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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Federal Defendants.

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

PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' OBJECTIONS RE: MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

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INTRODUCTION

This Court should adopt the Findings and Recommendations (ECF 146) ("F&Rs") of Magistrate Judge Coffin and deny Federal Defendants' Motion to Certify Order for Interlocutory Appeal (ECF 120) ("Motion to Certify"). Both the arguments in Federal Defendants' Objections to Findings and Recommendations of Magistrate Judge (ECF 149) ("Objections"), and in prior briefing on this matter, fail to establish the propriety of early appellate consideration of the questions for which they seek certification. Because each of the "hypothetical questions…federal defendants wish to present to the appellate court…fail[s] to satisfy the standards for interlocutory appeal," F&R, ECF 146 at 15, 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…hypothetical questions[s] to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings." *Id.* at 9.

As the F&Rs correctly conclude, the questions presented by Federal Defendants are not suitable for interlocutory appeal.[1] Contrary to Federal Defendants' assertions, whether Magistrate Judge Coffin set out findings "address[ing] the applicability of each prong" of the Section 1292(b) inquiry "to each issue for which certification to appeal is sought" is of no moment. Objections, ECF 149 at 4, n. 2. Federal Defendants bear the burden of establishing that *all* Section 1292(b) requirements are met and, as the F&Rs explain, each of the questions presented fails to satisfy at least one of those requirements. Further, even had Federal Defendants established the Section 1292(b) elements that Magistrate Judge Coffin finds lacking, Federal

[1] Having fully set forth in prior briefing why each of these questions 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 Federal Defendants' Motion to Certify Order for Interlocutory Appeal (ECF 133) ("Opp. to Motion"). This brief emphasizes and augments the key points therefrom in response to Federal Defendants' arguments in the Objections and in Federal Defendants' Reply in Support of Federal Defendants' Motion to Certify Order for Interlocutory Appeal (ECF 139) ("Fed. Reply").

Defendants have failed to show that *all* of the Section 1292(b) requirements are satisfied for *any* of the questions for which they seek interlocutory appeal, as is their burden.

In addition to the clear failure to satisfy the requirements of 28 U.S.C. 1292(b), this Court should deny 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. As Federal Defendants acknowledge in their Answer to Plaintiffs' First Amended Complaint (ECF 98) ("Answer"), "'business as usual' CO_2 emissions" imperil Plaintiffs with "dangerous, and unacceptable economic, social, and environmental risks." Answer, ECF 98 at ¶ 150. "[T]he Government has admitted that human-induced climate change threatens the public health and welfare of current and future generations and increases the risk of loss of life." F&Rs, ECF 146 at 10. "[G]iven the significant admissions made by the federal defendants after the Order denying the motions to dismiss," Magistrate Judge Coffin rightly acknowledged that Plaintiffs' claims have only been "enhanced since the complaint was filed...." *Id.* These and other admissions by Federal Defendants serve to underscore that this case fails to present the exceptional circumstances justifying interlocutory appeal. The exceptional circumstances of harm at stake in this case necessitate an expeditious schedule towards trial, not appeal.

In their Objections, Federal Defendants continue to mischaracterize the allegations in the Plaintiffs' First Amended Complaint (ECF 7) ("FAC") and offer no new substantive arguments as to the propriety of certification for interlocutory appeal that were not before Magistrate Judge Coffin. Plaintiffs respectfully request this Court exercise its unfettered discretion to deny Federal Defendants' Motion to Certify and adopt Magistrate Judge Coffin's F&Rs. Plaintiffs further request this Court clarify that Federal Defendants have failed to establish satisfaction of any of the Section 1292(b) requirements for any of the questions they seek 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 Federal 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] Federal Defendants cite *Howell v. Berryhil*, No. 6:16-CV-271-SB, 2017 WL 1653948, at * 1 (D. Or. May 1, 2017) to support their contention that review "is *de novo*." Objections, ECF 149 at 4. However, the findings and recommendations in *Howell* were dispositive of plaintiffs' claims; the magistrate affirmed the Social Security Administration's denial of her application for Disability Insurance Benefits. *Howell v. Berryhill*, No. 6:16-CV-271-SB, 2017 WL 1628405 (D. Or. March 23, 2017).

ARGUMENT

Pursuant to 28 U.S.C. § 1292(b), an otherwise non-final order may be subject to interlocutory appeal only if the district court certifies, in writing: (1) the order involves a "controlling issue of law"; (2) the controlling issue of law is one to which there is a "substantial ground for difference of opinion"; and (3) "an immediate appeal from 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) (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); *United States v. Riddick*, 669 Fed. Appx. 613, n. 2 (3rd Cir. 2016); *Rodriguez v. Banco Cent.*, 790 F.2d 172, n. 8 (1st Cir. 1986).

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" of cases, Congress "carefully confined the availability" of review under Section 1292(b) to exceedingly rare circumstances. *Id.* at 471; *U.S. v. Woodbury*, 263 F.2d 784, 799 n. 11 (9th Cir. 1959) (Section 1292(b) to be applied "only in exceptional circumstances"); *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (Section 1292(b) "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"); *see also 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. Magistrate Judge Coffin Properly Found that No Controlling Question of Law is Present

A. Development of a Full Factual Record Will Be Both Necessary and Helpful to Ensure Considered Appellate Review

Magistrate Judge Coffin properly found that none of the questions Federal Defendants seek to certify for interlocutory appeal present a controlling question of law for purposes of Section 1292(b) because "additional factual development is necessary prior to ultimate disposition" of the issues. F&R, ECF 146 at 14 (quoting *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, No. 09-CV-320-HU, 201 WL 952273, at * 3 (D.OR. March 10, 2010). Development of the factual record for each of the conclusions at issue in the November 10 Order is necessary "to permit considered appellate disposition of the questions presented," 16 WRIGHT & MILLER § 3930 (3d. ed. 2012), and will be helpful to the Court of Appeals in addressing the issues presented by this case. In denying interlocutory appeal of a question that may have been "the determinative one in [the] lawsuit," the Eighth Circuit accurately articulated the importance of a full factual record to an appellate court's ability to provide reasoned and informed review:

> Courts have traditionally been reluctant to grant interlocutory appeals not only because of the lack of finality of the order under review but also because the incomplete factual proof gives few guides for a proper decision. The integrity of the appellate process would be compromised if advisory opinions were rendered on hypotheses which evaporated in the light of full factual development. The legal questions should not be considered in the abstract. There must be precision in proof of fact worthy to serve as the premises essential to balance and weigh the legal issues involved.

Paschal v. Kansas City Star Co., 605 F.2d 403, 407, 411 (8th Cir. 1979) (citation and quotations omitted).

In keeping with these clear principles, Magistrate Judge Coffin rightly concluded that "[t]his 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." F&Rs, ECF 146 at 9. The discovery phase of this case will develop a factual record, in part, establishing with scientific and factual certainty: (1) the causal mechanisms underlying climate change; (2) the global and national injuries and unique personal injuries to Plaintiffs resulting from climate change; (3) the degree to which Federal Defendants' actions have caused those impacts; (4) the factual context within which Federal Defendants have taken, authorized, and permitted the actions resulting in those impacts; and (5) the degree to which Federal Defendants can mitigate and reverse those impacts through exercise of their authority over our nation's energy system. Such information is necessary, and indeed crucial, to permit an appellate court to conduct a considered review as to: (a) whether Plaintiffs' injuries suffice to establish standing; (b) whether Federal Defendants have caused, continue to cause, and can redress those injuries; (c) the propriety of the recognition of a "climate system capable of sustaining human life" in the circumstances of the current climate crisis; (d) whether Federal Defendants have acted and are acting with deliberate indifference to the rights of Plaintiffs; (e) whether Federal Defendants' actions unconstitutionally discriminate against

Plaintiffs and their fundamental rights; and (f) whether Federal Defendants have allowed the substantial impairment of public trust resources. At this early stage, appellate consideration of the questions presented for certification by Federal Defendants would necessitate deliberation of important aspects of this case in a hypothetical and ethereal vacuum, devoid of the factual context upon which reasoned review relies. The trier of these critical underlying facts is necessarily the district court, not the court of appeals. Cognizant of these circumstances, Magistrate Judge Coffin recognized that the discovery phase will provide "an evidentiary framework for [Plaintiffs'] claims that a hollow hypothetical question to the appellate court would lack." F&Rs, ECF 146 at 10. As the Eighth Circuit pronounced in *Paschal,* the need for factual development prior to appellate review is particularly pronounced where, as here, "the issues presented…are too significant and far-reaching to be decided without the full evidentiary record." 605 F.2d at 411 (citation and quotations omitted)

B. Plaintiffs' Standing is Not a Controlling Question of Law

Magistrate Judge Coffin correctly concludes that, with respect to Plaintiffs' standing, a controlling question of law "is not present here[]" because "none of the relevant factual issues are incorporated within the hypothetical question[]" that Federal Defendants "wish to present to the appellate court." F&Rs at 15, ECF 146. 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.*, 2010 WL 952273 at *3 (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'").

Federal Defendants challenge the sufficiency of Plaintiffs' standing allegations in the FAC and assert that disposition of the standing issue presents a controlling question of law. However, unlike the pure legal questions for which interlocutory appeal may be available, "[t]he issue of standing is a mixed question of fact and law." *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 641 (B.A.P. 9th Cir. 1992); *see also Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184 (2d Cir. 2013) (same). In resolving the question of standing on Federal Defendants' motion to dismiss, this Court properly presumed the veracity of the facts alleged in the FAC and applied them within the body of law governing Article III standing. This process is eminently different from the resolution of "purely legal questions" involving wholly academic or philosophical issues of legal interpretation, which are divorced from and lack dependence on factual context.[3]

Moreover, though Plaintiffs' allegations contain the requisite specificity, at the motion to dismiss stage, a complaint need not assert "detailed factual matters" as to standing, but only present sufficient allegations, which, accepted as true, "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Determinations of standing at the motion to dismiss stage are generally unsuitable for interlocutory appeal because factual development in discovery bears out standing allegations, thereby determining whether "general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife,* 504 U.S. 561 (1992). For this reason the district court in *Nutrishare, Inc. v. Connecticut General Life Insurance Company* refused to certify the issue of standing for interlocutory appeal. No. 2:13-cv-02378-JAM-AC, 2014 WL 2624981 (E.D. Cal. June 11, 2014). In denying a motion to dismiss, the *Nutrishare* court found that the general "allegations in the Counterclaim" were sufficient to allege the claimant's qualification as a "fiduciary" under the

[3] Notably, Federal Defendants intend to depose all 21 youth plaintiffs on the question of their standing, which illustrating their understanding of the dependence of the standing inquiry on questions of fact.

Employee Retirement Income Security Act ("ERISA") for purposes of standing. Having denied dismissal despite the claimant's failure "to specifically identify the plans" upon which its fiduciary status was premised, the court denied certification of the standing issue: "Once the claim is allowed to proceed to discovery…the specific language of the plans at issue" would conclusively determine "standing to bring the claims." *Id.* at * 3; *see also Dept. of Economic Dev. v. Arthur Anderson & Co.*, 683 F.Supp. 1463, 1487 (S.D.N.Y. 1988) (denying certification where determination of question alleged to be controlling depended on sufficiency of facts; "discovery may turn up new facts relevant to the issue of subject matter jurisdiction, and these facts may in turn influence this Court's interpretation of facts already proffered by the parties.") Similarly here, discovery will bear out with precision the nature and degree of injuries alleged by Plaintiffs, provide this Court with a precise accounting of the mechanisms by which Federal Defendants' actions and omissions have caused those injuries, and supply methodical calculations of the degree to which these injuries may be redressed by effective action.

A crucial principle underlying the impropriety of interlocutory appeals of standing determinations at the motion to dismiss stage is the requirement that an order appealable under Section 1292(b) must "raise issues that are ripe for appellate review. The most common ground for finding a lack of ripeness is that the case has not yet developed far enough to permit considered appellate disposition of the question presented." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012). Federal Defendants attempt to bend this language beyond its breaking point, arguing that the principle is limited to interlocutory appeals for "preliminary procedural matters," and asserting that "ripeness" in this context "does not denote a special form of ripeness applicable only in the appellate context; rather it refers to ripeness in the sense that an issue must be ripe for judicial determination generally…." Fed. Reply, ECF 139 at 11. Yet the quoted language, which distills the ripeness principle from numerous cases, clearly states that a controlling question of law must "raise issues that are ripe for *appellate* review," and the "most common ground for finding a lack of ripeness is that the case has not yet developed far enough to permit considered

appellate disposition of the question presented." 6 WRIGHT & MILLER § 3930 (3d. ed. 2012) (emphasis added).

As the entire focus of the Section 1292(b) inquiry is whether a question is appropriate for early *appellate* consideration, it would hardly make sense if the ripeness inquiry turned on any other principle than an issue's readiness for *appellate* review. Further, cases applying this principle, including the sole case upon which Federal Defendants rely, establish that the ripeness consideration is not limited to "preliminary procedural matters." *See* Fed. Reply, ECF 139 at 11 (citing *Oneida Indian Nation of N.Y. State v. Oneida Cty.*, 622 F.2d 624 (2d. Cir. 1980) (order denying summary judgment not ripe for appellate consideration under Section 1292(b))); *see also, e.g., Paschal v. Kansas City Star Co.*, 605 F.2d at 407 (order, issued after presentation of evidence, on what may have been "determinative" issue in suit, was not ripe for appellate consideration because "the record must be more fully developed so that we can make a precise decision upon a precise record not an abstract answer to an abstract question.") Absent development of Plaintiffs' standing allegations through discovery, certification of the standing issue here would likewise present the appellate court with an abstract question, preventing considered appellate review of the important issues raised in the FAC.

The question of whether Plaintiffs have adequately pleaded standing is inappropriate for interlocutory review for the further reason that "[r]ulings on the sufficiency of a pleading generally are unsuitable for interlocutory appeal" because of the "ready availability of amendment." 16 WRIGHT & MILLER § 3930, n. 21 (3d. ed. 2012). Federal Defendants' attempt to disarm this principle and its clear applicability to this case by noting that the same paragraph of the quoted text also states: "Rulings on the sufficiency of pleading a claim lying within a recognized body of law commonly are found unsuitable for interlocutory appeal because of the ready availability of amendment," Fed. Reply at 7, ECF 139 (quoting 16 WRIGHT & MILLER § 3930, n. 21 (3d. ed. 2012)), and that the "failure to plead facts sufficient to satisfy a recognized legal standard is ordinarily unsuitable for interlocutory review." Fed. Reply at 7, ECF 139. Federal Defendants fail to offer any convincing explanation as to why this is a distinction

with a difference. Nor can Federal Defendants seriously argue that the Article III standing analysis does not constitute a "recognized body of law" or a "recognized legal standard."

Acknowledging that "the ready availability of amendment" renders interlocutory appeal inappropriate in cases involving a "plaintiff's failure to allege facts," Federal Defendants incongruously maintain the inapplicability of this principle to the present dispute. *Id.* This argument cannot stand under its own weight. By definition, Federal Defendants' challenge to Plaintiffs' standing allegations consists of whether Plaintiffs set forth facts sufficient to allege standing. *See* Motion to Certify, ECF 120 at 6 ("whether Plaintiffs adequately alleged standing"); *Id.* at 8 ("adequately alleged Article III standing"); Fed. Reply at 10 ("whether Plaintiffs have adequately pleaded standing"). Were an appellate court to find that Plaintiffs' alleged facts do not suffice to establish standing, Plaintiffs could easily remedy this deficiency by amending the FAC – adding additional specificity as to Plaintiffs' injuries, Federal Defendants' actions, and their connection through the underlying science of climate change. Furthermore, in demonstration of the "ready availability of amendment" and its effect on the propriety of interlocutory appeals regarding standing, courts within the Ninth Circuit permit plaintiffs to amend pleadings rather than certify standing determinations for interlocutory appeal. *See Allen v. Similasan Corporation*, No. 12cv0376-BTM-WMC, 2013 WL 12061830 (S.D. Cal. 2013); *Perry v. Columbia Recovery Group, LLC*, No. 16-0191JLR, 2017 WL 714205 (W.D. Wash. 2017).

In sum, the question of Plaintiffs' standing at this stage does not present a controlling question of law, but rather a mixed question of law and fact for which development of a record beyond the pleadings is necessary to ensure meaningful appellate review. While Plaintiffs maintain that the allegations in the FAC are sufficient to establish standing, certification of this issue would be premature because the appellate court would lack a record upon which to make a fully informed decision. Absent development of such a record, the Court of Appeals will not be aided by certification of this "hollow hypothetical question." F&Rs at 10, ECF 146.[4] That

[4] Although Federal Defendants contend that Magistrate Judge Coffin's findings "completely ignore the causation and redressability factors," Objections, ECF 149 at 5, a fair reading of the

Federal Defendants seek review of "[w]hether standing to sue is *ever possible* in a case like this one," in which the underlying factual contours of the case have not even been established, showcases the impropriety and prematurity of appellate consideration, which would be entirely devoid of sufficient factual context. Objections, ECF 149 at 5.

C. Plaintiffs' Due Process Claims Do Not Present Controlling Questions of Law

1. Plaintiff's Due Process Claims Require Additional Factual Development Prior to Appellate Review

Plaintiffs' Due Process claims do not present controlling questions of law. Defendants mistakenly contend that Magistrate Judge Coffin "assum[ed] the answer to the key legal issue presented by [their] motion" – whether Plaintiffs may proceed on their substantive constitutional claims – and thereby "avoid[d] that issue altogether." Objections, ECF 149 at 5. However, Magistrate Judge Coffin's analysis on this issue unequivocally demonstrates that he conducted the requisite analysis, concluding that Plaintiffs' Due Process claims present "mixed question[s] of law and fact that mandate[] an opportunity to develop the record." F&Rs, ECF 146 at 11. Because 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.*, 2010 WL 952273 at *3, the plain language of Magistrate Judge Coffin's conclusion demonstrates his engagement in the proper inquiry.

Rather than presuming that Plaintiffs pleaded cognizable Due Process claims for purposes of the Section 1292(b) analysis, as Federal Defendants contend, *See* Objections, ECF 149 at 7, Magistrate Judge Coffin concluded that "any appellate review of the Order of the District Court allowing plaintiffs to proceed on their…due process constitutional claims will only be aided by a full development of the record regarding the contours of those asserted rights and

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F&Rs shows that the finding of the absence of a controlling question of law extends to the concept of standing as a whole. *See* F&Rs, ECF 146 at 14-15. Moreover, Plaintiffs previously demonstrated that none of the Article III standing components present a controlling question of law. *See* Opp. to Motion, ECF 133 at 5-6.

the extent of any harm being posed by the defendants' actions/inactions regarding human-induced global warming." F&Rs, ECF 146 at 9. This conclusion is wholly consistent with the principle that certification for interlocutory appeal is not appropriate where the "case has not yet developed far enough to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012); *See also Paschal,* 605 F.2d 403; *Molybdenum Corp. of America v. Kasey*, 279 F.2d 216 (9th Cir. 1960) (vacating initial grant of certification for appeal as improvident where record was inadequate to resolve the questions presented for review of denial of motion to dismiss).

Factual development will assuredly benefit the Court of Appeals in ensuring its ability to perform a reasoned and considered review of the November 10 Order's recognition of the right to a "climate system capable of sustaining life." November 10 Order, ECF 83 at 32. Although this Court may have been the first to acknowledge this specific and carefully-cabined right, the right is certainly not, as Federal Defendants claim, "new." ECF 120-1 at 7. Such a right finds indisputable and independent bases in law. *See* Opp. to Motion, ECF 133 at 19 – 20. If there is anything novel underlying this Court's conclusion as to the existence of this right, it is the unprecedented *factual* circumstances and developments of the current climate crisis which necessitate its recognition. Accordingly, review by the Court of Appeals of the bases for the recognition of this right at this moment in history is necessarily informed by the factual context justifying its recognition. Likewise, the soundness of Plaintiffs' "state-created danger" exception claims are clearly established. *Id.* at 21. Even so, appellate review of applicability of the "state-created danger" exception to the circumstances of this case requires exposition of the precise factual contours underlying this litigation.[5] As the Supreme Court recently pronounced, "when

[5] Federal Defendants take issue with Magistrate Judge Coffin's reliance on *Bennet v. Philadelphia*, No. Civ. A 03-5685, 2004 WL 187408 (E.D. Pa. Jan. 26, 2004) for the proposition that additional factual development is necessary prior to appellate review of Plaintiffs' "state-created danger" claim. Objections, ECF 149 at 12, n. 4. Federal Defendants offer mere speculation that the *Bennet* court "evidently assumed that the legal basis for the claim was valid and that Defendants were attacking the question of liability." *Id.* However, briefing by the *Bennet* defendants on this issue makes clear that the question for which certification was sought,

new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). Absent record development on the sampling of factual questions and issues identified by the Magistrate, among others, an appellate court would lack the necessary "new insight" by which to judge whether Plaintiff's liberty claims "must be addressed." *Id.*, *see* F&Rs, ECF 146 at 10-11, 15.

2. Additional Claims Would Remain to Be Tried In Any Event

Further, neither the question of whether there exists a right to "climate system capable of sustaining human life" nor the question of whether the "state-created danger" exception applies here presents a controlling question of law for purposes of Section 1292(b). A question is only "controlling" if "resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd* 459 U.S. 1190 (1983). Although resolution of an issue need not terminate an action in order to be "controlling," a mere effect on the duration of litigation without effect on its final outcome will not suffice. *Id.* at 1027 (interpreting a question as "controlling" by the effect of its resolution on the time, effort, or expense of conducting a suit would read the "controlling question of law" requirement out of Section 1292(b)).

No controlling question of law is present 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

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and "the determinative issue of liability," was "whether Plaintiffs stated an actionable claim under *DeShaney*…." Memo. of Law ISO Def.'s Mot. for Recons. or 1292(b) Certification, 2, *Bennet*, 2004 WL 187408 (attached hereto as Exhibit 1); Reply to Pl.'s Answer to Def.'s Mot. For Recons. or 1292(b) Certification, 4, *Bennet*, 2004 WL 187408 (attached hereto as Exhibit 2).

F.Supp. 438, 440 (D. Me. 1994) (same issues would remain no matter outcome of appeal, since other legal theories were also advanced); *Cf. 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)[6]; *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 November 10 Order's conclusions regarding Plaintiffs' Due Process rights were reversed on appeal, Plaintiffs' remaining constitutional claims dictate that this litigation would be conducted in the same manner. Hence, though those conclusions are law of the case and would control for purposes of summary and final judgment as to those claims to which they pertain, they are not "controlling questions of law" for purposes of interlocutory appeal. The "litigation would be conducted in the same way no matter" how these issues might be decided on interlocutory appeal.

In its November 10 Order, this Court stated: "Plaintiff's due process claims encompass asserted equal protection violations and violations of unenumerated rights secured by the Ninth Amendment," and referred to these claims, "[f]or simplicity's sake…collectively as 'due process' claims." November 10 Order, ECF 83 at n. 6. The November 10 Order addressed Plaintiffs' claims arising under the right to a "climate system capable of sustaining human life," or, as this Court also characterized it, a "stable climate system," *Id.* at 32; *see* FAC, ECF 7 at ¶¶ 279, 281, 282 ("stable climate system"), 283, 285, 286 ("destabilized climate system"), 288 ("climate

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[6] Federal Defendants' attempt to distinguish the cases here cited only reinforces their applicability in the present dispute. *See* Fed. Reply, ECF 139 at 3-4 (quoting *United States Rubber Co.*, 359 F.2d at 785 ("no disposition [the circuit court] might make of [the] appeal on its merits could materially affect the course of the litigation in the district court."), *Ashmore*, 855 F.Supp. 438 ("no factual issue or litigant would be removed from the case."). Further, contrary to Federal Defendants' contention that *McNulty* "does not appear to involve any interlocutory appeal issue at all," that case contained substantial discussion of the dispute's propriety for interlocutory appeal, denying certification because "trial of the defamation portion of this action will involve substantially the same evidence" as that on the issues for which certification was sought. 474 F.Supp. at 1121.

instability"), 289 ("dangerous climate system"), 304 ("stable climate system."). This Court also addressed Plaintiffs' claim that Federal Defendants have discriminated against them with respect to that fundamental right. November 10 Order, ECF 83 at n. 7; *see* FAC, ECF 7 at ¶ 292 ("The principles of the Equal Protection Clause…prohibit the Federal Government's…detabliliz[ation of] our nation's climate system…."). Finally, this Court also considered Plaintiffs' claims under the "state-created danger exception." November 10 Order, FAC 83 at 33-36; FAC, ECF 7 at 285.

However, contrary to Federal Defendants' contentions, this Court did not treat all of Plaintiffs' constitutional claims as "a single claim." Fed. Reply, ECF 139 at 9. The FAC unmistakably sets forth three constitutional counts, each arising under separate constitutional provisions, and several of which present multiple claims. FAC, ECF 7 at ¶¶ 277-306; *Wilson v. City of Des Moines*, 338 F.Supp. 2d 1008, n. 2 (S.D. Iowa 2004) ("While Wilson's complaint only avers two counts, each of these counts alleges multiple claims.").

Even if the Court of Appeals were to reverse this Court's conclusions with respect to Plaintiffs' constitutional claims addressed in the November 10 Order, Plaintiffs' additional constitutional claims would remain.[7] This Court stated that it has not yet addressed "whether youth or future generations are suspect classifications for equal protection purposes." November 10 Order, ECF 83 at n. 7. The FAC alleges that youth and future generations "should be treated as protected classes," whether as a suspect or quasi-suspect classification. FAC, ECF 7 at ¶¶ 294, 297. As Federal Defendants themselves acknowledge, "the Supreme Court has not definitively decided the question of whether youth could be considered a suspect class…." Fed. Reply, ECF 139 at 8. Supreme Court precedent indicates that youth may be at least a quasi-suspect classification. *See Plyler v. Doe*, 457 U.S. 202 (1982) (claims of children of undocumented immigrants denied education reviewed under intermediate scrutiny). Further, "[m]inors cannot vote and thus might be considered politically powerless to an extreme degree." *City of Cleburne,*

[7] Federal Defendants and Intervenor Defendants' motions to dismiss were denied in their entirety. November 10 order at 3, 54, *see also* Order and Findings & Recommendation, ECF 68 at 4, 24.

Tex. v. Cleburne Living Center, 473 U.S. 432, n. 24 (1985) (Marshall J., concurring in part and dissenting in part). Moreover, the circumstances of the current climate crisis, and the history of Federal Defendants' actions leading to it, provide abundant evidence to refute the principal argument against recognition of youth as a suspect class – that "minors…tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process." *Id.*

The cases relied upon by Federal Defendants are unconvincing. *See* Fed. Reply, ECF 139 at 7-8. *Mass. v. Bd. of Retirement v. Murgia* addressed claims of discrimination against the elderly, not youth, holding that *old age* does not constitute a suspect class. *Mass. v. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). *City of Cleburne* did not even involve a claim of age-based discrimination, and as noted above, Justice Marshall's opinion in that case provides support for recognition of youth as a protected class. 473 U.S. 432. Although the Ninth Circuit stated in *Nunez ex. rel. Nunez v. City of San Diego* that "age is not a suspect classification" within the context of a challenge to a city ordinance imposing a curfew on minors, *Nunez ex. rel. Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997), the issue of whether youth is a protected class was not before the court in that case. *See* Appellant's Opening Brief, *Nunez ex rel. Nunez*, No. 96-55290, WL 33419465, at *53-55 (9th Cir. June 10, 1996) (arguing only that challenged ordinance affected fundamental rights). Further, the sole case the court cited in support involved discrimination against the elderly and did not even discuss whether youth is a suspect classification. *Nunez ex. rel. Nunez,* 114 F.3d at 944 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (mandatory retirement case)). Similarly, the Supreme Court in *Gregory*, another mandatory retirement case, supported the holding that "age is not a suspect class" by citing to *Murgia*, *Cleburne*, and *Vance v. Bradley*, yet another mandatory retirement case. *Murgia*, *Cleburne*, and *Vance v. Bradley*, 501 U.S. at 470 (citing, e.g., *Vance v. Bradley,* 440 U.S. 93 (1979)). None of these cases addressed whether youth are a protected class.

Indeed, there are strong arguments in favor of recognizing youth and future generations as a suspect or quasi-suspect classification under each of the considerations that determine such

status. *See* Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 Am. U. L. Rev. 447, 474-481 (Dec. 2002). In any event, this Court has not yet addressed Plaintiffs' claims of discrimination against a protected class, and accordingly, no disposition of the November 10 Order on interlocutory appeal could affect those claims.

Even had this Court addressed and rejected Plaintiffs' protected class arguments, which it did not, Plaintiffs' equal protection discrimination claim would remain in any case. Contrary to Federal Defendants' contention that Plaintiffs do not challenge the rational basis of the policies and actions they challenge, Objections, ECF 149 at 11, counsel for Plaintiffs explicitly stated "if defendants' answer asserts and admits that there is great harm that will occur, then…the rational basis test can be met [by Plaintiffs] in this case." March 9, 2016 Transcript, Dkt. 67 at 69: 17-25. As Magistrate Judge Coffin acknowledged, Federal Defendants made a number of significant admissions regarding the great harm that will occur, including "that human-induced climate change threatens the public health and welfare of current and future generations and increases the risks of loss of life," thereby "enhanc[ing]" Plaintiffs' claims. F&Rs, ECF 146 at 2-4, 10, 14. Likewise, Plaintiffs clearly asserted that if they are only entitled to "intermediate scrutiny or rational basis review of their constitutional claims, the proper course is to decide the claims on the merits, not to dismiss for failure to state a claim…" Mem. Of Pl.'s In Opp. to Federal Def.'s Mot. To Dismiss, ECF 41 at 19; *see also* Pl.'s Mem. In Opp. to Def. Intervenors' Mot. To Dismiss, ECF 56 at n. 16 ("Failure to establish a suspect class or intentional discrimination does not mean the claim fails….at minimum, the Court would apply rational basis review.") Although this Court indicated that "defendants' affirmative actions would survive rational basis review," it premised this statement, at least partially, on its belief that satisfaction of the rational basis test "appears undisputed by plaintiffs." November 10 Order, ECF 83 at 30. However, based on the evidence Plaintiffs have and will obtain through discovery, Plaintiffs do dispute that Federal Defendants' actions can survive scrutiny under rational basis review, and at no time in these proceedings have Plaintiffs conceded otherwise. Therefore, Plaintiffs request this Court's clarification that Plaintiffs' constitutional claims as to the rational basis of Federal Defendants'

challenged actions remain viable even if an appellate court disagreed with the application of strict scrutiny in this case.

Similarly, notwithstanding any potential appellate disposition of the November 10 Order, Plaintiffs' claims arising under enumerated and previously recognized unenumerated Due Process rights would remain. This Court addressed those Due Process claims which "encompass asserted…violations of unenumerated rights secured by the Ninth Amendment," November 10 order, ECF 83 at n. 6, but did not specify which of those unenumerated rights that Plaintiffs allege as having been infringed were included within the scope this Court's opinion. The FAC makes clear that Plaintiffs bring, among other constitutional claims, Due Process claims arising out of their unenumerated rights to a "stable climate system," "health and welfare," "dignity," the "capacity to provide for their basic human needs," the ability to "safely raise families," to "practice their religious and spiritual beliefs," to "maintain their bodily integrity," to "lead lives with access to clean air, water, shelter, and food," and other unenumerated rights secured by the Fifth and Ninth Amendments. FAC, ECF 7 at ¶¶ 279-83, 285, 302-06. Further, the November 10 Order unmistakably indicated that it addressed only those of Plaintiffs' Due Process claims encompassing *unenumerated rights*, November 10 order, ECF 83 at n. 6, but it did not explicitly address Plaintiffs' separate and distinct Due Process claims arising under *enumerated* Due Process rights to life, liberty, and property. *See* FAC, ECF 7 at 278-280, 282, 284, 285, 289.

Plaintiffs further note that, though related, their claims under the "state-created danger" and "special relationship" exceptions to *De Shaney v. Winnebago Cty. Dep't of Soc. Servs*, form separate and distinct bases of liability from their claims arising solely from Federal Defendants' affirmative actions. *De Shaney v. Winnebago Cty. Dep't of Soc. Servs*, 489 U.S. 189 (1989). Though Federal Defendants' affirmative actions alone constitute an infringement of Plaintiffs' fundamental rights, under the "state-created danger" exception, they have placed Plaintiffs in a position of danger with "deliberate indifference to their safety" such that Federal Defendants' continuing failure to address the climate crisis constitutes another basis for a finding of unconstitutional conduct. *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997).

While this Court addressed the applicability of the "state created danger" exception to Plaintiffs' claims, the November 10 Order did not discuss the claim under the "special relationship exception," which likewise, constitutes an additional basis for liability. *See* FAC, ECF 7 at ¶ 286.

As demonstrated, even if the Ninth Circuit were to reverse this Court's conclusions as to the fundamental right to a "climate system capable of sustaining human life" and the applicability of the "state created danger" exception, a number of Plaintiffs' constitutional claims would remain. Review at this early stage would violate the strong policy against piecemeal review of cases because this Court has not yet ruled on Plaintiffs' remaining constitutional claims. *Movsesian v. Victoria Verischerung Ag*, 578 F.3d 1052, 1056 (9th Cir. 2009) (in deciding issues on appeal under Section 1292(b), the Ninth Circuit "will not address issues outside the order appealed from, or issues not yet considered by the district court") (citation omitted); *Miller v. Bolger*, 802 F.2d 660, 666 (3rd Cir. 1986) ("We have refused to reach an issue posed by an order appealed under section 1292(b) where that issue was not addressed by the district court") (citation omitted); *Coopers & Lybrand*, 437 U.S. at 471 (citing the "debilitating effect on judicial administration caused by piecemeal" appeal); *see also Molybdenum Corp. of America*, 279 F.2d 216. Those claims require discovery, expert testimony, and presentation of issues and information significantly overlapping those presented by Plaintiffs' claims of infringement to their right to a climate system capable of sustaining human life and under the "state created danger exception." Therefore, this litigation will proceed in much the same way no matter how the Ninth Circuit might address the more limited questions for which Federal Defendants seek certification, and the resolution of those issues is therefore not controlling under Section 1292(b). *See, e.g., U.S. Rubber Co.*, 359 F.2d at 785; *White v. Nix*, 43 F.3d 374, 378-89 (9th Cir. 1994).

D. Plaintiffs' Public Trust Claim Does Not Present a Controlling Question of Law

For similar reasons, whether this Court recognizes a federal Public Trust Doctrine that cannot be displaced is not a controlling question of law for purposes of Section 1292(b). Even

were an appellate court to reverse with respect to this issue, as discussed above, each of Plaintiffs' remaining constitutional claims, while presenting different standards, would require overlapping factual development through discovery, argument, and presentation of evidence similar to that involved in Plaintiffs' public trust claim. Here too, appellate review of this Court's holdings would be premature and implicate piecemeal consideration of an undeveloped record contrary to the letter and spirit of Section 1292(b). The November 10 Order did not specifically address whether the atmosphere is a public trust resource. Absent detailed consideration by the district court and development of a sufficient record, appellate deliberations on that issue would not be proper. *Movsesian,* 578 F.3d at 1056; *Miller,* 802 F.2d at 666. Additionally, the November 10 Order's conclusions as to the Public Trust Doctrine in the territorial seas, its connection to the atmosphere, and the results of the displacement analysis are determinations for which a fully developed factual record should be provided in order to facilitate non-piecemeal appellate review.[8] As Magistrate Judge Coffin rightly recognized "any appellate review of the Order of the District Court allowing plaintiffs to proceed on their public trust…claims will only be aided by a full development of the record regarding the contours of those asserted rights and the extent of harm being posed by the defendants' actions/inactions regarding human-induced global warming." F&Rs, ECF 146 at 9.

Each issue Federal Defendants claim to be controlling requires further development of the record to ensure considered appellate disposition of the questions presented. Additionally, even if these issues were reversed on appeal, this litigation would be conducted in substantially the same manner. Rather than contributing to the ultimate termination of this litigation, appellate

[8] For example, record development as to the hydrologic connection between atmospheric greenhouse gas pollution and acidification of the territorial seas will provide an appellate court with important information for review of Plaintiffs' public trust claims. Additionally, even were Plaintiffs' constitutionally-rooted public trust claims subject to displacement – which they are not – the effect of greenhouse gas pollution on the territorial seas necessarily informs the consideration of whether the Clean Air Act and other statutes "speak directly" to a question at issue here: the impairment of public trust aquatic resources. *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 424 (2010).

review at this stage would only delay and protract proceedings through piecemeal consideration of issues in this urgent case. Not one of the issues presented by Federal Defendants constitutes a controlling question of law under Section 1292(b) and Plaintiffs request clarification from this Court as to that issue.

II. There Are No Substantial Grounds for Differences of Opinion

As Plaintiffs explain in detail in their prior briefing, no substantial grounds for differences of opinion exist with respect to any of the determinations in the November 10 Order for which Federal Defendants seek certification for interlocutory appeal. Opp. to Motion, ECF 133 at 9- 25. Plaintiffs request this Court's recognition of this point.

A. There Are No Substantial Grounds for Differences of Opinion on Plaintiffs' Standing

Federal Defendants disagree with the conclusions of the November 10 Order and the Findings and Recommendations as to Plaintiffs' standing. However, Section 1292(b) is clear: the grounds for disagreement must be "*substantial*." 28 U.S.C. § 1292(b) (emphasis added). "[A] party's strong disagreement with the Court's ruling is not sufficient." *Couch*, 611 F.3d at 633.

1. Injury In Fact

Federal Defendants mischaracterize both Plaintiffs' standing allegations and the law governing their adequacy. They ask this Court to certify the question whether "injury in fact can be established by alleging a generalized harm to the world-wide environment" and misconstrue Plaintiffs' asserted grievances as "essentially that for decades the executive and legislative branches have governed imprudently on a subject affecting every human being on the planet." Objections, ECF 149 at 5. Contrary to their contentions, Plaintiffs' standing allegations are not premised on such world-wide harm, nor on a bare assertion of an interest in prudent governance, but rather on the unique and highly personal impacts befalling each of the 21 Youth Plaintiffs and future generations. FAC, ECF 7 at ¶¶ 16-97. As Magistrate Judge Coffin summarized:

> Plaintiffs have alleged, and federal defendants have since admitted, that human induced climate change is harming the environment to the point where it will

> relatively soon become increasingly less habitable causing an array of severe deleterious effects *to them* which includes an increase in allergies, asthma, cancer, cardiovascular disease, stroke, heat related morbidity and mortality, food-borne disease, injuries, toxic exposures, mental health and stress disorders, and neurological diseases and disorders. These are concrete, particularized, actual or imminent injuries *to the plaintiffs* that are not minimalized by the fact that vast numbers of the populace are exposed to the same injuries. F&Rs, ECF 146 (emphasis added).

Further, this Court's recognition of the particularity of the injuries alleged by and befalling Plaintiffs is entirely consistent with the law governing injury in fact and generalized grievances. November 10 Order, ECF 83 at 19-20.

Federal Defendants repeatedly misstate the law governing the generalized grievance rule under the standing analysis. Magistrate Judge Coffin's analysis soundly summarized standing with respect to widely-shared injuries, stating: "It would surely be an irrational limitation on standing which allowed isolated incidents of deprivation of constitutional rights to be actionable, but not those reaching pandemic proportions." F&Rs, ECF 146 at 14. In response, Federal Defendants repeat their refrain that "a 'pandemic' complaint conflicts with Supreme Court standing jurisprudence." Objections, ECF 149 at 6 (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 573-74 (1992)). Here again, Federal Defendants fail to see the forest for the trees, unable or unwilling to comprehend the unique and highly personalized manner in which climate change impacts each of these Youth Plaintiffs. Moreover, contrary to Federal Defendants' arguments, Supreme Court precedent establishes that a generalized grievance insufficient to establish injury is one claiming harm only to an abstract interest such as the "proper application of the Constitution and laws…." *Lujan*, at 504 U.S. at 573. However, if an alleged harm is personally and concretely manifested in an individual, it does not matter how many people share in its effect. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). These Youth Plaintiffs more than adequately allege concrete injury-in-fact by pointing to highly personalized and unique impacts

to their health, safety, property, recreational, spiritual, and other interests. *See* November 10 Order at 19-20 (detailing a selection of alleged impacts).

The cases Federal Defendants cite to support their misunderstanding of the generalized grievance rule are easily distinguished from Plaintiffs' standing allegations. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (generalized grievance rule applies where "the harm at issue is not only widely shared, but is of an abstract and indefinite nature – for example, harm to the common concern for obedience to the law.'") (citations omitted); *United States v. Richardson*, 418 U.S. 166, 177 (1974) (Plaintiff not "in danger of suffering any particular concrete injury…."). Further, Plaintiffs have already demonstrated that neither *Massachusetts v. EPA*, 549 U.S. 497 (2007) nor *Washington Envt'l Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013) preclude Plaintiffs' standing, but rather support a finding of standing based on the allegations in the FAC. Opp. to Motion, ECF 133 at 12-15. Additionally, in *Massachusetts* and *Bellon*, the emissions for which the applicable defendants were responsible were significantly lesser than those at issue in the instant case. Finally, since those cases, significant developments have occurred with respect to climate science and the increasing urgency of the climate crisis.

2. Causation

Likewise Federal Defendants' arguments as to the causation prong of standing are unfounded. *See* Opp. to Motion, ECF 133 at 13-17. With respect to the causation prong, Federal Defendants contend that "claims seeking injunctive relief directed at systemwide practices" cannot fulfill the Article III standing analysis. Fed. Reply, ECF 139 at 14. However, *Allen v. Wright*, the primary case upon which Federal Defendants rely for this proposition, establishes the contrary: where there is "actual present or immediately threatened injury resulting from unlawful government action," systemwide relief is appropriate. *Allen v. Wright*, 468 U.S. 737, 758 (1984). Nor do any of the other cases cited by Federal Defendants undermine Plaintiffs' satisfaction of the causation prong of standing. *See O'Shea v. Littleton*, 414 U.S. 488 (1974) (lack of standing where "none of the named plaintiffs is identified as having suffered any injury…."); *Rizzo v.*

Goode, 423 U.S. 362 (1976) (injunction was not warranted where "responsible authorities played no affirmative part in depriving any members…of any constitutional rights."); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (single isolated instance of police brutality did not establish real and immediate threat of future occurrence to plaintiff so as to justify injunctive relief). Indeed, systemwide relief is appropriate where, as here, Plaintiffs' injuries are causally related to Federal Defendants' systemwide actions and inadequacies. *See. e.g. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S.1, 15 (1971) (school desegregation) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Brown v. Plata*, 363 U.S. 493, 526 (2011) (statewide prison reform) (federal courts retain broad authority "to fashion practical remedies when faced with complex and intractable constitutional violations.").

3. Redressability

Similarly, Federal Defendants fail to establish substantial grounds for disagreement as to whether Plaintiffs' claims are redressable and Plaintiffs have addressed their arguments on this issue in detail. *See* Opp. to Motion, ECF 133 at 17-19. Further, while, Plaintiffs have adequately alleged existing statutory and regulatory authority under which Federal Defendants can provide the relief requested, *see* FAC, ECF 7 at ¶¶ 98-130, 180, 183, 265, 266, Federal Defendants fail to cite any authority, statutory or otherwise, limiting their ability to provide such relief. Indeed, Federal Defendants' argument that "the agency Defendants are creatures of statute and have only the legal authority that their organic statutes provide" establishes the redressability of Plaintiffs' claims, as demonstrated by the FAC. *Id.;* Fed. Reply, ECF 15. Nor, had Federal Defendants provided any authority compelling them to engage in activities which infringe the constitutional rights of Plaintiffs, could they offer any credible argument as to how the application of such authority would be constitutional.

Federal Defendants contend that Plaintiffs' claims lack redressability because there has been no waiver of sovereign immunity, Objections, ECF 149 at 6-7, raising an argument ineligible for interlocutory consideration as it was neither argued by any party nor addressed by the November 10 Order. *Movsesian*, 578 F.3d at 1056 (in deciding issues on appeal under Section 1292(b), the Ninth Circuit "will not address issues outside the order appealed from, or issues not yet considered by the district court") (citation omitted); *Ryes v. BCS Ins. Co.*, 379 F.App'x 412, 415 (5th Cir. 2010) (declining to address an argument on interlocutory review that was not raised before the trial court).

Furthermore, sovereign immunity is inapplicable here for *at least* two reasons. First, sovereign immunity does not apply in a suit against a sovereign trustee by the citizen beneficiaries because the judicial branch remains the ultimate guardian of the trust. *See Ctr. for Biological Diversity v. FPL Grp.*, 83 Cal.Rptr.3d 588, 602 (Cal. Ct. App. 2008). Second, Section 702 of the APA is a general waiver of sovereign immunity for suits seeking nonmonetary relief against the United States and its agencies, even if the claim neither arises under the APA nor seeks review limited to an administrative record. *Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989).

Likewise, Federal Defendants' argument that "no relief could be obtained against the President," Objections, ECF 149 at 7, is not eligible for interlocutory appeal as it was not previously addressed by any party or the November 10 Order. Further, this line of reasoning is substantially similar to one flatly rejected by the Ninth Circuit as "contrary to the fundamental structure of our constitutional democracy" in *Washington v. Trump*, in which the current president argued that he had "unreviewable authority" with respect to immigration policy "even if those actions potentially contravene constitutional rights and protections." *Washington v.*

Trump, 847 F.3d 1151, 1161 (9th Cir. Feb. 9, 2017). The argument here is similarly an attempt at "aggrandizement of one of the three co-equal branches of the Government at the expense of another," a position the separation of powers doctrine is designed to prevent. *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (citations omitted). Contrary to Federal Defendants' alarming argument, the judiciary may even "severely burden the Executive Branch by reviewing the legality of the President's official conduct," *Id.* at 682, 705 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), and "direct appropriate process to the President himself." *Id.* (citing *U.S. v. Nixon*, 418 U.S. 683 (1974). "Insofar as a court orders a President…to act or refrain from action, it defines, or determines, or clarifies, the legal scope of an official duty….[I]f the order itself is lawful[], it cannot impede, or obstruct, or interfere with the President's basic task – the lawful exercise of his Executive Authority." *Id.* at 718 (Breyer, J., concurring). In any case, there can be no grounds for disagreement as to any issue not argued at the motion to dismiss stage or addressed in the November 10 Order.

B. There Are No Substantial Grounds for Differences of Opinion as to Plaintiff's Due Process Rights

Federal Defendants likewise fail to establish substantial grounds for disagreement regarding the November 10 Order's conclusions with respect to Plaintiffs' Due Process rights. *See* Opp. to Motion, ECF 133 at 19-21. Federal Defendants assert that Magistrate Judge Coffin assumed "the key legal issue presented by [their] motion on the substantive due process claim," Objections, ECF 149 at 8, but a fair reading of the Findings and Recommendations indicates that Magistrate Judge Coffin correctly concluded that no grounds for substantial disagreement are present as to those claims. Further, contrary to Federal Defendants' contention that Plaintiffs "are unable to point to a single case" holding that pursuit of a general policy "can form the basis" of a Due Process claim, Objections, ECF 149 at 8, Plaintiffs have repeatedly drawn this Court's and

the parties' attention to numerous school desegregation cases in which the Supreme Court found the pursuit of discriminatory policies violative of substantive constitutional protections. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Education*, 347 U.S. 483 (1954).

Federal Defendants dispute that the necessity of a stable climate system to the enjoyment of other constitutional rights justifies its recognition as a fundamental right, arguing that acknowledgement of this right's status as a "baseline condition" is irrelevant to the inquiry at hand. Fed. Reply, ECF 139 at 20. However, the Supreme Court has long championed the importance of recognizing rights, such as the right to a "climate system capable of sustaining human life," which are necessary to preserve other fundamental rights. *See. e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "a fundamental political right, because [it is] preservative of all rights."); *Obergefell*, 135 S.Ct. at 2602 (marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress.") (citation omitted)). Federal Defendants further contend that the right to a stable climate "is an interest that could be advanced by any person in the Nation, or indeed on the planet," and is, therefore, not a fundamental right. Fed. Reply, ECF 139 at 20. This argument concedes the point, demonstrating a profound misunderstanding of the very concept of fundamental rights, which by their very nature are those in which *everyone* may claim an interest. By Federal Defendants' logic, not even our inherent rights to life, liberty, and property would qualify as fundamental since they "could be advanced by any person in the Nation."

Federal Defendants maintain that "extending the substantive due process theory" of the "state created danger" exception to Plaintiffs' claims presents a question for which there are substantial grounds for disagreement. Objections, ECF 149 at 8. However, the test employed in

"state created danger" cases undoubtedly encompasses Plaintiffs' claims. Plaintiffs need only show that the government's conduct has placed them "in peril in deliberate indifference to their safety." *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997). Nowhere in any of the "state created danger" jurisprudence is there any indication that this test is inapplicable to Plaintiffs' claims. In fact, the body of case law interpreting this exception establishes its applicability to claims involving exposure to environmental conditions. *See, e.g. Pauluk v. Savage*, 836 F.3d 1117, 1125-25 (9th Cir. 2016) (toxic mold); Munger v. City of *Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (freezing weather). Further, *Kennedy v. Ridgefield*, a case Federal Defendants make much of, requires that "the state actor need only have created the particularized risk that plaintiff might suffer such injury." *Kennedy v. Ridgefield*, 439 F.3d 1055, n.2 (9th Cir. 2006). That Federal Defendants have authorized, permitted, and promoted the extraction, transportation, and combustion of fossil fuels for decades with full knowledge that such activities would manifest unique and personalized injuries to individuals is certainly sufficient to establish a "state created danger" exception claim. Federal Defendants have not shown substantial grounds for disagreement as to the viability of Plaintiffs' due process claims.

C. There Are No Substantial Grounds for Differences of Opinion as to Plaintiff's Public Trust Claim

As demonstrated by both Magistrate Judge Coffin's recent, as well as this Court's prior analysis, there are no substantial grounds for disagreement as to the applicability of the Public Trust Doctrine to the federal government. F&Rs, ECF 146 at 11-14; November 10 Order, ECF 83 at 36-51. Plaintiffs have addressed the absence of substantial grounds for differences of opinion as to this issue at length. Opp. to Motion, ECF 133 at 22-25. Federal Defendants object that "[t]he Magistrate does not even mention the recent D.C. Circuit ruling in *Alec L.*, which found, consistent with *PPL Montana*, that the public trust doctrine is a matter of state law…." Objections, ECF 149 at 9 (citing *Alec L. ex. rel. Loorz v. McCarthy*, 561 Fed.App'x 7 (D.C. Cir.

2014) (citing *PPL Mont., LLC v. Montana*, 564 U.S. 576, 604 (2012)). However, this objection misses the mark. The *Alec L.* court relied on a single line of dicta from *PPL Montana* for its holding, 561 Fed.App'x at 8, and Magistrate Judge Coffin clearly recognized that "if the [Public Trust] doctrine were to be extinguished, it assuredly would not be in the form of tangential dicta in the context of a Supreme Court ruling on a matter that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories." F&Rs, ECF 146 at 13-14. Consequently, there was no need for the Magistrate to consider *Alec L.* to conclude that no substantial grounds for differences of opinion exist on this issue.

Federal Defendants further object that "the findings…assert that the federal government must retain some public trust rights over territorial seas, without explaining how that theory…could possibly form the basis for a suit challenging the federal government's policies relating to fossil fuel production, transportation and consumption or the regulation of CO_2." Objections, ECF 149 at 9. As a Washington State court recently explained, "[t]he navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that [greenhouse gas emissions] do not affect navigable waters is nonsensical." *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, slip op. at 8, 2015 WL 7721362 (Wash. Super. Ct. Nov. 19, 2015). Plaintiffs' allegations in the FAC provide ample explanation of the mechanisms by which carbon dioxide emissions substantially impair aquatic resources. *See* FAC, ECF 7 at ¶¶ 16-17, 27, 33, 39, 43, 45, 59, 61, 78, 96, 134, 212, 230-36, 259-60.

Lastly, Federal Defendants object that "the findings fail to address our argument that the Clean Air Act displaces any federal public trust theory of liability based on greenhouse gas emissions…" Objections, ECF 149 at 10. Plaintiffs previously addressed Federal Defendants' arguments on this issue in detail, explaining that as an innate attribute of sovereignty preserved in the Constitution rather than created by it, "public trust claims are inherently different from nuisance and other similar purely common law claims" which may be subject to displacement. Opp. to Motion, ECF 133 at 23-24. The "widespread judicial recognition that the public trust

doctrine is inherent in sovereignty makes statutory displacement of the doctrine beyond legislative authority." Michael C. Blumm and Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 418-421, 421 (Spring 2015). Plaintiffs respectfully request this Court's recognition that there are no substantial grounds for disagreement as to the applicability of the Public Trust Doctrine nor any of the other questions for which Federal Defendants seek interlocutory appeal.

III. Appeal Would Not Materially Advance Ultimate Termination of the Litigation

Magistrate Judge Coffin properly recommended denial of Federal Defendants' Motion. Federal Defendants' delayed effort to appeal the November 10 Order would not materially advance ultimate termination of this litigation, but instead result in further protraction and delay, contrary to the letter and spirit of Section 1292(b). Plaintiffs provided ample authority and reason for this Court to find that interlocutory appeal would not materially advance the ultimate termination of this litigation. *See* Opp. to Motion, ECF 133 at 25 to 29. "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 above, no issue offered by Federal Defendants presents a controlling question of law. Each issue requires presentation of evidence in order to present a court of appeals with a record adequate "to permit considered appellate disposition of the questions presented." 16 WRIGHT & MILLER § 3930 (3d. ed. 2012). Further, with respect to standing, even if this Court's determination of the adequacy of Plaintiffs' allegations were reversed, "[r]ulings on the sufficiency of a pleading generally are unsuitable for interlocutory appeal" because of the "ready availability of amendment." 16 WRIGHT & MILLER § 3930, n. 21 (3d. ed. 2012); *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 for interlocutory appeal as to standing pleadings; discovery might establish standing, making certification inappropriate).

Additionally, even if this Court's determinations as to the Public Trust Doctrine and Plaintiffs' Due Process rights were reversed on interlocutory appeal, Plaintiffs' remaining constitutional claims seek similar relief and involve and require overlapping factual development through discovery, argument, and presentation of evidence at trial. 16 WRIGHT & MILLER § 3930 (3d. ed. 2012) ("Immediate appeal may be found inappropriate…if the character of the trial is not likely to be affected.") (footnote omitted) Accordingly, interlocutory appeal would not "*appreciably* shorten the time, effort, or expense" of conducting this litigation, *In re Cement Antitrust Litigation*, 673 F.2d at 1027 (emphasis added and citation omitted), but rather only delay and protract the proceedings through disfavored piecemeal appeal. Clearly, 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 an 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. This case will not linger for years prior to final resolution by the Court. At that time, Defendants can appeal.

Importantly, Federal Defendants' four-month delay in seeking certification 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).

Notwithstanding the impropriety of interlocutory appeal in this case and Federal Defendants' inflated characterizations of their discovery burdens, Plaintiffs have been and remain receptive to Federal Defendants' concerns regarding discovery. Contrary to Federal Defendants' contention that Plaintiffs are serving "ever more unduly burdensome document production requests on federal agencies," Fed. Reply, ECF 139 at 26, Plaintiffs have expended significant effort narrowing the discovery requests served to date in an effort to accommodate Federal Defendants and secure a prompt resolution of Plaintiffs' claims. As he is overseeing the discovery process, Magistrate Judge Coffin has been well positioned to understand that Federal 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, in response to the meet and confer process with defendants.[9]

CONCLUSION

This Court should exercise its unfettered discretion to adopt Magistrate Judge Coffin's Findings and Recommendations and refuse Federal Defendants' request 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 deny Federal Defendants' Motion in its entirety.

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[9] *See* Plaintiffs' Revised Requests for Production of Documents to Defendant United States Department of State (attached hereto as Exhibit 3); Plaintiffs' Revised Requests for Production of Documents to Defendant United States Department of Defense (attached hereto as Exhibit 4); Plaintiffs' Revised Requests for Production of Documents to Defendant United States Department of Agriculture (attached hereto as Exhibit 5); Plaintiffs' Revised First Request for Production of Documents to Defendant the Executive Office of the President and President Donald Trump (attached hereto as Exhibit 6); Plaintiffs' Revised Joint Request for Production of Documents to Intervenor-Defendants (attached hereto as Exhibit 7); Plaintiffs' Revised Requests for Production of Documents to Intervenor-Defendant American Petroleum Institute (attached hereto as Exhibit 8).

DATED this 19th day of May, 2017, at Eugene, Oregon.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Supporting Memorandum complies with the applicable word-count limitation under LR 7-2(b) because it contains 33 pages and 11,842 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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