No. 24-

In the

Supreme Court of the United States

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents two questions. The first question is nearly identical to the question this Court is currently considering in *Gutierrez v. Saenz*, No. 23-7809 (oral argument scheduled for Feb. 24, 2025).

(1) When plaintiffs have established their ongoing injuries are traceable to defendants' policies and practices, does Article III require a particularized factual determination of whether a federal agency or official will redress plaintiffs' injuries following a favorable declaratory judgment that resolves the constitutional controversy?

(2) Whether exceptions exist to the three demanding conditions for mandamus articulated in *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367, 380–81 (2004).

PARTIES TO THE PROCEEDINGS

Petitioners (21 youth "Plaintiffs" in the district court) are Kelsey Cascadia Rose Juliana; Xiuhtezcatl Tonatiuh Martinez; Alexander Loznak; Jacob Lebel; Zealand Bell; Avery McRae; Sahara Valentine; Miriam Oommen; Tia Marie Hatton; Isaac Vergun; Miko Vergun; Leo Van Ummersen; Sophie Kivlehan; Jaime Butler; Journey Zephier; Vic Barrett; Nathaniel Baring; Aji Piper; Levi D., through his Guardian Leigh-Ann Draheim; Jayden Foytlin; and Nic Venner.

Respondents (Defendants in the district court—the "Government") are the United States of America; the Office of the President of the United States of America; Brenda Mallory, in her official capacity as Director of Council on Environmental Quality; Shalanda Young, in her official capacity as Director of the Office of Management and Budget; Arati Prabhakar, in her official capacity as Director of the Office of Science and Technology Policy; the United States Department of Energy; Jennifer Granholm, in her official capacity as Secretary of Energy; the United States Department of the Interior; Deb Haaland, in her official capacity as Secretary of Interior; the United States Department of Transportation; Pete Buttigieg, in his official capacity as Secretary of Transportation; the United States Department of Agriculture; Thomas J. Vilsack, in his official capacity as Secretary of Agriculture; the United States Department of Commerce; Gina Raimondo, in her official capacity as Secretary of Commerce; the United States Department of Defense; Lloyd Austin, in his official capacity as Secretary of Defense; the United States Department of State; Antony Blinken, in his official capacity as Secretary of State; the

United States Environmental Protection Agency; and Michael Regan, in his official capacity as Administrator of the EPA.

RELATED PROCEEDINGS

United States District Court for the District of Oregon:[*]

Juliana v. United States, No. 15-cv-01517 (May 1, 2024).

United States Court of Appeals for the Ninth Circuit:

In re United States, No. 24-684 (July 12, 2024).

Juliana v. United States, No. 18-36082 (Feb. 10, 2021).

Juliana v. United States, No. 18-80176 (Dec. 26, 2018).

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* Plaintiffs refer to the District Court docket as "D. Ct. Doc."; the Ninth Circuit docket for the Government's first petition for writ of mandamus as "Ct. App. I Doc.," No. 17-71692; the Ninth Circuit docket for the Government's second petition for writ of mandamus as "Ct. App. II Doc.," No. 18-71928; the Ninth Circuit docket for the Government's third petition for writ of mandamus in that court as "Ct. App. III Doc.," No. 18-72776; the Ninth Circuit docket for the Government's fourth petition for writ of mandamus in that court as "Ct. App. IV Doc.," No. 18-73014; the Ninth Circuit docket for the Government's 2018 Petition for Permission to Appeal as "Ct. App. V Doc.," No. 18-80176; the Ninth Circuit docket for the interlocutory proceedings under 28 U.S.C. § 1292(b) as "Ct. App. VI Doc.," No 18-36082; the Ninth Circuit docket for the Government's fifth petition for writ of mandamus in that court as "Ct. App. VII Doc.," No. 24-684; the Supreme Court docket for the Government's first application for stay as "S. Ct. I," No. 18A65; the Supreme Court docket for the Government's October 2018 petition for mandamus as "S. Ct. II," No. 18-505; and the Supreme Court docket for the Government's October 2018 application for a stay as "S. Ct. III," No. 18A410.

In re United States, No. 18-73014 (Dec. 26, 2018).

In re United States, No. 18-72776 (Nov. 2, 2018).

In re United States, No. 18-71928 (July 20, 2018).

In re United States, No. 17-71692 (Mar. 7, 2018).

Supreme Court of the United States:

In re Juliana, No. 24-298 (Nov. 12, 2024).

In re United States, No. 18-505 (July 29, 2019).

In re United States, No. 18A410 (Nov. 2, 2018).

United States v. U.S. Dist. Ct. for Dist. of Or., No. 18A65 (July 30, 2018).

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OPINIONS BELOW

The district court's 2018 order partly granting and partly denying the Government's motions for judgment on the pleadings and for summary judgment (App. J) is reported at 339 F. Supp. 3d 1062. The district court's order certifying the case for interlocutory appeal (App. H) is reported at 2018 WL 6303774. The Ninth Circuit's 2018 order granting permission to appeal (App. G) is reported at 949 F.3d 1125. The Ninth Circuit's 2020 opinion reversing and remanding for lack of Article III standing (App. F) is reported at 947 F.3d 1159.

The district court's order granting leave to file a second amended complaint (App. E) is reported at 2023 WL 3750334. The district court's order on the Government's motion to dismiss the second amended complaint (App. D) is reported at 2023 WL 9023339. The district court's order on the Government's motion for stay pending resolution of a petition for a writ of mandamus in the Ninth Circuit is reported at 2024 WL 1695064. The Ninth Circuit's May 1, 2024 order issuing a writ of mandamus to the district court to dismiss the case without leave to amend is not reported but is attached at App. A. Dispositions of four of the Government's prior petitions for writs of mandamus are reported at 884 F.3d 830, 895 F.3d 1101, 139 S. Ct. 1 (App. K), and 140 S. Ct. 16, respectively.

JURISDICTION

On May 1, 2024, the Ninth Circuit issued its order instructing the district court to dismiss without leave to amend. App. A. The district court entered judgment the same day. App. B. On July 12, 2024, the Ninth Circuit

denied rehearing en banc. App. L. Justice Kagan extended the time within which to file a petition for a writ of certiorari to December 9, 2024. On November 12, 2024, this Court denied Plaintiffs' petition for writ of mandamus to the Ninth Circuit. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides, in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States, . . . [and] to Controversies to which the United States shall be a Party . . . ."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201(a), provides, in pertinent part:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration,

> whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The All Writs Act, 28 U.S.C. § 1651(a), provides: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

The Final Judgment Rule, 28 U.S.C. § 1291, provides, in pertinent part: “The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.”

The Energy Policy Act, 15 U.S.C. § 717b(c), provides:

Expedited application and approval process

> For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

INTRODUCTION

This Court should hold this petition pending its opinion in *Gutierrez v. Saenz*, No. 23-7809, which will address a question nearly identical to Plaintiffs' first question, and then grant, vacate, and remand to the Ninth Circuit for review consistent therewith.

This Court has never required a particularized factual determination of whether a government defendant will redress a plaintiff's injuries following a favorable declaratory judgment that resolves a constitutional controversy, where the plaintiff has already established their injuries are traceable to a defendant's ongoing unconstitutional policies or practices, as Plaintiffs have here. The Fifth and D.C. Circuits, and the Ninth Circuit here, hold that a particularized factual determination on the effect of declaratory relief is required to prove standing. The First, Third, Sixth, and Eighth Circuits hold that such a determination is not required. This circuit split extends beyond prisoner due process cases. The divergent redressability rule of the Ninth, Fifth, and D.C. Circuits is inconsistent with this Court's long-standing precedent on the purpose and constitutionality of the Declaratory Judgment Act.

This petition poses a second important question about whether the "drastic and extraordinary" remedy of mandamus is confined to the three demanding conditions of *Cheney* or whether new exceptions exist to circumvent the final judgment rule. 542 U.S. at 380–81. The Ninth, Eleventh, and Federal Circuits hold that the conditions stated in *Cheney* do not apply in mandate-enforcing situations. The D.C., Third, and Eighth Circuits hold that the *Cheney* conditions apply without exception. Moreover,

the Ninth Circuit alone holds the first *Cheney* condition—that the petitioner must have no other means of obtaining the relief sought—is *never* a mandatory condition, even in non-mandate-enforcing contexts. The Third, Fifth, Sixth, and Seventh Circuits hold the first condition is required.

This second question is also important because the circuits are intractably divided over the traditional limits of mandamus. Across the country the use of "the most potent weapon[ ] in the judicial arsenal" is on the rise as a routine, as opposed to "extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95, 107 (1967). This deepening disregard of the final judgment rule threatens the congressionally-established structure of federal litigation and the circuit courts' statutorily-confined jurisdiction. In the instant case, the Government sought mandamus seven times to evade the ordinary burdens of litigation in the district court. Its final mandamus petition successfully circumvented *Cheney*'s conditions and Congress' final judgment rule.

STATEMENT OF THE CASE

This case concerns Fifth Amendment substantive due process and public trust claims for declaratory relief brought by individual youths against federal agencies and officials. Plaintiffs claim government policies and practices perpetuating a fossil fuel energy system, including 15 U.S.C. § 717b(c), have unconstitutionally caused and continue to measurably worsen already-hazardous atmospheric concentrations of greenhouse gas pollution, depriving Plaintiffs of their fundamental rights to life, liberty, personal security, dignity, bodily integrity, and their cultural and religious practices.

At summary judgment and on interlocutory appeal, the district court and Ninth Circuit found "copious expert evidence" of Plaintiffs' ongoing, concrete, and particularized injuries traceable to the challenged ongoing conduct of the Government. A divided panel of the Ninth Circuit dismissed, without prejudice, on Article III redressability grounds, grafting on an additional redressability requirement for Declaratory Judgment Act claims that a plaintiff must make a particularized showing as to how and whether defendants will respond to a declaration in plaintiff's favor. In so doing, the Ninth Circuit split with this Court and sister circuits. Thereafter, the district court granted Plaintiffs' motion for leave to amend their complaint for declaratory judgment and denied the Government's motion to dismiss, holding Plaintiffs met their burden to establish standing. The Ninth Circuit subsequently issued a writ of mandamus to the district court reversing its order granting leave to amend, dismissing the case with prejudice on the redressability grounds stated in the 2020 Opinion on interlocutory appeal.

A. Pretrial Proceedings

Twenty-one children and youth commenced this action on August 12, 2015, filing their first amended complaint for injunctive and declaratory relief as a matter of course on September 10, 2015. D. Ct. Doc. 7. Among the federal policies and practices challenged in the complaint, Plaintiffs

> assert[ed] that section 201 of the Energy Policy Act of 1992 . . . (codified at 15 U.S.C. § 717b(c)), which requires expedited authorization for

> certain natural gas imports and exports "without modification or delay," is unconstitutional on its face and as applied. The plaintiffs also challenge[d] DOE/FE Order No. 3041, which authorizes exports of liquefied natural gas from the proposed Jordan Cove terminal in Coos Bay, Oregon.

App. 105a n.2; *see also* App. 109a n.4 (listing other federal fossil fuel policies and practices challenged).

On November 10, 2016, Chief Judge Aiken adopted the magistrate's findings and recommendations, denying the Government's and former-intervenors' motions to dismiss. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). Judge Aiken's lengthy Article III standing analysis affirmed that Plaintiffs demonstrated injury, traceability, and redressability. *Id.* at 1242–48.

On October 15, 2018, the district court denied the Government's motion for judgment on the pleadings, and granted and denied, in part, the Government's motion for summary judgment. App. J. The court again concluded all three elements of Article III standing were met. App. 224a–45a.

The district court cited the Government's admissions that climate change is occurring, is caused mainly by fossil fuel combustion, "poses a 'monumental' danger," and that the Government's challenged conduct plays a substantial and traceable role in, even though not the sole cause of, Plaintiffs' ongoing, particularized injuries. App. 191a, 225a–40a. For example, the Government affirmatively authorizes the extraction, production, transport, and

combustion of fossil fuels that could not be combusted absent such conduct. App. 236a–38a. Evidence showed this Government conduct alone is responsible for over 25% of greenhouse gas pollution and the measurable increase in temperatures to which Plaintiffs are exposed. App. 238a, 235a.

The district court cited evidence that the pollution for which the Government is responsible is a substantial cause of Plaintiffs' particularized injuries. App. 225a–27a, 238a–39a. Evidence demonstrated that the specific extreme rainfall that repeatedly flooded Plaintiff Jayden's home would not have occurred without pollution-induced warming. App. 225a–27a, 239a. Similarly, evidence showed Plaintiff Jaime was forced to abandon her home on the Navajo Reservation from extreme drought, which also would not have occurred without pollution-induced warming. App. 239a, 226a–27a. Evidence supported Plaintiffs' individual claims of adverse harm to their physical health and personal safety from increased wildfire events due to pollution-induced warming. App. 226a–31a. The district court concluded Plaintiffs' specific injuries are "ongoing or likely to recur" because experts estimated these underlying "extreme weather events are likely to continue to increase as the global surface temperature continues to rise." App. 229a–30a. In finding standing at the pre-trial stage, the district court relied on "plaintiffs' sworn affidavits attesting to their specific injuries, as well as a swath of extensive expert declarations showing those injuries are linked to fossil fuel-induced climate change and if current conditions remain unchanged, these injuries are likely to continue or worsen." App. 231a. In contrast, "[f]ederal defendants offer[ed] nothing to contradict these submissions." *Id.* The

district court cited evidence showing that if Defendants altered their challenged conduct, it "could slow or reduce the harm plaintiffs are suffering," creating "an issue of material fact that must be considered at trial on full factual record." App. 244a. Based on these showings of particularized, ongoing, traceable injuries, the district court held Plaintiffs had adequately demonstrated the Government could redress their injuries, concluding: "It is clearly within a district court's authority to declare a violation of plaintiffs' constitutional rights." App. 243a.

Trial was set for October 29, 2018.

B. The Government's First Six Mandamus Petitions

Between June 9, 2017 and November 5, 2018, the Government filed six unsuccessful mandamus petitions, each seeking to avoid the ordinary burdens of discovery and trial and evade the normal appeals process. Ct. App. I Doc. 1-1 at 40; Ct. App. II Doc. 1-2 at 54; S. Ct. I, Appl. for Stay at 38, 32; Ct. App. III Doc. 1-2 at 24; S. Ct. II, Pet. for Mandamus; Ct. App. IV Doc. 1-2 at 27. Each petition was denied. *In re United States*, 884 F.3d 830, 838 (9th Cir. 2018); *In re United States*, 895 F.3d 1101, 1105–06 (9th Cir. 2018); App. 269a; Ct. App. III Doc. 5; *In re United States*, 139 S. Ct. 16 (2018) (mem.), *vacated*, App. 181a–84a; *In re United States*, 140 S. Ct. 16 (2019) (mem.); Ct. App. IV Doc. 15.

On the eve of trial, October 18, 2018, the Government petitioned this Court for a writ of mandamus (its fifth petition overall, its second in this Court) and for a stay. S. Ct. II, Pet. for Mandamus; S. Ct. III, Appl. for Stay. Chief Justice Roberts temporarily granted an administrative

stay pending consideration of the petition. Although this Court lifted the temporary stay on November 2, 2018, App. 181a–84a, the October 29 trial date had passed.

The Government filed its sixth mandamus petition (fourth in the Ninth Circuit) on November 5, 2018, seeking to avoid "the impending trial." Ct. App. IV Doc. 1-2 at 27. The same day, the Government moved the district court to reconsider certifying for interlocutory appeal its denial of the Government's dispositive motions. D. Ct. Doc. 418. On November 21, the district court stated it "stands 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," but nonetheless certified for interlocutory appeal, under 28 U.S.C. § 1292(b), its orders denying the Government's dispositive motions. App. 180a.

On December 26, 2018, a divided panel of the Ninth Circuit granted the Government's petition for permission to appeal under 28 U.S.C. § 1292(b). Ct. App. V Doc. 1-1; App. G. Judge Michelle Friedland dissented, writing:

> It is . . . 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.

App. 171a n.1.

C. Interlocutory Appeal

On January 17, 2020, after oral argument, two judges on a Ninth Circuit merits panel issued an interlocutory opinion from which Judge Staton (sitting by designation) dissented. App. 101a–64a (the "2020 Opinion"). The majority agreed with the district court that Plaintiffs demonstrated concrete, particularized injuries that were fairly traceable to the challenged Government conduct. App. 112a–13a. On redressability, the majority concluded "a declaration that the government is violating the Constitution . . . alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries . . . absent further court action." App. 116a. Regarding Plaintiffs' requested injunctive relief, the Ninth Circuit held "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan." App. 119a. Based solely on redressability grounds, the 2020 Opinion "remand[ed] this case to the district court with instructions to dismiss for lack of Article III standing." App. 127a. The 2020 Opinion did not foreclose leave to amend, did not discuss whether amendment would be futile, and did not order the district court to dismiss the case with prejudice. *See generally* App. 101a–27a.

The dissent agreed with the majority that injury and traceability were met and disagreed vigorously with the majority's redressability holding. App. 141a–46a. Thus, all five judges to have analyzed Plaintiffs' standing (the magistrate, the district court, and the full Ninth Circuit panel) agreed Plaintiffs' first amended complaint satisfied the injury and traceability prongs of Article III standing.

The 2020 Opinion's redressability holding is the subject of this petition's first Question Presented.

D. Remand and Leave to Amend

After the Ninth Circuit denied Plaintiffs' petition for rehearing en banc, 986 F.3d 1295 (9th Cir. 2021), the Ninth Circuit's interlocutory appeal mandate issued to the district court on March 5, 2021. Ct. App. VI Doc. 204.

On March 9, 2021, Plaintiffs moved for leave to amend their complaint to cure the jurisdictional deficiency adjudged by the Ninth Circuit. D. Ct. Doc. 462. The district court granted Plaintiffs' motion on June 1, 2023. App. 100a. The district court concluded that binding Ninth Circuit precedent required the court to interpret the 2020 Opinion's silence on leave to amend as not foreclosing amendment. App. 88a–90a. The district court conducted a Fed. R. Civ. P. 15(a) futility analysis under *Foman v. Davis*, 371 U.S. 178, 180–82 (1962), and concluded amendment would not be futile. App. 87a–88a, 91a–98a.

On June 8, 2023, Plaintiffs filed their second amended complaint, D. Ct. Doc. 542, which the Government moved to dismiss. D. Ct. Doc. 547.

On December 29, 2023, the district court significantly narrowed the claims by partly granting and partly denying the Government's motion to dismiss. App. 54a, 62a–63a, 68a, 72a–74a, 76a–78a. The sole claims remaining were for declaratory relief under the Due Process Clause of the Fifth Amendment and the public trust doctrine.

E. The Ninth Circuit Grants Mandamus

On February 2, 2024, the Government filed its seventh petition for a writ of mandamus in this case (its fifth in the Ninth Circuit) and moved for another stay. Ct. App. VII Doc. 1.1. The Government repeated its singular desire to avoid discovery and trial, the same argument rejected in its prior mandamus petitions. Ct. App. VII Doc. 1.1 at 48–49; *In re United States*, 884 F.3d at 835–36; *In re United States*, 895 F.3d at 1104–06. The sole "damage or prejudice" the Government claimed it would suffer was the prospect of "be[ing] required to comply with additional discovery requests and proceed to trial on Plaintiffs' sweeping claims." Ct. App. VII Doc. 1.1 at 48. In support, the Government proffered declarations detailing its time and expense defending the case, including evidence that it had spent more time seeking interlocutory appeal and mandamus than what it would have spent at trial. *Id.*

The Government answered the second amended complaint on February 27, 2024, admitting many factual allegations. D. Ct. Doc. 590.

On February 29, 2024, a motions panel of the Ninth Circuit directed Plaintiffs to answer the mandamus petition, Ct. App. VII Doc. 12.1, which they did. Ct. App. VII Doc. 14.1. The district court also filed a supplemental order addressing the petition. App. 7a–24a. The same day, the district court denied the Government's motion for stay, finding the petition for mandamus unlikely to succeed on the merits because it met none of *Cheney*'s conditions for mandamus. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2024 WL 1695064, at *2–4 (D. Or. Apr. 19, 2024).

On May 1, 2024, in an unpublished 3-page order on the papers without oral argument, a motions panel of the Ninth Circuit—an entirely different panel from the merits panel that issued the 2020 Opinion or the panel that previously denied the earlier mandamus petitions—granted the Government's petition for a writ of mandamus. App. 2a. The panel took de novo review of the district court's compliance with the 2020 panel's mandate, App. 3a, and neither cited nor inquired into whether the *Cheney* conditions for mandamus were satisfied. App. 2a–5a; 542 U.S. at 380–81. The panel conducted no review of Plaintiffs' second amended complaint, concluding instead that the prior mandate as to the *first* amended complaint precluded leave to file a *second* amended complaint. App. 2a–5a. The panel conducted no Fed. R. Civ. P. 15(a) futility analysis under *Foman*, 371 U.S. at 180–82, and neither cited nor addressed the binding precedent that the district court relied on when concluding that the 2020 Opinion's silence did not foreclose leave to amend. The panel egregiously erred in granting mandamus, ordering the district court to dismiss the case without leave to amend. App. 5a. The district court dismissed and issued final judgment the same day. D. Ct. Doc. 600; App. 6a.

Plaintiffs timely petitioned for rehearing en banc on June 17, 2024. Ct. App. VII Doc. 27.1. Five *amicus curiae* briefs supported the petition for rehearing. Ct. App. VII Docs. 31.1; 32.1; 33.2; 35.1; 36.1. The panel denied rehearing on July 12, 2024. App. 270a–71a.

The Ninth Circuit's 2024 writ of mandamus to the district court is the subject of this petition's second Question Presented.

REASONS FOR GRANTING THE PETITION

I. This Court Has Already Determined That the First Question on Redressability Merits Review.

This Court should hold this petition pending its opinion in *Gutierrez v. Saenz*, No. 23-7809, which will address a question nearly identical to Plaintiffs' first question. By granting certiorari in *Gutierrez*, this Court necessarily determined that the question presented there, as here, merits review. Like the Fifth Circuit in *Gutierrez*, the Ninth Circuit's 2020 Opinion fashions a pernicious redressability rule in a declaratory judgment action that deepens a growing circuit split on a question of law once settled by this Court. In *Utah v. Evans*, 536 U.S. 452, 464 (2002), this Court held that it is sufficient in a declaratory judgment action, for purposes of the redressability prong of standing, if "the courts would have ordered a change in a legal status . . . , and the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered."

As in *Gutierrez*, the district court and circuit court here held that the injury and causation elements of Article III standing were satisfied. App. 112a–13a. Just as the Fifth Circuit did, the Ninth Circuit dismissed Plaintiffs' claims for declaratory relief only because it held the Article III redressability prong requires a plaintiff to make a particularized showing as to how the government defendant will follow a favorable ruling. App. 116a, 118a (holding it is not enough if the plaintiff demonstrates "some possibility that the requested relief would prompt the injury-causing party to reconsider the decision

that allegedly harmed the litigant"). The Ninth Circuit wrongly decided that "a declaration that the government is violating the Constitution" "is unlikely by itself to remediate [Plaintiffs'] alleged injuries absent further court action." App. 116a. A burdensome standing test that requires foretelling a government defendant's response to, and minimizes the value of, declaratory judgment in a plaintiff's favor, is unworkable and contradicts the Court's recent analyses of redressability in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024); *Reed v. Goertz*, 598 U.S. 230 (2023); and *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021).

Article III standing is an issue in every federal case. Private citizens, organizations, and other entities routinely seek declaratory judgments against government defendants without seeking further relief. Both Congress and this Court have long said such declaratory judgment suits comply with Article III. The Court should correct the deepening circuit split over declaratory judgment, just as it did in *Uzuegbunam* for nominal damages, as a form of relief consistent with Article III even in the absence of further relief.

A. The Circuit Split Extends Beyond Death Penalty Cases.

As the *Gutierrez* petition explained in part, the circuits are increasingly divided over what—if anything—Article III requires plaintiffs to establish when they request only declaratory relief and have met their factual burden of satisfying the injury and causation prongs of Article III standing. The Fifth and D.C. Circuits, alongside the Ninth Circuit here, developed what might be called a

"Predictive" rule: a plaintiff who is seeking declaratory relief bears a burden of proving that a declaratory judgment alone is likely to remove *all* future obstacles to real-world amelioration of the plaintiff's ongoing, particularized, concrete injury—even if the plaintiff has already borne their burden of proving that their injury is traceable to the very government conduct plaintiff seeks to have declared unconstitutional, and that the government is capable of abiding by the judgment.

The **Fifth Circuit** held, in *Gutierrez v. Saenz*, that it is not sufficient, for Article III redressability purposes, that a favorable declaratory judgment would remove one legal barrier to real-world amelioration of a plaintiff's injury. 93 F.4th 267, 274–75 (5th Cir. 2024). The Fifth Circuit held a plaintiff must satisfy a "fact-specific evaluation" of "how the decision is *likely* to affect a relevant actor," including how the declaration would remove all other legal barriers to ameliorating the injury. *Id.*

The **D.C. Circuit** held, in *Ohio v. EPA*, that for a plaintiff's request for declaratory relief to satisfy the redressability prong of Article III standing, the plaintiff must provide affidavits or other evidence of specific facts demonstrating the causal chain through which a favorable declaratory judgment likely will result in real-world amelioration of their injuries. 98 F.4th 288, 300–06 (D.C. Cir. 2024), *cert. pet. pending sub nom. Diamond Alt. Energy v. EPA*, No. 24-7.

The First, Third, Sixth, and Eighth Circuits take the opposite view, and adhere to what may be called the "Practical" rule. Consistent with tradition, these Circuits hold that if a plaintiff has demonstrated injury

and traceability, it is sufficient if the plaintiff identifies *logically* how the declaratory judgment's change in legal status removes *at least one* practical barrier to ameliorating the concrete injury—even if other practical barriers remain.

The **Third Circuit** holds declaratory relief alone satisfies Article III redressability if a plaintiff has demonstrated a concrete and particularized injury-in-fact that is fairly traceable to the defendant's conduct, even if the plaintiff faces "independent obstacles" to amelioration "that are potentially removable but that cannot be challenged in" the present litigation. *Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 193–95 (3d Cir. 2004). The Third Circuit rejected as "absurd" the notion that Article III requires plaintiffs to establish a declaration in their favor could, on its own, remove all independent barriers to actual redress. *Id.* at 195.

The **Sixth Circuit** holds that, even when a favorable declaratory judgment would leave in place "a variety of other sources" of a plaintiff's injury, the existence of those sources poses no barrier to Article III redressability. *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 716 (6th Cir. 2015). Instead, "it is reasonable to assume a likelihood that the injury would be partially redressed where, as here," plaintiffs have already established their concrete injury is fairly traceable to the challenged conduct. *Id.* at 717.

The **First Circuit** similarly holds: "To carry its burden of establishing redressability, [a plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." *Antilles Cement Corp. v.*

Fortuno, 670 F.3d 310, 318 (1st Cir. 2012). The First Circuit considers removing “a barrier” to the amelioration of the injury to be “effectual relief” even where additional hurdles would need to be cleared before the plaintiff could experience real-world amelioration. *Id*.

The **Eighth Circuit** also holds: “For the same reason [plaintiffs’] injuries are traceable [to an allegedly unconstitutional state law], they would be redressed by a declaratory judgment.” *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 780 (8th Cir. 2019) (conducting factual analysis for injury and causation only; not predicting the future ramifications of declaratory judgment although other barriers to relief existed).

B. The Redressability Issue is Recurring and Exceptionally Important to Address as a Bright-Line Rule.

This question is exceedingly important for the reasons set forth in the *Gutierrez* petition. Under the Predictive rule side of the circuit split, a plaintiff’s standing, and thus a federal court’s jurisdiction, “will now depend on how particular state officials—or any federal defendants—may act in the future following a judgment in the plaintiff’s favor.” Pet. for Cert. at 18, *Gutierrez v. Saenz*, No. 23-7809. The heavy evidentiary burden to predict defendants’ future response to a judgment against them, to establish federal court jurisdiction in the present, upends the Declaratory Judgment Act and Article III case-or-controversy standing.

Moreover, at the time of writing, a petition for certiorari in *Diamond Alternative Energy v. EPA*, No.

24-7—presenting largely the same question—is pending before this Court. Together, the trio of the instant case (from the Ninth Circuit), *Gutierrez* (from the Fifth Circuit), and *Diamond Alternative Energy* (from the D.C. Circuit) represent all three circuits that adhere to the Predictive rule. The question is clearly of the utmost importance for all litigants and warrants resolution by this Court.

Resolution of this redressability question for declaratory judgments naturally follows this Court's recent bright-line Article III redressability standard for nominal damages—the close cousin of declaratory judgment—in *Uzuegbunam*, 592 U.S. at 285, 292–93. There, this Court held that, when a plaintiff has demonstrated a concrete past injury traceable to the defendant's past conduct, "a *request* for nominal damages satisfies the redressability element of standing," and the plaintiff need not factually demonstrate a pathway through which the relief will ameliorate their past injury. *Id.* (emphasis added). *Uzuegbunam* implied, but did not expressly hold, that a *request* for declaratory relief likewise satisfies the redressability element of standing if the plaintiff factually established ongoing injury and traceability.[1]

1. "Justice Story also made clear that this logic applied to both retrospective and prospective relief." *Id.* at 288. "By obtaining a declaration of trespass, a property owner could 'vindicate his right by action' and protect against those future threats." *Id.* at 286. "There is no dispute that" nominal damages provide prospective relief because, at common law, they served as a form of declaratory relief. *Id.* at 298 (Roberts, C.J., dissenting).

The construction of Article III's case-or-controversy requirement is an important issue because it is ubiquitous. Every plaintiff who seeks a forum in federal court must establish Article III standing for each form of relief sought at every stage of litigation. The redressability question raised in this petition, in *Gutierrez*, and in *Diamond Alternative Energy* thus recurs multiple times in every federal civil and constitutional case in which any party seeks declaratory judgment, where further relief may not be available. The more burdensome the redressability requirement is, the more often the courthouse doors will be closed even to the most meritorious claims by citizens, organizations, and governmental bodies suffering concrete, particularized ongoing injuries caused by ongoing defendant conduct. By requiring a plaintiff to prove defendants' anticipated future conduct, the Predictive rule expands the scope of discovery in every federal declaratory judgment action, increasing the discovery burden on government officials to submit to depositions.

The question presented here is even more straightforward than in *Gutierrez* because redressability here is not intertwined with the separate standard for modifying a criminal conviction and there is no interplay between a federal declaratory judgment and state law.

C. The Ninth Circuit is Wrong.

The Practical rule applied by the First, Third, Sixth, and Eighth Circuits is correct. The Practical rule holds that a plaintiff who sues over an ongoing or impending injury and establishes the first two elements of standing (injury and traceability) can establish the third by requesting

only declaratory relief. *See Uzuegbunam*, 592 U.S. at 285, 292–93. That bright-line rule is the appropriate Article III redressability standard for five reasons.

First, the Practical rule is more faithful to the Constitution's text. Article III, § 2 provides in relevant part that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States, . . . [and] to Controversies to which the United States shall be a Party . . . ." That plain mandate names certain types of disputes (Cases, Controversies); parties (the United States); and substantive claims (arising under the Constitution), but it alludes to no restrictions on what may be considered acceptable redress. On the contrary, its language—"all Cases . . . [and] Controversies"—is expansive. The letter and spirit of the Constitution's text align more closely with the permissive Practical rule than with the stringent Predictive rule.

Second, the Practical rule is supported by this Court's precedents on Article III standing regarding declaratory judgment. Consistent with Article III's text, these precedents place far more emphasis on the plaintiff's burden to demonstrate injury and causation than on redressability. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (discussing the court's remedial powers not as a separate hurdle, but to emphasize that the plaintiff's injuries must be particularized and concrete); *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 38 (1976) (same); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Evans*,

536 U.S. 452; *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 74 (1978). These precedents treat redressability and traceability as two sides of the same inquiry. *See FDA*, 602 U.S. at 380 ("flip sides of the same coin"); *Duke Power*, 438 U.S. at 74 (redressability is traceability "put otherwise"); *California v. Texas*, 593 U.S. 659, 672 (2021) (analyzing redressability only for the purpose of illustrating why traceability is lacking).

Third, the Practical rule is logical. Whenever a plaintiff has established a concrete ongoing injury fairly traceable to a defendant's ongoing conduct, it logically follows that a declaratory judgment *necessarily* effectuates a change in the legal status of the defendant's conduct or between the parties. In every case, "the practical consequence of that change would amount to a significant increase in the likelihood" that the plaintiff "would obtain relief that directly redresses the injury suffered." *Reed*, 598 U.S. at 234 (internal quotations omitted) (quoting *Evans*, 536 U.S. at 464). Any reasonable person will, upon receiving a judgment that their conduct is unlawful, be significantly more likely to refrain from, or to alter, the unlawful conduct going forward. Even if there may be other independent obstacles to a particular plaintiff getting full redress, there is no Article III reason to deny a particular plaintiff a federal forum to remove one particular obstacle. *See Khodara*, 376 F.3d at 193–95 (analogizing such a denial to the "two hunters" problem in torts).

Fourth, history and tradition support the Practical rule. In *Uzuegbunam*, this Court explained that there was no question "that nominal damages historically could provide prospective relief" for purposes of Article III

standing because "[t]he award of nominal damages was one way for plaintiffs at common law to 'obtain a form of declaratory relief in a legal system with no general declaratory judgment act.'" 592 U.S. at 285 (quoting D. Laycock & R. Hasen, Modern American Remedies 636 (5th ed. 2019)).

Fifth, the text and history of the Declaratory Judgment Act support the Practical rule. The DJA's drafters anticipated that plaintiffs seeking declaratory relief would have to meet Article III's requirements because the DJA itself provides that declaratory judgment is available only in "a case of actual controversy within [a federal court's] jurisdiction." 28 U.S.C. § 2201; *see also Aetna*, 300 U.S. at 240. However, the DJA's framers did not anticipate a stringent redressability requirement. They never intended that a declaratory judgment's effectiveness would be measured by its ability to bring about a particular post-judgment state of affairs. *See* Edson R. Sunderland, *The Courts as Authorized Legal Advisors of the People*, 54 Am. L. Rev. 161, 171 (1920) (envisioning declaratory judgment as a non-coercive form of prospective relief). That is why the DJA expressly states that declaratory relief shall be available "whether or not further relief is or could be sought." 28 U.S.C. § 2201.

In short, the Article III redressability requirement does not require crystal-gazing into the likelihood of future post-judgment events. It is sufficient, for purposes of redressability, that the plaintiff has a concrete and particularized ongoing injury fairly traceable to the defendant's challenged conduct. Those prerequisites are all that is required for a district court to interpret the Constitution, declare the law, and resolve the immediate

controversy before it. Article III, this Court's precedents, and the DJA require nothing more.

Contrary to the Practical rule, the Ninth Circuit required these Plaintiffs to predict and factually prove at summary judgment "that the requested relief would prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." App. 118a (internal quotations omitted). According to the Ninth Circuit, Article III redressability required Plaintiffs to show that "their requested relief will [] alone solve" their injury. *Id.* That is the wrong standard. On that flawed basis, the Ninth Circuit dismissed the case before final judgment in the district court. *See* App. 127a, 5a. Had the Ninth Circuit applied the correct standard used by sister circuits, it would have had to conclude that, because Plaintiffs demonstrated an ongoing or impending injury that was fairly traceable to the Government's ongoing conduct, App. 112a–13a, Plaintiffs' request for declaratory relief satisfied the redressability element of Article III standing.

II. On the Question of Whether Exceptions Exist to the *Cheney* Standard for Mandamus.

The Ninth Circuit's 2024 mandamus decision in this case deepens an acknowledged circuit split, undercuts Congress' final judgment rule, and contradicts this Court's articulation of the standard for mandamus in *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367, 380–81 (2004).

A. The Circuits are Sharply Divided.

The circuits are sharply divided over whether an exception exists to the *Cheney* conditions for mandamus. This Court held:

> As the writ [of mandamus] is one of the most potent weapons in the judicial arsenal, three conditions *must* be satisfied before it may issue. First, the party seeking issuance of the writ *must* have no other adequate means to attain the relief he desires,—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner *must* satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, *must* be satisfied that the writ is appropriate under the circumstances.

Cheney, 542 U.S. at 380–81 (internal quotation marks and citations omitted) (emphasis added); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); App. 181a (this Court's prior opinion in this case).

The *Vizcaino* Split. The circuits are evenly divided (3-3) over whether an exception to the three *Cheney* conditions exists when mandamus is sought to enforce an appellate court's mandate. Mandate-enforcing situations arise when a case has previously been before the Court of Appeals and, on remand, the district court issues a non-immediately-appealable order which a party believes

conflicts with the appellate court's mandate. The Ninth, Eleventh, and Federal Circuits hold that the rule stated in *Cheney* does not apply in mandate-enforcing situations; the D.C., Third, and Eighth Circuits hold that it does.

The **Ninth Circuit**'s mandate-enforcing exception ("*Vizcaino*") holds that the normal conditions for mandamus "do[] not apply when mandamus is sought on the ground that the district court failed to follow the appellate court's mandate." *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999); *see also Perry v. Schwarzenegger*, 602 F.3d 976, 980 (9th Cir. 2010). In such circumstances, the Ninth Circuit's standard for granting mandamus is "de novo." App 2a–3a (citing *Vizcaino*, 173 F.3d at 719, and misapplying the treatment of *Vizcaino* in *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010)).

In mandate-enforcing situations, the **Eleventh Circuit**—like the Ninth Circuit—grants petitions for mandamus on a simple showing that a lower court deviated from the circuit court's prior mandate. *See, e.g.*, *In re Chrispus Venture Cap., LLC*, No. 19-11726-F, 2019 WL 13192053, at *1 (11th Cir. Dec. 16, 2019); *In re Adams*, No. 14-11102-F, 2014 WL 3630416, at *1 (11th Cir. July 16, 2014).

The **Federal Circuit** routinely applies a *Vizcaino* exception in mandate-enforcing situations. *In re Nokia Inc.*, 760 F.3d 1348 (Fed. Cir. 2014) (per curiam) (implying that different standards apply in mandate- and non-mandate-enforcing situations); *In re Nwogu*, 570 F. App'x 919, 921 (Fed. Cir. 2014) (citing *Vizcaino* as the appropriate standard). However, its practice is inconsistent. *In*

re Princo Corp., 478 F.3d 1345, 1353 (Fed. Cir. 2007) (applying the *Cheney* conditions in a mandate-enforcing situation); *see also In re Nwogu*, 570 F. App'x at 922–23 (Wallach, J., dissenting) (criticizing the majority for applying a *Vizcaino*-type standard instead of the *Cheney* conditions).

Acknowledging the circuit conflict and positioning itself opposite the Ninth Circuit, the **D.C. Circuit** rejects the Ninth Circuit's "special rule for mandate-mandamus actions." *In re Trade & Com. Bank By & Through Fisher*, 890 F.3d 301, 303 (D.C. Cir. 2018) (citing *Vizcaino*). The D.C. Circuit holds that, even in mandate-enforcing situations, petitioners "must show, as in all mandamus cases," the three conditions commanded in *Cheney*. *Id.*

The **Third Circuit** almost always holds that the three *Cheney* conditions determine whether mandamus may issue to enforce a prior mandate. *See, e.g.*, *United States v. Norwood*, No. 20-3478, 2023 WL 1433632, at *2 (3d Cir. Feb. 1, 2023); *In re Flood*, 500 F. App'x 105, 108–09 (3d Cir. 2012); *In re Ellis*, 578 F. App'x 71, 72 (3d Cir. 2014); *In re Dohou*, 848 F. App'x 88, 90 (3d Cir. 2021); *but see SBRMCOA, LLC v. Bayside Resort, Inc.*, 596 F. App'x 83, 87 (3d Cir. 2014) (applying a mandate-enforcing exception).

The **Eighth Circuit** consistently holds that the three conditions for mandamus required in *Cheney* apply even in mandate-enforcing contexts. *See, e.g.*, *Iowa League of Cities v. EPA*, No. 11-3412, 2021 WL 6102534, at *1 (8th Cir. Dec. 22, 2021); *Blade v. United States*, 266 F. App'x 499, 500 (8th Cir. 2008).

The circuits are thus evenly and intractably divided as to whether the standard articulated in *Cheney* applies to petitions for writs of mandamus in mandate-enforcing situations.

The *Bauman* Split. The Ninth Circuit's standard for mandamus outside of mandate-enforcing situations—i.e., the standard the Ninth Circuit would apply if the *Vizcaino* exception alone were struck down—is the five-factor *Bauman* balancing test. *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977). Contrary to *Cheney*, the *Bauman* test does not treat the availability of a statutory method of appeal as fatal to a mandamus petition. *See, e.g.*, *Perry*, 602 F.3d at 980–81. The Ninth Circuit recently explained its exceptional view that

> the Supreme Court has clearly instructed that the writ of mandamus is not to be used "as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81. . . . But we nonetheless conclude that [a] failure [to seek statutorily-prescribed methods of review] does not mandate denial of mandamus relief[.]

In re Kirkland, 75 F.4th 1030, 1049 (9th Cir. 2023); *see also Perry*, 602 F.3d at 980–81; *In re Creech*, 119 F.4th 1114, 1120 (9th Cir. 2024).

Other circuits hold the opposite: the availability of an alternative avenue for review *is* fatal to a mandamus petition. *See, e.g.*, *In re Flood*, 500 F. App'x at 108; *In re Am. Marine Holding Co.*, 14 F.3d 276 (5th Cir. 1994); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 474 (6th Cir. 2006); *In re*

NCR Corp., 601 F. App'x 450, 451 (7th Cir. 2015).[2] Far from rejoining the herd, the Ninth Circuit's most recent mandamus decisions are its most adverse to *Cheney*. *See In re Kirkland*, 75 F.4th at 1049; *In re Creech*, 119 F.4th at 1120 (holding the *Bauman* test does not typically consider whether relief is available after final judgment, essentially nullifying the final judgment rule). This Court should grant certiorari to provide the Ninth Circuit with needed guidance and resolve this deep and mature circuit divide.

B. The Issue is Recurring and Important.

The *Vizcaino* and *Bauman* conflicts between the circuits concern an "important matter," Sup. Ct. R. 10(a), for at least three reasons.

First, the circuit splits undermine the congressionally established structure of federal litigation. "It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed . . . until after final judgment has been rendered by the trial court." *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (internal quotation marks omitted); *see also* 28 U.S.C. § 1291. Because the standards for interlocutory appeal and collateral orders are comparatively uniform and well-defined, *see* 28 U.S.C. § 1292; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985), litigants and circuit judges who are

2. Although the Sixth Circuit adopted the *Bauman* factors—*In re Powerhouse Licensing, LLC*, 441 F.3d 467, 471 (6th Cir. 2006)—the Sixth Circuit's test (unlike the Ninth Circuit's) treats the availability of relief after final judgment as fatal to a mandamus petition. *Pogue*, 444 F.3d at 474.

eager for early appellate review gravitate to mandamus. Loose circuit standards for mandamus allow litigants and appellate panels to drive bulldozers through the final judgment rule. The uncertainty and unfairness created by the existing circuit conflict are detrimental to the orderly functioning of federal civil procedure.

Second, the issue is frequently litigated and recurring. Since 2017, the Office of the Solicitor General has filed an unprecedented number of requests for emergency or extraordinary relief, including mandamus. The DOJ pursued a mandamus-barrage strategy in the instant case. App. 171a n.1. Use of the strategy is spreading: non-governmental defendants have also copied the mandamus-barrage tactic to avoid trial in mass tort cases[3] and to obtain venue transfer in patent infringement cases.[4] The tactic is unlikely to subside on its own because it works. Regardless of whether DOJ's mandamus petitions result in a writ, they often succeed in leaving the specific federal

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3. *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 36 (2021) (noting the "unconventionally robust use of mandamus against Judge Polster" in *In re National Prescription Opiate Litigation*, No. 1:17-MD-02804 (N.D. Ohio)). That grant of mandamus spawned a mandate-enforcement dispute. Response from Hon. Dan A. Polster, *In re CVS Pharmacy*, No. 20-3075 (6th Cir. July 7, 2020).

4. *In re Apple Inc.*, 979 F.3d 1332, 1336 (Fed. Cir. 2020) (granting Apple's third mandamus petition); *id.* at 1347 (Moore, J., dissenting) ("Our mandamus jurisdiction is not an invitation to exercise de novo dominion, as the majority does here, over the district court's individual fact findings and the balancing determination that Congress has committed 'to the sound discretion of the trial court.'").

policy under challenge in place (or halting complained-of discovery) pending the petition's resolution, thereby impeding "the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1. *See, e.g.*, App. 171a n.1; *In re United States*, 583 U.S. 1029 (2017) (granting DOJ's request for a stay pending resolution of its mandamus petition); *Dep't of Com. v. U.S. Dist. Ct. for S. Dist. of N.Y.*, No. 18-557 (Oct. 9 & 22, 2018) (same).

Third, the lack of uniformity among the circuits results in similar cases being decided differently. Had the Plaintiffs brought their constitutional claims in the D.C. Circuit (rather than the Ninth Circuit), that court would have denied the Government's seventh mandamus petition under the stringent *Cheney* standard, and the case would be headed to trial, or resolved long ago. Congress set the scope of the circuit courts' appellate jurisdiction on a national scale, *see* 28 U.S.C. §§ 1291–92, and these important questions of federal law should not be decided by the vagaries of geography.

Importantly, this case—taught in law schools around the world—is of fundamental societal and legal significance because its merits pertain to the scope of children's fundamental right to life, consideration of which should not be short-circuited by a newly permissive mandamus test that is inconsistent with this Court's long-standing precedent.

C. By Presenting a Purely Legal Question, this Case is an Ideal Vehicle.

This case presents an ideal vehicle for resolving the second question presented. It turns on the purely legal issue of whether there are exceptions to the standard for mandamus articulated in *Cheney*.

The issue is squarely presented in this case. The Ninth Circuit's 2024 decision clearly and unambiguously held that "when [mandamus is] 'sought on the ground that the district court failed to follow the appellate court's mandate'[,] . . . [w]e review a district court's compliance with the mandate de novo." App. 2a–3a. (citing *Vizcaino*, 173 F.3d at 719, and *Pit River*, 615 F.3d at 1080). The Ninth Circuit never cited *Cheney* or considered its mandatory conditions.

The two circuit splits on this issue are both outcome-determinative here. As to the *Vizcaino* split, the Ninth Circuit's 2024 decision identified de novo as the appropriate standard for mandamus and, on that basis, granted the Government's petition for a writ of mandamus ordering the district court to dismiss the case without leave to amend. The Ninth Circuit never reviewed the district court's decisions below granting leave to amend or denying and granting in part the Government's motion to dismiss. As to the *Bauman* split, had the Ninth Circuit denied the mandamus petition on the basis of available relief upon final judgment—as it would have been required to do under the *Cheney* standard (as explained below)—the case would have had a final appealable judgment on the merits by the time this petition is resolved.

D. The Ninth Circuit is Wrong.

Cheney is the correct standard even in mandate-enforcing contexts. This Court's articulation of the rule for mandamus in *Cheney* could not be clearer: it says "must." *Cheney*, 542 U.S. at 380–81 ("[T]hree conditions must be satisfied before [the writ] may issue": "the party . . . must have no other adequate means to attain the relief"; "the petitioner must satisfy the burden of showing that his

right to issuance of the writ is clear and indisputable"; and "the issuing court . . . must be satisfied that the writ is appropriate under the circumstances.") (internal quotation marks and citations omitted).

These conditions are firmly rooted in history and tradition. They were the conditions for mandamus at English common law. *See Rex v. Barker*, 3 Burr. 1265, 1266, 97 Eng. Rep. 823, 824 (K.B. 1762) (Lord C.J. Mansfield) (mandamus requires that a subject has been "dispossessed" of a right, has "no other specific legal remedy," and the writ is appropriate "upon reasons of justice" and "public policy"); 3 William Blackstone, Commentaries *110 (A petitioner for mandamus must have "a right . . . to have any thing done," and must have "no other specific means of compelling it's [sic] performance."). This Court has likewise insisted on these conditions since the founding. *See Marbury v. Madison*, 5 U.S. 137, 168–69 (1803) (mandamus requires not only that the petitioner has been "dispossessed" of a "right," but also that "the person applying for it must be without any other specific and legal remedy" and "in justice and good government there ought to be one"); *Kerr*, 426 U.S. at 403 (The "conditions" for issuance of mandamus include that the petitioner has "no other adequate means to attain the relief he desires, and that he satisfy the burden of showing that his right . . . is clear and indisputable.") (internal quotations and citations omitted).

It is a "settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right." *United States ex rel. Girard Tr. Co. v. Helvering*, 301 U.S. 540, 544 (1937). If an appeal is available "after the final decree shall be had in the cause," then "[a] writ

of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge . . . although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form." *Ex parte Whitney*, 38 U.S. 404, 408 (1839).

These traditional conditions serve an important gatekeeping function. "[M]andamus actions . . . have the unfortunate consequence of making the district court judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants appearing before him in the underlying case." *Kerr*, 426 U.S. at 402 (internal quotations omitted). Unless the gatekeeping function of these conditions is upheld, "the flexibility of" mandamus as a "vehicle for appeal is such that it can encompass any order issued by a district court," thereby "threaten[ing] litigation coherence." Alexandra D. Lahav, *Procedural Design*, 71 Vand. L. Rev. 821, 858 (2018).

The Ninth Circuit wrongly granted the Government's mandamus petition. Without applying and contrary to the *Cheney* conditions, the Ninth Circuit granted the Government's mandamus petition on a simple de novo standard. Under *Cheney*, the Ninth Circuit would have been forced to deny the petition because it fell far short of meeting even the first two *Cheney* conditions.

First, the Government here had other adequate means of obtaining relief. Both orders at issue in the Government's mandamus petition, Ct. App. VII Doc. 1.1 at 23, 49—the district court's grant of leave to file a second amended complaint, and its partial denial of the Government's motion to dismiss the new complaint—are appealable after final judgment. The Government

theorized that having to engage in discovery and trial *at all* constituted prejudice not correctable on appeal. This is the only evidence it proffered to justify mandamus. *Id.* at 48. However, this Court has emphatically rejected that theory, holding "the inconvenience of requiring [petitioners] to undergo a trial . . . . [that] may be of several months' duration and may be correspondingly costly and inconvenient" is not a cognizable basis for mandamus because "that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). If it were otherwise, all denials of motions to dismiss or for summary judgment would be immediately reviewable through mandamus, opening the federal appellate floodgates.

Second, the Government did not satisfy its burden of showing that its right to issuance of the writ was clear and indisputable. The Government sought mandamus to challenge the district court's interpretation of the 2020 mandate's *silence* on the issue of leave to amend. *Compare* App. 101a–64a (not addressing leave to amend) *with* Ct. App. VII Doc. 1.1 at 23–29 (quoting no language from the 2020 Opinion on the topic of leave to amend) *and* App. 2a–5a (same). Ample authority required the district court to interpret the prior mandate's silence as leaving the issue of leave to amend to the district court's sound discretion. *See* Fed. R. Civ. P. 15(a)(2); 28 U.S.C. § 1653; *Foman*, 371 U.S. at 180–82; *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986); *S.F. Herring Ass'n v. Dep't of Interior*, 946 F.3d 564, 574 (9th Cir. 2019). The Government's mere disagreement with the district court's interpretation of that authority—or with its exercise of discretion—falls far short of meeting the second *Cheney* condition.

Mandamus was also inappropriate under the circumstances. The district court's orders, which the Government sought to challenge through mandamus, fully considered the Government's arguments and explained the court's reasons for finding those arguments unpersuasive. App. 88a–100a, 28a–61a, 7a–24a. Moreover, the Government's petition for mandamus relief from nearly-concluded discovery was baseless because no discovery motions or orders existed.

CONCLUSION

This Court should hold this petition pending the Court's opinion in *Gutierrez v. Saenz*, and then grant, vacate, and remand this case to the Ninth Circuit for further proceedings consistent therewith. Alternatively, this Court should grant certiorari.

Respectfully submitted,

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