federal government has

violated a plaintiffs' constitutional rights so long as the government has taken some steps to address climate change." F&Rs, ECF 146 at 8. Again, Intervenor Defendants' assertion that they never proffered such an argument, Objections, ECF 152 at 13, is belied by their submissions to this Court. *See* Int. MTD Objections, ECF 73 at 24 (arguing that adjudication of Plaintiffs' claims would express a lack of respect because "Congress and executive agencies have taken a wide range of steps to address the potential impacts and risks of climate change."). Rather than "sidestep[ping] the relevant legal standard," Objections, ECF 152 at 13, Magistrate Judge Coffin conducted a proper inquiry and found no substantial grounds for disagreement with this Court's conclusions on Intervenor Defendants' *Baker* formulation arguments.

B. No Authority Establishes Substantial Grounds for Disagreement that The Political Question Doctrine Does Not Bar Plaintiffs' Claims

Intervenor Defendants establish no authority showing substantial grounds for disagreement with this Court's determination that Plaintiffs' claims do not implicate the political question doctrine. Magistrate Judge Coffin, therefore, properly concluded that the question "they wish to present to the appellate court….fail[s] to satisfy the standards for interlocutory appeal." F&Rs, ECF 146 at 15. As Plaintiffs previously demonstrated in detail, Intervenor Defendants' argument as to the establishment of substantial grounds for disagreement relies wholly upon four manifestly distinguishable cases founded upon harms from climate change – three of which are clearly inapposite and one that actually supports the conclusions in the November 10 Order. Opp. to Motion, ECF 132 at 9-20; *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.'").[9]

In their Objections regarding this issue, Intervenor Defendants cite to no additional authority addressing climate change-related cases. Instead, they replicate an argument, nearly verbatim, previously before Magistrate Judge Coffin, and premised on the same cases. Int. Reply, ECF 138 at 7 (citing *Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014); *Shuker v. Smith & Nephew PLC*, No. 13-cv-6158, 2015 WL 4770987 (E.D. Pa. Aug. 13, 2015); *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-cv-4466, 2013 WL 2285955 (D.N.J. May 23, 2013)); Objections, ECF 152 at 12 n. 3. Intervenor Defendants argue that, because these cases looked at "analogous litigation" in determining the presence or absence of substantial grounds for disagreement, the cases they previously proffered establish the requisite showing for certification for interlocutory appeal. *Id.* While these cases might establish that courts may look to precedent within the same narrow body of law in determining whether the second Section 1292(b) prong is satisfied, they certainly do not extend so far as to permit consideration of cases asserting entirely different claims, as Intervenor Defendants maintain.

As an initial matter, the *Fortyune* case did not even discuss the Section 1292(b) criteria, but only noted that the court was "satisfied that the district court and the motions panel of this court correctly determined that certification was proper in this case." 766 F.3d at 1101 n. 2. *See* Objections, ECF 152 at 12 n. 3 (erroneously characterizing *Fortyune* as deciding whether substantial grounds for disagreement were present). Accordingly, the *Fortyune* court's treatment of analogous cases is irrelevant. Even were the case relevant to the inquiry at hand, *Fortyune*'s

[9] Intervenor Defendants' reliance on *Am. Elec. Power Co. v. Connecticut*, is similarly misplaced. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011). *See* Opp. to Motion, ECF 132, at 17-18.

reliance on an Americans with Disabilities Act Title III case in deciding *the merits* of a motion to dismiss in a case brought under *the same statute* hardly establishes the broad principle Intervenor Defendants seek to advance.

In *Manning*, the parties did not dispute whether the Section 1292(b) standards had been satisfied. 2013 WL 2285955, at *1, 2, 2 n. 2. Consequently, like *Fortyune*, this case is of dubious relevance. Nor if this case were authoritative on the issue would it provide any guidance to this Court in applying the questionable principle Intervenor Defendants urge. The *Manning* court found that substantial grounds for differences of opinion were present "as evinced by the different outcome reached by this Court and Magistrate Judge Michael Hammer in this case, as well as those of other Courts in this District in other cases dealing with similar issues." However, *Manning* provided no information as to the nature of those cases. Accordingly, *Manning* cannot possibly support a method of interpretation in which cases addressing wholly distinct and unrelated legal theories are eligible for consideration in the inquiry under the second prong of Section 1292(b).

Shuker is similarly insufficient to establish the broad and unworkable principle advanced by Intervenor Defendants. In that case, the district court addressed whether there were substantial grounds for disagreement as to whether a manufacturer's compliance with the "premarket approval process" under the Medical Device Amendments ("MDA") to the Food, Drug, and Cosmetic Act resulted in preemption of state tort claims with respect to a particular medical device. 2015 WL 4770987. In doing so, the court looked to "the different conclusions reached by those few district courts that have addressed the same or similar issues." *Id.* at *4. Of the three cases considered by the court, *see id.* at *4 n. 6, two involved the same medical device, and all three addressed whether state law tort claims were preempted by "premarket approval"

compliance under the MDA. *See Simon v. Smith & Nephew, Inc.*, 18 F.Supp.3d 423, 428-49 (S.D.N.Y. 2014) (same device); *Bertini v. Smith & Nephew, Inc.*, 8 F.Supp.3d 246, 254-58 (E.D.N.Y. 2014) (same device); *Huskey v. Ethicon, Inc.*, 29 F.Supp. 3d 736, 749-52 (S.D. W.Va. 2014). None of these cases support the broad principle Intervenor Defendants advance. Indeed, *Katz v. Live Nation, Inc.*, a case relied upon by Intervenor Defendants in support of their erroneous argument that interlocutory appeal will materially advance the ultimate termination of this litigation, provides otherwise. *Katz v. Live Nation, Inc.*, No. CIV. A. 09-3740, 2010 WL 3522792, at *6 (D.N.J. Sept. 2, 2010) (case relied upon by movant for certification did not create substantial grounds for disagreement "because that case involved a libel claim, rather than a claim for unconscionable commercial practices under the NJFCA.")

Further, even if the principle advanced by Intervenor Defendants were applicable, such that consideration of cases premised upon harms from climate change, but alleging completely different legal theories, were sufficient to establish substantial grounds for differences of opinion, the cases relied upon by Intervenor Defendants would still fail to establish such grounds. As noted, Plaintiffs have previously demonstrated the eminently distinguishable nature of the cases upon which Intervenor Defendants rely. Further, "[c]ourts 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…." *Couch*, 611 F.3d at 633. However, no dispute exists among the circuits because there is no precedent at the appellate level for avoiding judicial review on political question grounds in a climate change case. *See* Opp. to Motion, ECF 132 at 11-14, 17-18.

Nor is interlocutory appeal justified based on Intervenor Defendants' contention that this case presents "novel legal issues." Objections, ECF 152 at 12. If there is anything underlying this

Court's conclusions as to the questions which Federal and Intervenor Defendants seek to certify, it is the unprecedented *factual* circumstances and developments of the current climate crisis. No substantial grounds for disagreement exist regarding the accuracy of this Court's conclusion that this case does not implicate the political question doctrine. Magistrate Judge Coffin correctly concluded that Intervenor Defendants failed to establish the propriety of interlocutory appeal.

IV. Magistrate Judge Coffin Properly Recommended Denial of Certification Because Interlocutory Appeal Would Protract Rather than Advance the Termination of this Litigation

Magistrate Judge Coffin properly recommended denial of Intervenor Defendants' Motion. 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 II, *supra*, applicability of the political question doctrine to this case does not present a controlling issue of law because the factual record has not yet developed so as to permit considered appellate review of any of Plaintiffs' claims. Accordingly interlocutory appeal will not materially advance this litigation.

Intervenor Defendants erroneously contend that interlocutory appeal might advance this litigation if the appellate court were to find that the political question doctrine barred some, but not all, of Plaintiffs' claims. Objections, ECF 152 at 14. However, as Plaintiffs explained extensively in separate briefing, even were interlocutory review to result in dismissal of a subset of Plaintiffs' claims, Plaintiffs' remaining claims would dictate that this litigation proceed in substantially the same manner. Pl.'s Fed. Obj. Resp., ECF 159 at 14-20.

Appeal will not result in material advancement of the ultimate termination of litigation if additional claims would remain to be tried after appeal, especially if those claims involve similar evidence as those to which the question relates. *See, e.g., United States Rubber Co.*, 359 F.2d at 785 (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); *see also* 16 WRIGHT & MILLER § 3930 (3d. ed. 2012) ("[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.") (Footnotes omitted).

Even if the appellate court overturned the November 10 Order's conclusions regarding a subset of Plaintiffs' claims, Plaintiffs' remaining claims require that this "litigation would be conducted in the same way no matter" how these issues might be decided on interlocutory appeal. 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 remaining for trial," ECF 152 at 14, this litigation would proceed 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). Accordingly, premature appellate consideration of this issue

would only prolong the proceedings rather than advance them. *Jackson v. Rohm & Haas Co.*, 2007 WL 2916396, at *1 (E.D. Pa. Oct. 5, 2007) ("[I]t would appear that this case will go to discovery irrespective of whether the RICO claims are dismissed….Therefore, I conclude that allowing for an interlocutory appeal would further delay, not advance the termination of this litigation.")

The urgency of the climate crisis upon which Plaintiffs' claims rest counsels this Court to exercise its unfettered discretion to deny certification. 16 WRIGHT & MILLER § 3930 (3d. ed. 2012) ("Delay may be a particularly strong ground for denying appeal if…there are special reasons for pressing on with discovery or trial."); *Struthers Scientific & Intern. Corp. v. General Foods Corp.*, 290 F.Supp. 122 (S.D. Tex. 1968) (appeal would more likely delay rather than advance termination of the litigation and "[t]he parties would be better advised to expend their energies completing discovery rather than taking appeals"). In contrast, while interlocutory appeal will cause significant prejudice and delay to Plaintiffs seeking to protect their fundamental rights, there will be minimal delay of any ultimate appeal given that Plaintiffs are on track for a late 2017 trial. *See* Nov. 28, 2016 Transcript, ECF 100 at 12:2-5. This case will not linger for years prior to final resolution by this Court. At that time, Defendants can appeal.

Importantly, Intervenor Defendants' substantial, four-month delay in seeking certification, for which they offer no convincing explanation, counsels strongly in favor of denial. *See, e.g., Arenholz v. Bd. Of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) ("There is also a nonstatutory requirement: the petition must be filed in the district court within a *reasonable* time after the order sought to be appealed.") (citation omitted); *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 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"). Perplexingly, in attempting to justify their considerable delay, Intervenor Defendants offer *one* excuse: they "filed their motion within a few days after the federal defendants filed their motion for interlocutory appeal." Int. Reply, ECF 138 at 11. Another party's unrelated delinquency does not justify delay by Intervenor Defendants. Further, since Intervenor Defendants premised their intervention on the proposition that Federal Defendants cannot adequately protect Intervenor Defendants' interests, as required under Federal Rule of Civil Procedure 24(a)(2), their reliance on Federal Defendants' oversight in this matter to justify their own delay is, at best, confusing. Memorandum in Support of Motion to Intervene, ECF 15 at 16-17. Similarly convoluted is Intervenor Defendants' argument that their answer to Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief is irrelevant. Objections, ECF 152 at 15. Had Intervenor Defendants wished to attempt to avoid filing an answer, the proper course would have been to seek *timely* certification for interlocutory appeal.

Notwithstanding the impropriety of interlocutory appeal in this case and Intervenor Defendants' inflated and unsubstantiated characterizations of their discovery burdens, Plaintiffs have been and remain receptive to Intervenor Defendants' concerns regarding discovery. Notwithstanding Intervenor Defendants' contention that they "are being burdened by discovery that they contend should never have started," Objections, ECF 152 at 15, Plaintiffs have expended significant effort meeting and conferring to narrow discovery requests served to date in an effort to accommodate Intervenor Defendants and secure a prompt resolution of Plaintiffs'

claims. As he is overseeing the discovery process, Magistrate Judge Coffin is well positioned to understand that Intervenor Defendants' assertion does not apply. In fact, Plaintiffs served six significantly narrowed versions of previous requests for document production prior to the filing of this response, as a result of the meet and confer process with Defendants. *See* Exhibits 3-8 to Pl.'s Fed. Obj. Resp., ECF 159-3 – 159-8.

CONCLUSION

This Court should adopt Magistrate Judge Coffin's Findings and Recommendations and exercise its unfettered discretion to deny Intervenor Defendants' Motion to Certify. Intervenor Defendants should not be allowed to short-circuit 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 to Certify in its entirety.

DATED this 26th day of May, 2017, at Eugene, Oregon.

Respectfully submitted,

/s/ *Julia A. Olson*

JULIA OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
WILD EARTH ADVOCATES
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY (*pro hac vice*)
pgregory@cpmlegal.com
COTCHET, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

DANIEL M. GALPERN (OR Bar 061950)
dan.galpern@gmail.com
LAW OFFICES OF DANIEL M. GALPERN
2495 Hilyard Street, Suite A
Eugene, OR 97405
Tel: (541) 968-7164

Attorneys for Plaintiffs

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 27 pages and 8,585 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.

/s/ *Julia A. Olson*
JULIA OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
WILD EARTH ADVOCATES
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825