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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

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

INTRODUCTION

The Court should reject the magistrate's Findings and Recommendation and certify its November 10, 2016 Opinion and Order ("Order") for interlocutory appeal. This case checks all of the boxes for immediate review: the political question holding "involves a controlling question of law" (because it is a threshold jurisdictional question), upon which "substantial ground for difference of opinion" exists (because fair-minded jurists might and in fact have reached contradictory conclusions), and an interlocutory appeal may "materially advance the ultimate termination of the litigation" (because it could reduce or eliminate otherwise wasteful time and effort for all involved). 28 U.S.C. § 1292(b).[1] Indeed, the Ninth Circuit has reached the same conclusion several times before, including in a *currently pending case*. *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 Section 1292(b)); Order, *Cooper v. Tokyo Elec. Power Co.*, No. 15-80110, Dkt. 6 (9th Cir. Sept. 16, 2015) (granting permission to appeal political question issue under Section 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").

As this Court's Order makes clear, moreover, this case involves precisely the "exceptional situation[]" for which interlocutory appeal is appropriate to "avoid protracted and expensive litigation," *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981), and to consider "novel legal issues," *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681,

[1] The intervenor-defendants have 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. Dkt. 122-1 at 2 n.1.

4817-8918-0488.1

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688 (9th Cir. 2011). In the Court's own words, this case "is no ordinary lawsuit," is "not a typical environmental case," and "implicates hotly contested political issues" along with "profoundly important interests." Dkt. 83 at 3, 7, 13-14, 54. Such "exceptional" and "novel" issues deserve prompt interlocutory review.

The magistrate's recommendation does not engage most of the intervenor-defendants' arguments and otherwise confounds the legal standards. The given reasons for denying certification are: (1) intervenor-defendants' merits arguments are wrong, (2) the Court might avoid political question problems when fashioning remedies, and (3) the issue is "purely hypothetical" without "a full development of the record." Dkt. 146 at 6-9. But, these reasons are beside the point. The first misconstrues the relevant inquiry, which does not ask whether the Court agrees with intervenor-defendants—of course it does not, as the Order states—but whether "fair-minded jurists might reach contradictory conclusions." *Reese*, 643 F.3d at 688. The second is equally misplaced, because deciding the *threshold* jurisdictional inquiry does not depend on a wait-and-see approach to determining possible remedies. Dkt. 83 at 6-17. And the third reason given is backwards: controlling jurisdictional questions are not "hypothetical," and the whole point of deciding them at the outset is to avoid a "full development of the record" because no factual development could salvage the complaint. Interlocutory appeal should be granted.

STATEMENT OF THE CASE

The plaintiffs' amended complaint asserts that numerous arms of the Executive Branch, including the President, have "failed to preserve a habitable climate system …, and instead have created dangerous levels of atmospheric CO_2 concentrations," creating increased risks to the

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worldwide population and to the plaintiffs. Dkt. 7 at 50. The plaintiffs claim that these risks infringe their rights under the Due Process Clause, Equal Protection Clause, and Ninth Amendment, and also violate federal governmental responsibilities under the alleged federal "public trust" doctrine. *Id.* at 84, 88, 91, 92.

Should they prevail on those claims, moreover, the plaintiffs seek a Court-issued and Court-monitored Order over Executive Branch officials and agencies. They demand, for example, "an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]" and "to restore Earth's energy balance." *Id.* at 5, 94. In direct conflict with legislative and statutory authority,[2] the desired plan would require the federal government to "cease the[ ] permitting, authorizing, and subsidizing of fossil fuels and … move to swiftly phase out [carbon dioxide] emissions, as well as take such other action as necessary to ensure that atmospheric [carbon dioxide] is no more concentrated than 350 [parts per million] by 2100." *Id.* ¶ 12 (emphasis omitted). The Court would then "[r]etain jurisdiction over this action to monitor and enforce [the] Defendants' compliance with the national remedial plan." *Id.* at 94.

The federal defendants and the intervenor-defendants filed motions to dismiss, arguing both that there was no jurisdiction over this case—because the plaintiffs lack Article III standing and the claims present non-justiciable political questions—and that the complaint fails to state a

[2] The United States Supreme Court has made clear who has, and who does not have, the authority to develop a plan like the one proposed by the Plaintiffs: "It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).

4817-8918-0488.1

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valid claim for relief even if there were jurisdiction. Dkt. 20 at 6-21; Dkt. 27-1 at 7-29. The magistrate judge recommended that the motions be denied, Dkt. 68 at 24; the defendants filed objections, Dkt. 73; Dkt. 74; Dkt. 82; and this Court ultimately denied both motions. On the political question issue, the Court held that the claims were "squarely within the purview of the judiciary" and that "no *Baker* factor is inextricable from the merits of this case," while subsequently acknowledging "great care" would be needed to "avoid separation-of-powers problems in crafting a remedy." Dkt. 83 at 11-17.

The intervenor-defendants and the federal defendants both filed motions seeking certification for interlocutory appeal. The federal defendants focused their motion on the holdings that the plaintiffs have Article III standing and that plaintiffs have stated a valid claim. Dkt. 120-1. The intervenor-defendants focused on the political question doctrine holding. Dkt. 122-1. The intervenor-defendants also joined the federal defendants' motions for certification and for a stay, as well as the federal defendants' request for expedited review. *Id.* at 2 n.1. The intervenor-defendants join the federal defendants' objections to the magistrate's findings and recommendation. Dkt. 149.

The magistrate denied the motion for a stay and recommended that this Court deny the motions for certification. Dkt. 146 at 16. With respect to the political question issue, the magistrate's report observes that the Order discussed "the merits of the political question doctrine," but then offers a few "observations" about the merits of certification. *Id.* at 6. First, the magistrate returns to the merits and repeats conclusions that, for example, "the Constitution" does not "textual[ly] commit … climate change related issues to a specific branch of government," and that courts do not lack jurisdiction over climate change just because those

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issues relate to "political values" or "debate." *Id.* at 6-9. Second, the magistrate states that the Court could fashion remedies without "micro manag[ing] federal agencies or mak[ing] policy judgments that the Constitution leaves to the other branches." *Id.* at 7-8. Finally, the magistrate contends that "a full development of the record" would aid appellate review and that the question presented for certification is "purely hypothetical" now. *Id.* at 6-9.

With respect to the federal defendants' motion, the magistrate made many of the same points but also thought that the federal defendants' answer to plaintiffs' complaint provided additional reason to deny certification and continue to "develop the record." *Id.* at 10-15.

Intervenor-defendants now object to the recommendation.

LEGAL STANDARDS

A district court can certify an order for interlocutory appeal when: "(1)…there [is] a controlling question of law, (2)…there [is] substantial grounds for difference of opinion, and (3)…an immediate appeal [from the order] may materially advance the ultimate termination of the litigation." *Cement*, 673 F.2d at 1026; *see also Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Such appeals are appropriate in "exceptional situations" when they "would avoid protracted and expensive litigation." *Cement*, 673 F.2d at 1026.

When a magistrate issues a "recommended disposition," rather than a "decision," and proper objections are filed, this Court's review of the recommendation is de novo. Fed. R. Civ. P. 72; *McDonnell Douglas Corp. v. Commodore Bus. Machs. Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981) ("the district court is charged to make a de novo determination of [any] portion" to which objections are made); *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1059 (D. Or. 2011). "[T]he court may accept, reject, or modify, in whole or in part, the findings or

4817-8918-0488.1

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recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

ARGUMENT AND OBJECTIONS

The Court should reject the recommendation in its entirety and certify the Order for appeal. The issue of whether the political question doctrine bars the plaintiffs' claims is a "controlling question of law" because it concerns the Court's subject matter jurisdiction to evaluate those claims. 28 U.S.C. § 1292(b); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). There is "substantial ground for difference of opinion" because other courts have *already determined* that the doctrine could or does bar similar litigation. 28 U.S.C. § 1292(b). Immediate resolution likewise may "materially advance the ultimate termination of the litigation," because it could result in all-out dismissal or narrowing the issues. *Id.* The magistrate's report mistakenly concludes that these factors are not squarely met.

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

The issue of whether the political question doctrine bars the plaintiffs' claims is a prototypical controlling question of law. As an initial matter, a "question of law" is "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine," *e.g.*, *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1089 (E.D. Cal. 2008), and it is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court," *Cement*, 673 F.2d at 1026. "[Q]uestions…relating to jurisdiction" are controlling. *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). Because courts lack subject matter jurisdiction over cases presenting political questions, *Corrie*, 503 F.3d at 982, other district courts and the Ninth Circuit have properly recognized that the political question doctrine "affect[s] whether the Court has jurisdiction" and is thus controlling,

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Cooper, 166 F. Supp. 3d at 1142. This Court should too.

The magistrate made two observations related to this factor, but both should be rejected. First, the magistrate stated that there is no controlling question of law because the issue is presently "hypothetical" and does not incorporate "numerous factual questions that would be addressed at trial" or through "full development of the record." Dkt. 146 at 9, 15. Respectfully, however, that fundamentally misconceives the jurisdictional nature of the question presented. These are questions of law, regularly and properly decided as threshold matters and for which further factual development will not change the analysis. *See, e.g.*, *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991) ("The existence of subject matter jurisdiction is a question of law . . . ."); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1030 (10th Cir. 2001) ("Whether the political question doctrine restricts our review of this matter is a question of law . . . ."). Indeed, the recommendation concludes with a list of supposed "factual questions" that should be "incorporated" into the question presented—questions like whether "climate change [is] occurring" or whether "federal defendants' actions are a substantial cause of the alleged injuries." Dkt. 146 at 15. But none of these "factual questions" has any bearing on the threshold legal question of whether this Court has subject matter jurisdiction over plaintiffs' claims.

More than that, the magistrate's point rests on the mistaken premise that the controlling issue—whether plaintiffs' Amended Complaint presents a non-justiciable political question—is hypothetical at this stage and must wait for factual development "beyond the pleadings." Dkt. 146 at 9. But the pleadings are the very problem, and jurisdiction over them is an issue ripe for appellate review now rather than after discovery or a remedial stage decision from the Court.

4817-8918-0488.1

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See, e.g., *Bassidji v. Goe*, 413 F.3d 928, 932 (9th Cir. 2005) (certifying a controlling question of law for interlocutory appeal even though that question considered "'the kind of illegality and the particular facts involved'"). The question presented is no more "hypothetical" in this case than in every other case recognizing that political question issues can and should be decided on the pleadings. *See, e.g.*, *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). The intervenor-defendants made all of these arguments in their briefs, Dkt. 122-1, Dkt. 138, but the recommendation does not confront any of them.

Second, and related, the magistrate's recommendation suggests that there is no controlling question of law because the Court can "fashion reasonable remedies" that would avoid the political question doctrine. Dkt. 146 at 6-9. That is also mistaken. To start, the question presented is not inexorably tied to any potential 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, and the intervenor-defendants have been clear that the plaintiffs' *claims themselves* raise political question concerns, not just the relief they seek, *e.g.*, Dkt. 138 at 4; Dkt. 73 at 26.

Even accepting the constricted focus on remedies, however, there is still 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. The magistrate states that the Court would not need to "micro manage federal agencies," Dkt. 146 at 8, but that is exactly what the plaintiffs have asked for. They want a court-monitored national remedial plan for climate change—a course that would inevitably require the Court to direct other branches of government on how

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and even whether to regulate 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 the 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 even if the doctrine's applicability includes 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). In short, neither the absence of record development nor the Court's remedial discretion to somehow fashion a remedy that might not violate the political question doctrine serves to transform 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. What the Plaintiffs have demanded in their Amended Complaint—a takeover of the legislative and executive branches' exclusive authority to regulate climate change issues—most certainly raises plain and intractable political question problems.

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

The Order's holding on the political question doctrine provides substantial ground for difference of opinion. There is a substantial ground for difference of opinion "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions." *Reese*, 643 F.3d at 688. That is true here because (1) other 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. Dkt 122-1 at 9-13; Dkt. 138 at 6-9.

First, fair-minded jurists have already reached contradictory conclusions because other courts have determined that the political question doctrine either could or does bar litigation involving claims by plaintiffs alleging harm from climate change. *See, e.g.*, *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) ("The Court finds that the claims presented by the plaintiffs constitute non-justiciable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the Court to make initial policy determinations that have been entrusted to the [United States Environmental Protection Agency] EPA by Congress."); *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 n.5 (D.D.C. 2012) (observing that the political question defense is "clearly implicated by the totality of the relief sought by the Plaintiffs"); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874-77 (N.D. Cal. 2009) (finding that several *Baker* factors "militate[] in favor of dismissal" of the plaintiffs' federal common law nuisance claims for alleged climate change-caused harms); *People of State of California v. Gen. Motors Corp.*,

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No. C06-05755, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) ("Because each of the identified *Baker* indicators is inextricable from Plaintiff's federal common law global warming nuisance claim, the Court finds that the claim presents a non-justiciable political question . . . ."). Such decisions make clear that there are *already* differences of opinion on the fundamental question of whether federal courts have the power and jurisdiction to regulate and supervise national climate change policy.[3]

Second, even without the existence of conflicting precedent, fair-minded jurists could conclude that the political question doctrine bars the plaintiff's broad claims. The plaintiffs' claims involve issues which are "constitutional[ly] commit[ed]…to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), seeking a Court action that would inevitably commandeer agencies. *See* Dkt. 20 at 11-16; Dkt. 59 at 10-14; Dkt. 73 at 21-28. "Ultimately, Plaintiffs are effectively seeking to have the Court mandate that federal agencies undertake specific regulatory activity, even if such regulatory activity is not required by any statute enacted by Congress." *Alec L.* 863 F. Supp. 2d at 17. Such action would "express[] lack of the respect due" other branches of government, *Am. Elec. Power*, 564 U.S. at 427-28, which the political question doctrine forbids.

Third, "novel legal issues" are particularly appropriate for interlocutory appeal, *e.g.*, *Reese*, 643 F.3d at 688; *Couch*, 611 F.3d at 633 ("novel and difficult questions of first impression"), and this Court has repeatedly acknowledged that the legal issues in this case are

[3] It makes no difference whether all of these cases involve the precise legal issues raised here, because courts 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).

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unique, extraordinary, and novel. *See* Dkt. 83 at 3, 7, 13-14, 54.

The magistrate's contrary recommendation should be rejected because it sidesteps the relevant legal standard. In particular, the magistrate states that "[t]he Order thoroughly discusses the political question doctrine," and then repeats a few high-level points showing why this Court disagreed with the intervenor-defendants. Dkt. 146 at 6-9. But the standard is whether "fair-minded jurists might reach contradictory conclusions," *Reese*, 643 F.3d at 688, not whether the Court agrees with the intervenor-defendants on the merits—after all, the premise of *any* interlocutory appeal motion is a decision rejecting the movant's position. The recommendation never engages the correct standard and, by discussing its view of the merits of the political question issue, asks the wrong questions.

That is reason enough to reject the recommendation, but the magistrate's findings also misapprehends the intervenor-defendants' arguments and the law. As to the former, the intervenor-defendants have never maintained that the political question doctrine applies whenever "the federal government has violated a plaintiff's constitutional rights [but] has taken some steps to address the damage," or that the doctrine applies because climate change views are "determined by political values" or "political debate." Dkt. 146 at 8. Just because it is called the "political question" doctrine obviously does not mean that it precludes any question that could be subject to debates over politics, and these mischaracterizations of the intervenor-defendants' position are thus wholly beside the point. As for the law, it is immaterial (and unsurprising) that the Constitution does not contain an express "textual commitment of climate change related issues to a specific branch of government," Dkt. 146 at 7, because all that is required is that the Constitution's overall text and structure commit the task to another branch. *See, e.g.*, *Alperin v.*

4817-8918-0488.1

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Vatican Bank, 410 F.3d 532, 549–51 (9th Cir. 2005) ("[W]e divine no explicit constitutional reference that is applicable to this case. … 'The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution.'"); *Schroder v. Bush*, 263 F.3d 1169, 1171, 1174–75 (10th Cir. 2001) (holding that appellants' request that the government maintain certain agricultural market conditions was a political question because of the Commerce Clause and other broad constitutional provisions). That is the case here.

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

The final factor is whether immediate resolution "may materially advance" the litigation. 28 U.S.C. § 1292(b). Immediate resolution by the Ninth Circuit of the Order's holding on the political question doctrine will advance the ultimate termination of this case. A final disposition would of course do so, but it is also sufficient that interlocutory appeal may narrow the claims remaining for trial. *Reese*, 643 F.3d at 688. The scope and volume of discovery sought is relevant to that determination. *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) ("[C]ertification 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) (similar).

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These standards are readily satisfied: "If 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. If even a subset of claims are barred by the political question doctrine, moreover, interlocutory appeal would narrow the scope of the litigation, as the scope and volume of discovery being sought is extraordinary, *e.g.*, Dkt. 122-1 at 14; Dkt. 131, and would thus be "substantial," "difficult," and "expensive," *City of Los Angeles*, 2014 WL 3101450, at *2; *Katz*, 2010 WL 3522792, at *3.

The magistrate does not address the obvious point that interlocutory appeal will materially advance the ultimate termination of this litigation. Instead, the magistrate cites to the federal defendants' answer as support for the proposition that interlocutory appeal is inappropriate because the factual record is not fully developed. Dkt. 146 at 2-4, 10-11. This approach is misguided. As noted above, the questions presented for interlocutory review involve threshold questions of law. As the federal defendants explained, "the heart of the dispute is the legal questions concerning whether Plaintiffs have standing, whether this Court has jurisdiction, and whether Plaintiffs have stated claims that are cognizable in a federal court." Dkt. 149 at 13. Thus, the issues raised by the motion for interlocutory appeal can and should be decided *on the pleadings*—before an answer was filed and before any subsequent discovery. If anything, as also noted above, the prospect of sweeping ongoing discovery counsels *in favor of* review, and surely the fact that the intervenor-defendants and the federal defendants have filed answers that they contend should have never been filed (because there is no jurisdiction) and are being burdened by extensive discovery that they contend should never have started cannot be used as a basis for

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continuing to subject them to those burdens.

CONCLUSION

For the above reasons, and for those given in related filings by the intervenor-defendants and the federal defendants, the Court should reject the findings and recommendation of the magistrate and certify its Order for interlocutory appeal.

DATED this 9th day of May 2017.

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by the following indicated method or methods on the date set forth below:

☒ **CM/ECF system transmission.**

DATED this 9th day of May 2017.

/s/ C. Marie Eckert

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