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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL

REPLY BRIEF

This case readily satisfies all the requirements for interlocutory appeal, and Plaintiffs' opposition provides no persuasive argument to the contrary. The propriety of such an appeal is clear from the jurisdictional nature of the issue intervenor-defendants seek to certify, as the Ninth Circuit has recognized several times before, including in a case *currently pending on interlocutory appeal* from the denial of a motion to dismiss on political question grounds. *See, e.g.*, *Cooper v. Tokyo Elec. Power Co.*, 166 F. Supp. 3d 1103, 1141-43 (S.D. Cal. 2015) (certifying political question issue under § 1292(b)); Order, *Cooper v. Tokyo Elec. Power Co.*, No. 15-80110, Dkt. No. 6 (9th Cir. Sept. 16, 2015) (granting permission to appeal political question issue under § 1292(b) over opposition); *Mottola v. Nixon*, 464 F.2d 178, 179 (9th Cir. 1972) (section 1292(b) appeal from denial of motion to dismiss arguing, among other things, that "the action presents a non-justiciable political question").

In addition to these precedents, the Court's recognition that this is "no ordinary lawsuit," is "not a typical environmental case," and "implicates hotly contested political issues" and "profoundly important interests," Dkt. 83 at 3, 7, 13-14, 52, 54, confirms that interlocutory appeal is warranted here. In short, the Court's exercise of subject-matter jurisdiction over this "no[t] ordinary" case presents precisely the circumstances for which Congress created an exception to the usual finality rules.

Plaintiffs' opposition obscures the relevant legal standards and otherwise confuses the issues. Courts routinely hold that issues of subject-matter jurisdiction, like the political question doctrine, present "controlling questions of law" that could "materially advance" the termination of a case. Plaintiffs argue that this case is different because the jurisdictional inquiry actually turns on the *remedy* the Court would have to fashion were plaintiffs to prevail. But this Court's

assessment of the political question issue was not based on its ability to "craft[] a remedy," which was mentioned only *after* the Court had already assessed the *Baker* factors and concluded that the lawsuit was not barred. Dkt. 83 at 6-17. Indeed, plaintiffs' view of the political question doctrine would effectively mean that such issues could never be resolved on a motion to dismiss—a transparently unsupportable proposition. The remainder of plaintiffs' opposition argues that there is no substantial ground for a difference of opinion because no identical case has been decided differently. In fact, many courts have issued climate change decisions that are irreconcilable with the fundamental features of plaintiffs' claims.

Although plaintiffs would undoubtedly prefer to forge ahead with sweeping discovery, their opposition offers no sound reason for doing so. Congress authorized interlocutory appeals in "exceptional situations" to "avoid protracted and expensive litigation." *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). Intervenor-defendants respectfully submit that this is exactly the situation at hand and thus ask that the Court certify the case for interlocutory appeal.[1]

I. THE QUESTION PRESENTED IS A CONTROLLING QUESTION OF LAW.

Whether the political question doctrine applies is a prototypical controlling question of law. Dkt. 122-1 at 8-9. The reason is straightforward: "questions … relating to jurisdiction" are controlling, *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996), and the political

[1] As the intervenor-defendants noted in their Memorandum in Support of Motion for Certification of Order for Interlocutory Appeal ("Motion"), they also joined the federal defendants' Motion to Certify Order for Interlocutory Appeal, Dkt. 120, 120-1, for two other independent reasons—(1) the complaint's failure to allege a valid federal cause of action or implicate a federal question subject to federal jurisdiction and (2) the plaintiffs' failure to satisfy Article III standing requirements—and thus did not address those arguments in that Motion and do not address them in this Reply. Dkt. 122-1 at 2 n.1.

question doctrine concerns the Court's subject-matter jurisdiction, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). Indeed, there is presently an appeal in the Ninth Circuit in which another district court (and the Ninth Circuit) decided that the political question issue "affect[s] whether the Court has jurisdiction" and is therefore controlling. *Cooper*, 166 F. Supp. 3d at 1142. This Court should reach the same conclusion.

Plaintiffs' response is that the political question issue can be addressed on appeal "[o]nly after this Court has ordered a remedy based on factual information produced in discovery and established at summary judgment or trial." Dkt. 132 at 4-9. This effort to recast the jurisdictional inquiry as a purely factual question about remedy is wrong for at least two reasons.

First, the premise is false: the applicability of the doctrine is neither "intertwined" with yet-to-be-developed facts nor inexorably tied to the remedy. This Court's analysis of the *Baker* factors made no mention of remedies until a concluding remark on the care that would be needed in crafting a remedy *if* plaintiffs were to prevail. Dkt. 83 at 8-17. For their part, intervenor-defendants also made clear that the political question "problem here is not only the relief requested; it is the claims themselves." Dkt. 73 at 26; *see also id.* at 12-14 (adjudication of the claims implicates numerous political questions about policy judgments); *contra* Dkt. 132 at 5 (erroneously stating that 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"). Legal issues are regularly decided in context, but that does not make them factual or incapable of resolution before a case's remedial stage. *See, e.g.*, *Bassidji v. Goe*, 413 F.3d 928, 932 (9th Cir. 2005) (in determining a controlling question of law existed, district court recognized the legal question involved consideration of "the kind of illegality and the particular facts involved"). The fact that the political question doctrine takes context into

account is no different. *Saldana v. Occidental Petrol. Corp.*, 774 F.3d 544, 545 (9th Cir. 2014) (per curiam) (affirming district court decision to grant a motion to dismiss on political question grounds).

Second, even accepting plaintiffs' constricted focus on remedies would still not undermine the existence of a controlling question of law because *any* remedy in this case would run afoul of the political question doctrine given the scope of the relief requested. Plaintiffs have asked this Court to adopt and enforce a national remedial plan for climate change—a course that would inevitably require the Court to direct other branches of government on how and even whether to regulate, to control or supervise how agencies exercise their discretion, and to make and then enforce policy judgments that the Constitution leaves to the other branches. Indeed, a court-approved remedial plan would presumably strip the executive and legislative branches of the ability to adopt different regulations, even if such action was deemed to be in the public's interest, but would simultaneously allow plaintiffs to return to court to allege that the government is not taking sufficiently aggressive action. It is for similar reasons that courts have granted motions to dismiss on political question grounds when the applicability of the political question doctrine involves concerns over the eventual remedy. *See Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 943, 952 (5th Cir. 2011) (holding that the political question doctrine barred claims in part because appellants sought as a remedy "the dismantling of OPEC and the inception of a global market that operates in the absence of agreements between sovereigns"); *cf. Barnett v. Obama*, No. SACV09-0082, 2009 WL 3861788, at *10-16 (C.D. Cal. Oct. 29, 2009) (discussing political question concerns over claims regarding President's location of birth because plaintiffs sought removal from office as a remedy), *aff'd sub nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011). There is simply no support for plaintiffs' suggestion that

the Court's remedial discretion *if plaintiffs were to prevail* transforms the subject-matter-jurisdiction question from a controlling question of law, *e.g.*, *Cooper*, 166 F. Supp. 3d at 1142, into an inquiry that must await trial.[2]

II. THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION CONCERNING THE APPLICATION OF THE POLITICAL QUESTION DOCTRINE TO THE CLAIMS IN THIS CASE.

The second factor asks whether there is a substantial ground for difference of opinion. There is here because (1) other district courts have *already* determined that the political question doctrine either could or does bar similar litigation, (2) fair-minded jurists could reach contradictory conclusions, and (3) the Court itself has acknowledged the novelty of the plaintiffs' claims, which also supports interlocutory appeal. Dkt. 122-1 at 9-13. Each of these points would be sufficient on its own; together, they make absolutely clear that there exist substantial grounds for a difference of opinion under Ninth Circuit precedent. *See, e.g.*, *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

Plaintiffs' opposition rests on a fundamental misconception of these standards. To begin with, intervenor-defendants cited a number of cases in the climate change arena either holding that the political question doctrine barred plaintiffs' claims or acknowledging the force of such an argument. Dkt. 122-1 at 10-11 (citing cases). Plaintiffs identify immaterial distinctions

[2] Plaintiffs also argue that there would be no controlling question of law if the political question doctrine were to eliminate jurisdiction over some but not all of their claims. Dkt. 132 at 8-9; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005) ("some of the claims are barred by the political question doctrine and some of the claims are justiciable"). The standard, however, is not whether the issue would end litigation but whether it "could materially affect the outcome." *In re Cement*, 673 F.2d at 1026. Dismissal of some of the plaintiffs' claims and narrowing the issues would do at least that much.

between the cases, but that misses the mark. Dkt. 132 at 11-14. On the fundamental question of whether federal courts have the power and jurisdiction to regulate and supervise national climate change policy, there are differences of opinion. Courts should look to analogous litigation to demonstrate the existence of substantial ground for difference of opinion. *See, e.g.*, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1100, 1101 n.2 (9th Cir. 2014) (looking at a Title III ADA claim about movie theater seating to find a substantial ground for a difference of opinion over whether Title II of ADA required handicap accessible on-street parking); *Shuker v. Smith & Nephew PLC*, No. 13-cv-6158, 2015 WL 4770987, at *4 (E.D. Pa. Aug. 13, 2015) (looking at cases addressing "the same or similar issues"); *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-cv-4466, 2013 WL 2285955, at *2 (D.N.J. May 23, 2013) (same). And that is perfectly sensible: disparate opinions on the political question doctrine's application to climate change claims makes clear that there exist substantial grounds for a difference of opinion.

Plaintiffs take issue with the contention that fair-minded jurists could reach a contrary conclusion by misconstruing intervenor-defendants' argument. Dkt. 132 at 14-19. In particular, plaintiffs declare that intervenor-defendants' "own disagreement with the Court's conclusions serves as their primary basis for the asserted substantial grounds for differences of opinion." *Id.* But intervenor-defendants have not focused on their own disagreement with this Court's conclusion. Instead, intervenor-defendants referenced their prior briefing—as well as cases—to substantiate the belief that "other fair-minded jurists might reach a [different] conclusion." Dkt. 122-1 at 11-12. Despite plaintiffs' contrary insinuations, Dkt. 132 at 14, that standard about "fair-minded jurists" comes *directly* from Ninth Circuit precedent, *Reese*, 643 F.3d at 688, and is fully satisfied here.

The remainder of plaintiffs' opposition largely continues their review of intervenor-defendants' case citations. Dkt. 132 at 14-19. But, this is just more of the same. To support the fact that fair-minded jurists could disagree, for example, intervenor-defendants cited cases showing that jurists have already decided that a "broad call on judicial power to assume continuing regulatory jurisdiction" is nonjusticiable, *Gilligan v. Morgan*, 413 U.S. 1, 5, 8 (1973), and that court-managed climate change regulation would "express[] lack of the respect due" to Congress's designation of EPA for that role, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). Plaintiffs spend pages trying to distinguish these cases, Dkt. 132 at 14-19, but these efforts are once more founded on their unduly limited view of the relevant inquiry. Indeed, the different opinions throughout *AEP*'s case history—from the district court, to the Second Circuit, to the Supreme Court, *see* 564 U.S. 419-20—show, if anything, that reasonable and fair-minded judges could reach (and have reached) contrary conclusions on these issues. That is all that is required.

Finally, plaintiffs seemingly ignore intervenor-defendants' observation that this Court candidly has recognized the novelty of these claims, which provides yet another basis for finding a substantial ground for difference of opinion.[3] Dkt. 122-1 at 12-13. Plaintiffs' own cases hold that "novel and difficult questions of first impression" qualify for interlocutory appeal. Dkt. 132 at 10 (quoting *Couch*, 611 F.3d at 633). Other cases likewise hold that "novel legal issues … on which fair-minded jurists might reach contradictory conclusions" are subject to interlocutory appeal, even if there has not been "development of contradictory precedent," *Reese*, 643 F.3d at

[3] Elsewhere, Plaintiffs have publicly trumpeted the unique nature of this case calling it a "landmark" lawsuit and the Court's decision denying the defendants' motions to dismiss "historic." Landmark U.S. Federal Climate Lawsuit – Our Children's Trust, https://www.ourchildrenstrust.org/us/federal-lawsuit (last visited Apr. 10, 2017)

688. Plaintiffs' silence on this point in their opposition serves to confirm that intervenor-defendants have met their burden to show a substantial ground for difference of opinion.

III. IMMEDIATE RESOLUTION OF THE COURT'S HOLDING ON THE POLITICAL QUESTION DOCTRINE WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION.

Immediate appellate resolution of the political question holding will materially advance the ultimate termination of this case. As in *Cooper*, "[i]f the lawsuit proceeded and then [intervenor-defendants] successfully appealed this Court's determination regarding the lack of subject matter jurisdiction …, much time and expense would be wasted by all of the parties, Plaintiffs included." *Cooper*, 166 F. Supp. 3d at 1143. Congress established section 1292(b)'s certification procedure to avoid just that kind of waste.

Plaintiffs offer two principal responses, but neither has merit. First, plaintiffs argue that whatever discovery burdens there may be are "outweigh[ed]" by the worsening impact of climate change on plaintiffs that would come from delay. Dkt. 132 at 21-22. But virtually every plaintiff would prefer more expeditious resolution of their claims, and yet courts appreciate that interlocutory appeal may well save *everyone*—plaintiffs, defendants, and the judicial system—considerable time and effort.

More than that, plaintiffs are simply wrong to suggest that the scope of discovery is an inappropriate consideration here. In truth, in determining whether interlocutory appeal will materially advance the ultimate termination of this case, courts often consider that voluminous factual and expert discovery is being sought. *See, e.g.*, *City of Los Angeles v. Wells Fargo & Co.*, No. 2:13-CV-09007, 2014 WL 3101450, at *2 (C.D. Cal. July 7, 2014) ("A reversal from the Ninth Circuit could put a stop to the City's litigation before substantial discovery and additional motion practice occurs."); *Katz v. Live Nation, Inc.*, No. CIV.A. 09-3740, 2010 WL

3522792, at *3 (D.N.J. Sept. 2, 2010) ("certification materially advances the litigation's ultimate termination where the interlocutory appeal will eliminate the need for … issues that make discovery more difficult and more expensive"); *L.R. v. Manheim Twp. Sch. Dist.*, 540 F. Supp. 2d 603, 613 (E.D. Pa. 2008) ("An interlocutory appeal materially advances litigation if it…'eliminate[s] issues to make discovery easier and less costly.'") (citation omitted).

Such considerations are particularly important in this case because, as intervenor-defendants have explained elsewhere, the scope of discovery plaintiffs are seeking is extraordinary. They want to "probe into decades of information," Dkt. 122-1 at 14, and have expressed an intent to offer "eleven experts across numerous disciplines" while reserving "the right to introduce new experts at a subsequent date," Dkt. 131 at 11-12. Plaintiffs have already propounded exceptionally broad discovery requests and have announced their belief that their discovery alone should entail 35 fact depositions,[4] 100 interrogatories, 200 document requests, and unlimited requests for admission per party. Dkt. 131 at 5-6, 13, 17-18. Such discovery would be "substantial," "difficult," and "expensive." To the extent that an interlocutory appeal even narrows the issues for trial, it will materially advance the ultimate termination of this case. *Wells Fargo*, 2014 WL 3101450, at *2; *Katz*, 2010 WL 3522792, at *3; *Manheim*, 540 F. Supp. 2d at 613.

Finally, plaintiffs contend that the intervenor-defendants' "four-month delay in seeking certification … counsels strongly in favor of denial." Dkt. 132 at 22. It does not. Plaintiffs cite

[4] Plaintiffs' list of individuals they wish to depose includes the Secretaries of State, Interior and Agriculture, the Administrator of the Environmental Protection Agency, the CEO of the American Petroleum Institute, the President and CEO of the American Fuel & Petrochemical Manufacturers, and a member of the National Association of Manufacturers' ("NAM") board of directors.

no Ninth Circuit precedent for the proposition that the passage of time is a relevant consideration at all. *Id.* In any event, intervenor-defendants filed their motion within a few days after the federal defendants filed their motion for interlocutory appeal. "What is most important is the soundness of the certification at the time it is made," 16 Charles A. Wright, et al., *Federal Practice and Procedure* § 3929 (3d ed. 2017 update), and, for all the reasons stated, certification now would be both sound and proper.

CONCLUSION

For all of the foregoing reasons, as well as those stated in the intervenor-defendants' Motion and the federal defendants' Motion to Certify Order for Interlocutory Appeal and

accompanying reply, the intervenor-defendants request that the Court certify its holdings for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 10th day of April 2017.

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