FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamel Vergun; HAZEL V., through her Guardian Margo Van Ummerson; SOPHIE K., thourgh her Guardian Dr, James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Plaintiffs-Respondents,

v.

UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her capacity as Director of Council on Environmental

No. 18-80176

D.C. No. 6:15-cv-01517-AA
District of Oregon,
Eugene

ORDER

Quality; SHAUN DONOVAN, in his official capacity as Director of the Office of Management and the Budget; JOHN HOLDREN, Dr., in his official capacity as Director of the Office of Science and Technology Policy; ERNEST MONIZ, Dr., in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, in his official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; PENNY PRITZKER, in her official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; ASHTON CARTER, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; JOHN F. KERRY, in his official capacity as Secretary of State; GINA MCCARTHY, in her official capacity as Administrator of the EPA; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Defendants-Petitioners.

BEFORE: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

The district court certified this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), finding "that each of the factors outlined in § 1292(b) have been met . . . ." Thus, the district court "exercise[d] its discretion" in certifying the case for interlocutory appeal, noting that it did "not make this decision lightly."

An interlocutory appeal under 28 U.S.C. § 1292(b) is authorized when a district court order "'involves a controlling question of law as to which there is substantial ground for difference of opinion' and where 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 687–88 (9th Cir. 2011) (quoting 28 U.S.C. § 1292(b)). The district court properly concluded that the issues presented by this case satisfied the standard set forth in § 1292(b) and properly exercised its discretion in certifying this case for interlocutory appeal.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioners shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d). All pending motions are denied as moot.

Juliana v. United States, No. 18-80176

FRIEDLAND, Circuit Judge, dissenting:

In the process of granting certification, the district court expressed that it does not actually think that the criteria for certification are satisfied. Because I read 28 U.S.C. § 1292(b) to give discretion to district judges to determine whether an immediate appeal will promote judicial efficiency—and to authorize only those interlocutory appeals that the district judge believes will do so—I think the district court's statements prevent us from permitting this appeal.

Appellate review is ordinarily available only after a district court has entered a final judgment. 28 U.S.C. § 1291. As the Supreme Court has explained, this foundational default rule serves "important purposes," including "emphasiz[ing] the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals," and "promoting efficient judicial administration." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (internal quotation marks and citations omitted). And while § 1292(b) allows departures from that rule in limited instances, certification of interlocutory appeals should be granted only in "exceptional circumstances." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

A district court may certify an order for interlocutory appeal under § 1292(b) only if it is "of the opinion" that (1) the "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Supreme Court indicated that it believes this case involves controlling questions as to which there are substantial grounds for difference of opinion. *United States v. U.S. District Court*, 139 S. Ct. 1 (July 30, 2018) (mem) ("The breadth of

respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion."); *see also United States v. U.S. District Court*, — S. Ct. —, 2018 WL 5778259, at *1 (Nov. 2, 2018) (mem) (referencing the Court's July 30th order as "noting that the 'striking' breadth of plaintiffs' claims 'presents substantial grounds for difference of opinion'"). We referenced that assessment in our own order granting Petitioners' motion for a temporary stay to allow time for consideration of pending motions. Order, *United States v. U.S. District Court*, No. 18-73014, Dkt. 3 (9th Cir. Nov. 8, 2018).

Apparently in response, the district court certified its motion to dismiss, judgment on the pleadings, and summary judgment orders for immediate appeal. Reading the certification order as a whole, however, I do not believe that the district court was actually "of the opinion" that "an immediate appeal from [these orders] [would] materially advance the ultimate termination of the litigation"—nor did it meaningfully "so state." 28 U.S.C. § 1292(b). The district court emphasized that "[t]rial courts across the country address complex cases involving similar jurisdictional, evidentiary, and legal questions as those presented here without resorting to certifying for interlocutory appeal," and the court said that it stood "by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018). But the court then suggested that, because of the Supreme Court's statements and our repetition thereof in what the court called an "extraordinary Order," it was "find[ing] that each of the factors outlined in § 1292(b) [were] met." *Id.*

Although the district court's statement that the § 1292(b) factors were met would ordinarily support certification, here it appears that the court felt compelled to make that declaration even though—as the rest of its order suggests—the court did not believe that to be true. This is very concerning, because § 1292(b) reserves for the district court the threshold determination whether its

two factors are met. The statutory scheme makes particular sense with respect to the second factor, because although we and the Supreme Court may be as well-positioned as the district court to consider whether § 1292(b)'s purely legal first requirement is satisfied, the district court—having, among other things, direct experience with the parties, knowledge of the status of discovery, and the ability to sequence issues for trial—is far better positioned to assess how to resolve the litigation most efficiently. Neither we nor the Supreme Court had expressed a view on that second requirement, but it seems the district court interpreted our orders as mandating certification anyway.[1]

Section 1292(b) respects the district court's superior vantage point and its particular, critical role in the judicial process by allowing an interlocutory appeal only when the district court is "of the opinion"

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[1] It is also concerning that allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts. *See* Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, *United States v. U.S. District Court*, No. 17-71692, Dkt. 1 (9th Cir. June 9, 2017) (requesting a stay of district court proceedings and relief from the Ninth Circuit); Petition for a Writ of Mandamus and Emergency Motion for a Stay of Discovery and Trial Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-71928, Dkt. 1 (9th Cir. July 5, 2018) (same); Application for a Stay Pending Disposition by the United States Court of Appeals for the Ninth Circuit of a Petition for a Writ of Mandamus to the United States District Court for the District of Oregon and Any Further Proceedings in This Court and Request for an Administrative Stay, *United States v. U.S. District Court*, No. 18A65 (U.S. July 17, 2018) (requesting a stay from the Supreme Court pending Ninth Circuit review of mandamus petition); Petition for a Writ of Mandamus Requesting a Stay of District Court Proceedings Pending Supreme Court Review, Emergency Motion Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-72776, Dkt. 1 (9th Cir. Oct. 12, 2018) (requesting a stay of district court proceedings from the Ninth Circuit pending Supreme Court review of mandamus petition); Application for a Stay Pending Disposition of a Petition for a Writ of Mandamus to the United States District Court for the District of Oregon and any Further Proceedings in this Court and Request for an Administrative Stay, *In re United States, Applicants*, No. 18A410 (U.S. Oct. 18, 2018) (bypassing the Ninth Circuit and requesting mandamus relief from the Supreme Court); Petition for a Writ of Mandamus and Emergency Motion Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-73014, Dkt. 1 (9th Cir. Nov. 5, 2018) (requesting a stay of district court proceedings and relief from the Ninth Circuit).

that both of the section's requirements are met. 28 U.S.C. § 1292(b). We have accordingly held that we lack jurisdiction when a district court grants certification but simultaneously expresses that it does not think the requirements of § 1292(b) are satisfied. *See Couch v. Telescope, Inc.*, 611 F.3d 629, 632 (9th Cir. 2010). Because that is the situation we face here, I believe we should allow the case to proceed to trial.[2] We could then resolve any novel legal questions if and when they are presented to us after final judgment.

For these reasons, I respectfully dissent.

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[2] In *Couch*, after explaining that interlocutory appeal was precluded by the district court's assessment of the § 1292(b) requirements, we went on to also discuss why we believed the district court was correct in that assessment. 611 F.3d at 633-34. That further discussion, which related to § 1292(b)'s first requirement, seems to have been unnecessary to our holding regarding application of § 1292(b), which turns solely on the *district judge's* opinion whether the two factors are satisfied. But, in any event, I do not think the district court's conclusion here that "this case would be better served by further factual development at trial" than by immediate appeal represents an abuse of discretion. *Juliana*, 2018 WL 6303774, at *3; *cf. United States v. W.R. Grace*, 526 F.3d 499, 509, 516 (9th Cir. 2008) (en banc) (emphasizing that "district courts have inherent power to control their dockets" and that we review pretrial case management and discovery orders for abuse of discretion); *Gen. Signal Corp. v. MCI Telecommc'ns Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995) ("This court reviews issues relating to the management of trial for an abuse of discretion.").