No. 24-684

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Respondent on Petition for Writ of Mandamus,

and

KELSEY CASCADIA ROSE JULIANA, et al.
Real Parties in Interest—Plaintiffs.

On Petition for a Writ of Mandamus in No. 6:15-cv-1517-AA

PETITION FOR REHEARING EN BANC OR, IN THE ALTERNATIVE, RECONSIDERATION EN BANC OF REAL PARTIES IN INTEREST—PLAINTIFFS

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INTRODUCTION AND FRAP 35(b) STATEMENT

Having invested nine years of their young lives to vindicate their constitutional rights, the 21 *Juliana* Petitioners here ("Youth Plaintiffs") respectfully request rehearing (or reconsideration) en banc of the panel's May 1, 2024 "Order,"[1] issuing an extraordinary writ of mandamus against the district court for (1) interpreting this Court's mandate "to dismiss for lack of Article III standing" in *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) ("2020 Opinion"), as "not expressly preclud[ing]" amendment of Youth Plaintiffs' complaint; and (2) concluding that *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), constituted "intervening authority" that further justified amendment of Youth Plaintiffs' complaint and a preliminary ruling of redressability. Order at 4–5.

The Order issuing the writ squarely conflicts with, and does not cite or apply, the Supreme Court's and this Court's authoritative decisions in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004), and *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977), which set the standard for granting the extraordinary relief of mandamus, and this Court's two prior orders denying mandamus in this case. *See In re United States*, 884 F.3d 830 (9th Cir. 2018); *In re United States*, 895 F.3d 1101 (9th Cir. 2018).

[1] Rehearing, rather than reconsideration, en banc is warranted where the decision should have been designated an "OPINION" for "alter[ing]" "a rule of federal law;" "involv[ing] a legal or factual issue of … substantial public importance," and "[i]s a disposition of a case in which there is a published opinion by a lower court." 9th Cir. R. 36-2(a)(d)(e). *See* Motion filed concurrently.

The Order also conflicts with other authoritative decisions of the U.S. Supreme Court and this Court regarding (a) the broad discretion district courts enjoy to liberally grant leave to amend for a jurisdictional dismissal and (b) binding precedent that declaratory relief can provide sufficient redress for constitutional violations to create standing under Article III.

The Order substantially lowers the "high bar" the Supreme Court and this Court have set for the "drastic and extraordinary remedy" of mandamus, inviting a flood of petitions to challenge interlocutory district court decisions that "are better addressed through the ordinary course of litigation." *In re United States*, 884 F.3d at 833–34. The Order simultaneously usurps district courts' broad discretion to allow plaintiffs to amend complaints after a jurisdictional dismissal, thereby burdening district courts with contradictory direction regarding how to interpret a mandate that dismisses a case without any reference to amendment or prejudice. *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019). Finally, en banc review is necessary to safeguard conformity with Supreme Court precedent and respect for the final judgment rule, which protects all parties here. *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981); Fed. R. App. P. 35(a)(1)–(2).

BACKGROUND

I. A panel of this Court rejected two prior 2018 mandamus petitions and the Supreme Court denied review.

Youth Plaintiffs' original complaint for injunctive and declaratory relief was filed in 2015 and amended once as of right. ECF Nos. 1, 7. Since that time, Respondents here ("Defendants") have filed **seven** petitions for writs of mandamus to prevent a trial on Youth Plaintiffs' claims, five in this Court and two in the Supreme Court, more than any filed in a single case in the history of the Department of Justice.[2] This Court, and the Supreme Court, denied them all, until now—with this Order disregarding that prior precedent. *See In re United States*, 884 F.3d 830; *In re United States*, 895 F.3d 1101; *United States v. U.S. Dist. Ct. for Dist. of Or.*, 139 S. Ct. 1 (2018); *United States v. U.S. Dist. Ct. for Dist. of Or.*, No. 18-72776, Order (9th Cir. Nov. 2, 2018); *In re United States*, No. 18-73014, Order (9th Cir. Dec. 26, 2018); *In re United States*, 140 S. Ct. 16 (2019).

II. Another panel heard interlocutory appeal and issued the 2020 Opinion dismissing on redressability.

In the shadow of an unprecedented onslaught of mandamus petitions against the district court that upended trial days before it was about to begin in 2018, the district court certified this case for interlocutory appeal pursuant to 28 U.S.C.

[2] Dkt. 7.2 ¶ 4; *See* Dockets 17-71692, 18-71928, 18-72776, 18-73014, & 24-684 (9th Cir.); S. Ct. Dockets 18A-65 & 18-505.

§ 1292(b). ECF No. 444. A divided panel accepted jurisdiction, with Judge Friedland writing in dissent: "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." *Juliana v. United States*, 949 F.3d 1125, 1127 n.1 (9th Cir. 2018) (Friedland, J., dissenting).

Yet another panel (the "2020 panel") heard the interlocutory appeal, but did not reach the merits of Youth Plaintiffs' claims because it held they lacked standing. *Juliana,* 947 F.3d at 1175. The 2020 panel unanimously affirmed the district court's decisions that Youth Plaintiffs could bring their Fifth Amendment claims directly under the Constitution, *id.* at 1167–68, and that their complaint met both the injury and causation prongs for Article III standing. *Id.* at 1168–69. Over a strong dissent, the 2–1 majority "reluctantly" reversed the district court narrowly on redressability, ruling "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan." *Id*. at 1165, 1171. The 2020 panel focused on "[t]he crux of the plaintiffs' requested remedy[,] an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions." *Id*. at 1170.

Devoting three sentences to Youth Plaintiffs' requested declaratory relief, the 2020 panel assumed that "[a] declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action." *Id*. The 2020 panel "remand[ed] this case to the district court with instructions to dismiss for lack of Article III standing." *Id.* at 1175. The 2020 Opinion was silent on whether Youth Plaintiffs could cure the jurisdictional deficiency through amendment, and as to whether the jurisdictional dismissal was *with* or *without* prejudice. *Id.*

III. Exercising its broad discretion under Rule 15, the district court granted leave to amend.

On remand, Youth Plaintiffs promptly moved for leave to amend under Rule 15(a) to cure the jurisdictional deficiency identified in the 2020 Opinion. ECF No. 462. The amended complaint removed the objectionable request for injunctive relief and alleged new facts evincing how declaratory judgment would provide at least partial redress of asserted ongoing and prospective concrete injuries, even if further relief was unavailable. *See Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 3750334, at *6 (D. Or. June 1, 2023). After briefing and oral argument, the district court granted leave to amend for the first time, holding that the amendments, considered in conjunction with new Supreme Court precedent, satisfied Rule 15, the mandate, and redressability. *Id.* at *1, *3–9. Specifically, the district court interpreted this Court's 2020 Opinion and mandate pursuant to *San Francisco*

Herring, 946 F.3d 564, as not deciding the issue of leave to amend, which remained in the discretion of the district court. *Juliana*, 2023 WL 3750334, at *5.

Defendants filed another motion to dismiss, ECF No. 547, which was granted in part and denied in part. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 9023339 (D. Or. Dec. 29, 2023).

IV. Yet another panel issues writ of mandamus, without oral argument, dismissing case without leave to amend.

On January 18, 2024, Defendants motioned the district court for a stay, ECF No. 571, and—without waiting for the district court to rule—on February 2, petitioned this Court for a stay and a writ of mandamus to reverse the district court's orders granting leave to amend and denying dismissal. Dkt. 1.1. A motions panel of this Court denied the stay, ordered Youth Plaintiffs to answer the mandamus petition, and invited the district court to respond, which it did. Dkts. 12, 22.1. Youth Plaintiffs answered and requested oral argument. Dkt. 14.1. On May 1, 2024, without oral argument,[3] yet another panel (the "Panel") concluded in a three-page order, applying

[3] Rule 34 requires the Panel to agree unanimously to any exception to the rule that "[o]ral argument must be allowed in every case." Rule 21(b)(6) requires writs of mandamus "be given preference over ordinary civil cases." The Panel denied oral argument without explanation, notwithstanding these rules and the interest shown two years earlier by a member of the Panel in publicly discussing the case—and Article III standing in particular—with counsel for both parties at a May 2022 roundtable hosted by the Federalist Society. At the event, the Honorable Ryan D. Nelson questioned undersigned counsel Julia Olson and former counsel for the

de novo review, that a writ of mandamus should issue against the district court for granting Youth Plaintiffs' leave to amend. Order at 2–5. The Panel instructed the district court "to dismiss the case forthwith for lack of Article III standing, without leave to amend." Order at 4–5. The district court dismissed the case and entered judgment for Defendants the same day. ECF Nos. 600, 601. Youth Plaintiffs now petition the full Court for review en banc.

ARGUMENT

I. The Panel issued "the most potent weapon in the judicial arsenal" without applying the legal standard required by the Supreme Court in *Cheney*, upending the uniformity of this Court's decisions, and creating uncertainty for district courts.

In *Cheney*, the Supreme Court set the standard of review governing *all* petitions for writs of mandamus under the All Writs Act, 28 U.S.C. § 1651:

> As the writ 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

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United States, Eric Grant, about *Juliana*—specifically about Article III standing. *See, e.g.*, https://fedsoc.org/events/from-russia-without-love-u-s-energy-policy-environmental-goals-foreign-wars-and-the-administrative-state at "Event Transcript" (J. Nelson: "In what ways do you think that the *Juliana* case has impacted future ability for those who want to challenge climate impacts to bring those cases to federal court?").

> discretion, ***must*** be satisfied that the writ is appropriate under the circumstances.

542 U.S. at 380–81 (cleaned up, emphasis added). The Panel did not reference these conditions or conclude they were satisfied. *See* Order. The first condition alone should have ended the Panel's inquiry because Defendants have adequate means to challenge the district court's interlocutory orders—granting Rule 15(a)(2) leave to amend and denying Rule 12(b)(1) dismissal of the second amended complaint—on appeal of final judgment. 28 U.S.C. § 1291; *United States v. Gila Valley Irrigation Dist*., 859 F.3d 789, 797 (9th Cir. 2017) (interlocutory orders merge into the final decision for review on appeal). The writ issued against the district court overrides the regular appeals process in direct contravention of *Cheney*.

A. The Order ignores the *Bauman* factors as this Circuit's framework for complying with *Cheney*.

The Order explicitly disregards this Court's black letter mandamus standard. Prior to *Cheney*, this Court set five "specific guidelines"—"the *Bauman* factors"—for determining whether mandamus may issue. *Bauman*, 557 F.2d at 654–55. In the aftermath of *Cheney*, this Court's precedent still requires petitions for writ of mandamus to be reviewed through the *Bauman* factors framework in a manner "consistent with" *Cheney*. *In re United States*, 791 F.3d 945, 955 n.7 (9th Cir. 2015); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010).

Instead, by reviewing the district court's interlocutory opinions for "compliance with the mandate de novo," the Order turns an extraordinary writ into a routine appeal, directly contravening *Cheney* and *Bauman*. Order at 3. This upending of binding precedent makes an "extraordinary remedy" available any time a party takes issue with a lower court's interlocutory order interpreting this Court's mandate, including motions fully within the discretion of the district courts. Fed. R. Civ. P. 15(a)(2); *Webb*, 655 F.2d at 979.

B. Under the governing *Cheney-Bauman* standard, this Court's 2018 opinions in this case are dispositive of Defendants' mandamus petition.

The Order evades this Court's precedential opinions denying Defendants' prior petitions for writ of mandamus, in which this Court concluded that Defendants "fail[ed] to establish that they will suffer prejudice not correctable in a future appeal." *In re United States*, 895 F.3d at 1106; *see also In re United States*, 884 F.3d at 836 ("We are not persuaded that simply allowing the usual legal processes to go forward will [threaten the separation of powers] in a way not correctable on appellate review."). The Order contravenes this Court's binding precedent that:

> There is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn, appellate review is aided by a developed record and full consideration of issues by the trial courts. If appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed.

884 F.3d at 837.

> Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them.

Id. at 836.

C. *Cheney*, and this Court's mandamus precedent post-*Cheney*, limit *Vizcaino* to final *merits* judgments denying relief to members of a previously certified class.

With disregard for *Cheney* and post-*Cheney* precedent of this Court, the Order elevated an isolated pre-*Cheney* case involving a final merits judgment in an otherwise unappealable class certification decision as setting the controlling standard of review—de novo—for mandamus here. Order at 2 (citing *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999) and misapplying the Court's treatment of *Vizcaino* in *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1078–80 (9th Cir. 2010)). The Order states that on a petition for writ of mandamus, "a district court's compliance" with a mandate issued by this Court is reviewed "de novo," irrespective of the three *Cheney* conditions or the five *Bauman* factors. Order at 2–3. The Panel's decision here is **the first time** this Court has relied on *Vizcaino* to issue a writ of mandamus without satisfying the *Cheney-Bauman* standard. It is also **the first time** since *Cheney* this Court has applied de novo review as the standard for a writ of mandamus, leap-frogging *Cheney* straight to the merits to permanently dismiss a case.

Likewise, the Panel's reliance on *Pit River* is erroneous because *Pit River* applied the *Bauman* factors *first* to determine whether the issue was sufficiently "extraordinary" to warrant mandamus, and only applied the de novo legal standard to the *merits* of the case thereafter. *Pit River*, 615 F.3d at 1079. This Court took special care in *Pit River* to explain that "[n]othing in *Bauman* allows for this [*Vizcaino*] exception." *Id.* at 1079 n.1; *see also In re Trade & Com. Bank By & Through Fisher*, 890 F.3d 301, 303 (D.C. Cir. 2018) (rejecting a *Vizcaino* exception because "[n]either *Cheney* nor any later case created an exception for mandamus actions seeking to enforce a mandate").

In order for this Court's 1999 *Vizcaino* decision to survive after *Cheney* (2004), its mandamus analysis must be limited to its proper sphere of application, i.e., cases where a district court's failure to follow an appellate mandate would result in "relitigation of final judgments," where there would be no further opportunity to appeal, and where the writ of mandamus is not used as a substitute for the ordinary appeals process. *Vizcaino*, 173 F.3d at 719–20; *Cheney*, 542 U.S. at 380–81. This Court issued the writ in *Vizcaino* in the extraordinary circumstance where there had been an appeal and a mandate **on the merits**, followed by "a judgment on the merits denying relief to plaintiffs and the members of the class certified by the district court" where "that judgment would be res judicata with respect to the claims [of the plaintiffs and others.]" *Vizcaino*, 173 F.3d at 720. Thus, *Vizcaino* applies only to

cases where there is no full right of appeal of a district court's decision. *Id.* at 721–22; *Perry v. Schwarzenegger*, 602 F.3d 976, 980 (9th Cir. 2010). Otherwise, the Order turns *Vizcaino* into a broadly applicable standard, rather than the extraordinary exception mandamus is intended to be.

The fundamental error on this writ of mandamus, which "must be given preference over ordinary civil cases," warrants en banc review. Fed. R. App. P. 21(b)(6).

II. Even if it were proper to consider the merits of whether the district court correctly interpreted the mandate and had discretion to grant leave to amend, the Order further disregards binding precedent.

A. District courts must liberally exercise discretion to grant leave to amend to cure a jurisdictional defect.

Even if the Panel had applied the *Cheney-Bauman* standard, the Order ignores additional unambiguous precedent of this Court that "[a]bsent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings…." *San Francisco Herring*, 946 F.3d at 574 (citing *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986)). Authoritative precedent affirms that the mandate's dismissal for lack of jurisdiction must be *without* prejudice "because a court that lacks jurisdiction is powerless to reach the merits." *Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (cleaned up). "It is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile." *Nat'l*

Council of La Raza v. Cegavske, 800 F.3d 1032, 1041 (9th Cir. 2015) (citing *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)). The district court was also required to consider Youth Plaintiffs' amendments with "extreme liberality." *Webb*, 655 F.2d at 979 (citing *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam)); *Lay v. Treesource Indus., Inc.*, 143 F. App'x 786 (9th Cir. 2005) (reversing this district court, J. Aiken, for *not* granting leave to amend).

The district court was therefore required to consider Youth Plaintiffs' motion for leave to amend after the 2020 panel issued an order "remand[ing] this case to the district court with instructions to dismiss for lack of Article III standing" that was silent as to leave to amend, with no analysis of futility. *Juliana*, 947 F.3d at 1175. However, as if this were an appeal of a final judgment, the Panel instead construed the "spirit" of the 2020 Opinion as implicitly requiring dismissal with no leave to amend despite the authoritative precedent of *San Francisco Herring* that requires otherwise. Order at 2–5. The Order thereby usurps district courts' discretion to consider leave to amend even when such leave has not been expressly precluded by this Court. Indeed, the **only** court to have examined whether amendment would be futile, concluding it is not, is the district court. *Juliana*, 2023 WL 3750334, *5–9. En banc review is necessary to maintain plaintiffs' uniform rights to seek leave to amend once for jurisdictional defects and to leave the determination of amendment

and futility to a district court's proper discretion under Rule 15, where an appellate court has not held otherwise. *See Foman v. Davis*, 371 U.S. 178, 180–82 (1962).

B. The Order broadly makes declaratory relief unavailable as a standalone remedy for ongoing or impending constitutional injuries.

The Order directly contradicts binding Supreme Court precedent that in constitutional cases, declaratory judgment alone is sufficient to redress an ongoing or prospective injury for purposes of Article III standing. *See*, *e.g.*, *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 77–78 (1978) (declaratory relief alone sufficient to redress prospective injury); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("[T]he injury alleged is likely to be redressed by declaratory relief against the Secretary alone."); *Quinn v. Millsap*, 491 U.S. 95, 102–03 (1989) (constitutional suit for declaratory judgment alone satisfied Article III standing because the case "retain[ed] the essentials of an adversary proceeding"); *see also Uzuegbunam*, 141 S. Ct. at 798, 801 (reciting historical precedent that forms of declaratory relief are sufficient to redress ongoing and prospective injuries; providing the example at common law that "[b]y obtaining a **declaration** of trespass, a property owner could 'vindicate his right by action' and protect against those future threats" of trespass; holding that affecting the defendant's behavior towards the plaintiff independently provides redress; and effectuating even a partial remedy, like

the behavior shift a single dollar can cause, satisfies Article III).[4] Congress agrees. 28 U.S.C. § 2201. "The Declaratory Judgment Act … gave the federal courts competence to make a declaration of rights." *Pub. Affs. Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962). District courts are vested "with discretion in the first instance" to determine whether declaratory judgment is proper, "because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007).

Contrary to the Order, this Court's precedents also conform that declaratory relief provides redress sufficient for Article III standing. *See*, *e.g.*, *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1120 (9th Cir. 2022) (holding declaratory judgment alone clarifying the constitutionality of California's foie gras ban sufficient to redress ongoing injuries); *Cornett v. Donovan*, 51 F.3d 894, 897 (9th Cir. 1995) (holding declaratory judgment alone on the constitutionality

[4] Contrary to the Panel's assertion that *Uzuegbunam* says nothing about prospective relief, the Supreme Court recognized that a declaration of law alone can provide actual prospective redress. 141 S. Ct. at 798. The Court also accepted "the declaratory function" of nominal damages and said that "[b]oth sides agree that nominal damages historically could provide prospective relief. The 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.'" *Id.*; *see also Platt v. Moore*, 15 F.4th 895, 903 (9th Cir. 2021) ("[N]ominal damages are more like pure declaratory relief" than they are like incidental damages "because they are by definition minute and so of no budgetary consequence.").

of the state's conduct toward institutionalized persons was sufficient to redress the ongoing injuries of institutionalized plaintiffs). This Court only holds declaratory judgments insufficient to redress an ongoing constitutional injury when the injury itself is not cognizable, or where the ongoing injury was caused exclusively by defendant's unlikely-to-recur *past* conduct, which is not the case here. *See, e.g.*, *Arakaki v. Lingle*, 477 F.3d 1048, 1064 (9th Cir. 2007); *Mayfield v. United States*, 599 F.3d 964, 972–73 (9th Cir. 2010); *compare*, *e.g.*, ECF No. 542, ¶¶ 12, 276-A.

Without conducting any futility analysis or even peeking at Youth Plaintiffs' amended complaint, the Panel's holding that declaratory relief is inherently insufficient to redress an ongoing constitutional injury is incompatible with the precedent of this Court and the Supreme Court, with implications reaching far beyond the present case. The Department of Justice has already cited the Order[5] as precedent in another constitutional case seeking declaratory relief, resulting in its dismissal for lack of redressability citing "the Ninth Circuit's recent mandamus order in *Juliana*" as the court's decisive reason. *See G.B. v. United States Env't Prot. Agency*, No. CV 23-10345-MWF, at *8 (C.D. Cal. May 8, 2024).

The Court should grant en banc review to prevent the lack of uniformity created by the Panel's ruling from spreading further. Any potential error in awarding

[5] Appendix B, hereto.

declaratory judgment as proper redress under Article III can be corrected upon final judgment.

CONCLUSION

Juliana is cited by federal and state courts around the country, it is taught in every law school, and it will stand as an important precedent for decades to come. The exceptional importance of the conflicting law the Order creates is deserving of en banc review, as are these brave youth who seek your honorable assistance in upholding the rule of law and their access to justice to obtain a declaration of their constitutional rights and any ongoing violation thereof. "Defendants [ ] have other means, such as a direct appeal, to obtain the desired relief." Dkt. 22.1 at 15. Authoritative precedent says that is all the Court needs to reverse the writ of mandamus.

For the foregoing reasons, the Youth Plaintiffs respectfully request this Court grant their petition.

DATED this 17th day of June, 2024, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson
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Attorneys for Real Parties in Interest–Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 24-684

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,199.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Julia A. Olson **Date** Jun 17, 2024

*(use "*s/[typed name]*" to sign electronically-filed documents)*

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 1 2024

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

In re: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, et al.;

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE,

Respondent,

STATE OF ALABAMA,

Defendant,

XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez, et al.;

Real Parties in Interest,

THE NATIONAL ASSOCIATION OF MANUFACTURERS, et al.;

Intervenors,

ENVIRONMENTAL JUSTICE CLINIC - UNIVERSITY OF MIAMI SCHOOL OF LAW, et al.;

No. 24-684

D.C. No.
6:15-cv-1517
District of Oregon,
Portland

ORDER

Amici Curiae.

Before: BENNETT, R. NELSON, and MILLER, Circuit Judges.

In the underlying case, twenty-one plaintiffs (the Juliana plaintiffs) claim that—by failing to adequately respond to the threat of climate change—the government has violated a putative "right to a stable climate system that can sustain human life." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339, at *1 (D. Or. Dec. 29, 2023). In a prior appeal, we held that the Juliana plaintiffs lack Article III standing to bring such a claim. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). We remanded with instructions to dismiss on that basis. *Id.* The district court nevertheless allowed amendment, and the government again moved to dismiss. The district court denied that motion, and the government petitioned for mandamus seeking to enforce our earlier mandate. We have jurisdiction to consider the petition. *See* 28 U.S.C. § 1651. We grant it.

1. "[M]andamus is an extraordinary remedy . . . reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). "[M]andamus is the appropriate remedy" when "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 United States v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 263 (1948). We review a

district court's compliance with the mandate de novo. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010).

2. The petition accuses the district court of failing to execute our mandate on remand. District courts must "act on the mandate of an appellate court, without variance or examination, only execution." *United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006). "[T]he only step" that a district court can take is "to obey the mandate." *Rogers v. Consol. Rock Prods. Co.*, 114 F.2d 108, 111 (9th Cir. 1940). A district court must "implement both the letter *and the spirit* of the mandate, taking into account the [prior] opinion and the circumstances it embraces." *Pit River Tribe*, 615 F.3d at 1079 (emphasis added) (cleaned up).

3. In the prior appeal, we held that declaratory relief was "not substantially likely to mitigate the plaintiffs' asserted concrete injuries." *Juliana*, 947 F.3d at 1170. To the contrary, it would do nothing "absent further court action," which we held was unavailable. *Id.* We then clearly explained that Article III courts could not "step into the[] shoes" of the political branches to provide the relief the Juliana plaintiffs sought. *Id.* at 1175. Because neither the request for declaratory relief nor the request for injunctive relief was justiciable, we "remand[ed] th[e] case to the district court with instructions to dismiss for lack of Article III standing." *Id.* Our mandate was to dismiss.

4. The district court gave two reasons for allowing amendment. First, it concluded that amendment was not expressly precluded. Second, it held that intervening authority compelled a different result. We reject each.

The first reason fails because we "remand[ed] . . . with instructions to dismiss for lack of Article III standing." *Id.* Neither the mandate's letter nor its spirit left room for amendment. *See Pit River Tribe*, 615 F.3d at 1079.

The second reason the district court identified was that, in its view, there was an intervening change in the law. District courts are not bound by a mandate when a subsequently decided case changes the law. *In re Molasky*, 843 F.3d 1179, 1184 n.5 (9th Cir. 2016). The case the court identified was *Uzuegbunam v. Preczewski*, which "ask[ed] whether an award of nominal damages by itself can redress a past injury." 141 S. Ct. 792, 796 (2021). Thus, *Uzuegbunam* was a damages case which says nothing about the redressability of declaratory judgments. Damages are a form of retrospective relief. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608–09 (2001). Declaratory relief is prospective. The Juliana plaintiffs do not seek damages but seek only prospective relief. Nothing in *Uzuegbunam* changed the law with respect to prospective relief.

We held that the Juliana plaintiffs lack standing to bring their claims and told the district court to dismiss. *Uzuegbunam* did not change that. The district court is

instructed to dismiss the case forthwith for lack of Article III standing, without leave to amend.

PETITION GRANTED.

APPENDIX B

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GENESIS B., a minor, by and through her guardian, G.P., *et al.*, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	No. 2:23-cv-10345-MWF-AGR **DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFANDANTS' MOTION TO DISMISS [36]**

Defendants provide this Notice of Supplemental Authority to apprise the Court of the Ninth Circuit's decision granting the United States' Petition for Writ of Mandamus and ordering dismissal without leave to amend of *Juliana v. United States*, 15-cv-1517 (D. Or.) ("Order," attached hereto).

The Order is relevant to the motion now pending before this Court because it reaffirms and amplifies the Ninth Circuit's holding in *Juliana v. United States* that "declaratory relief was 'not substantially likely to mitigate the plaintiffs' asserted concrete injuries.'" Order at 3 (quoting 947 F.3d 1159, 1170 (9th Cir. 2020)).

The Order also explains that *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), relied on by Plaintiffs here, "was a damages case which says nothing about the redressability of declaratory judgments." Order at 4.

Dated: May 1, 2024

Respectfully submitted,

TODD KIM
Assistant Attorney General
United States Deparment of Justice
Environment and Natural Resources Division

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FILED

MAY 1 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, et al.;

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE,

Respondent,

STATE OF ALABAMA,

Defendant,

XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez, et al.;

Real Parties in Interest,

THE NATIONAL ASSOCIATION OF MANUFACTURERS, et al.;

Intervenors,

ENVIRONMENTAL JUSTICE CLINIC - UNIVERSITY OF MIAMI SCHOOL OF LAW, et al.;

No. 24-684

D.C. No.
6:15-cv-1517
District of Oregon,
Portland

ORDER

Amici Curiae.

Before: BENNETT, R. NELSON, and MILLER, Circuit Judges.

In the underlying case, twenty-one plaintiffs (the Juliana plaintiffs) claim that—by failing to adequately respond to the threat of climate change—the government has violated a putative "right to a stable climate system that can sustain human life." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339, at *1 (D. Or. Dec. 29, 2023). In a prior appeal, we held that the Juliana plaintiffs lack Article III standing to bring such a claim. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). We remanded with instructions to dismiss on that basis. *Id.* The district court nevertheless allowed amendment, and the government again moved to dismiss. The district court denied that motion, and the government petitioned for mandamus seeking to enforce our earlier mandate. We have jurisdiction to consider the petition. *See* 28 U.S.C. § 1651. We grant it.

1. "[M]andamus is an extraordinary remedy . . . reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). "[M]andamus is the appropriate remedy" when "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 United States v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 263 (1948). We review a

district court's compliance with the mandate de novo. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010).

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3. In the prior appeal, we held that declaratory relief was "not substantially likely to mitigate the plaintiffs' asserted concrete injuries." *Juliana*, 947 F.3d at 1170. To the contrary, it would do nothing "absent further court action," which we held was unavailable. *Id.* We then clearly explained that Article III courts could not "step into the[] shoes" of the political branches to provide the relief the Juliana plaintiffs sought. *Id.* at 1175. Because neither the request for declaratory relief nor the request for injunctive relief was justiciable, we "remand[ed] th[e] case to the district court with instructions to dismiss for lack of Article III standing." *Id.* Our mandate was to dismiss.

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