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

MOTION TO VACATE MAY 1, 2024 ORDER AND RECALL THE MANDATE OF REAL PARTIES IN INTEREST—PLAINTIFFS

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INTRODUCTION

The 21 *Juliana* Real Parties in Interest ("Youth Plaintiffs") respectfully move this Court to vacate its May 1, 2024 order (the "Order") granting Defendants' petition and to recall the writ of mandate (the "Mandate") issued to the district court "to **dismiss the case forthwith** for lack of Article III standing, without leave to amend." Order at 4–5 (emphasis added). The district court immediately complied with the Order and dismissed the case on the day the Mandate was issued. ECF Nos. 600, 601. The Order should be vacated and the Mandate recalled for three primary reasons: (1) the panel denied Youth Plaintiffs' request for oral argument on Defendants' petition without unanimously finding it unnecessary under Federal Rule of Appellate Procedure 34(a)(2) and in the absence of any applicable exception; (2) the panel disposed of Youth Plaintiffs' entire case in the form of an "Order," whereas it should have designated its decision an "Opinion" under the criteria of Circuit Rule 36-2; and (3) the Order and Mandate violates Federal Rule of Appellate Procedure 41 and Circuit Rule 41-2, and the policy set forth in General Order 4.6(a), because it directed the district court to dismiss the case "forthwith," instead of 7 days after the deadline for a motion for reconsideration or rehearing en banc.

Bolstering each of these reasons is Federal Rules of Appellate Procedure Rule 21, which requires petitions for writ of mandamus "be given preference over ordinary civil cases." Fed. R. App. P. 21(b)(6). Before using "the most potent

weapon in the judicial arsenal" that "preference" extends to prioritizing an All Writs Act case for oral argument, the obligation to write a thorough reasoned opinion citing the binding Supreme Court precedent on the proper standard of review, and the restraint to not jump to de novo review and direct the district court to dismiss "forthwith" when there is no emergency to do so and where every issue raised by Defendants in their petition is fully reviewable on appeal of final judgment. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004); 28 U.S.C. § 1651; Fed. R. App. P. 21(b)(6), 34(a)(2). The Order and Mandate conflicts with and undermines Supreme Court and this Circuit's writ of mandamus precedent, as set forth in Youth Plaintiffs' Petition for Rehearing En Banc, or In the Alternative, Reconsideration En Banc, filed concurrently with this motion, Dkt. 25.1.

In short, this Court granted Defendants' petition for a writ of mandamus and issued the Order and Mandate compelling the immediate dismissal of this case without oral argument, without leave to amend, without designating its decision an Opinion, and without citing authoritative precedent of the Supreme Court and authoritative precedent of this Court. For all of these reasons, the Order should be vacated and the Mandate recalled.[1]

[1] Youth Plaintiffs have been unable to ascertain the position of opposing counsel because the clear need for the instant motion to protect Youth Plaintiffs' interests, in addition to "Youth Plaintiffs' Petition for Rehearing En Banc or, in the Alternative,

ARGUMENT

I. Standard of Review

This Court's authority to vacate, modify, or recall a mandate or withdraw a decision stems from its inherent "power to protect the integrity of [this Court's] own processes." *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). This Court may exercise that authority "in exceptional circumstances," *Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007), "for good cause or to prevent injustice." *Zipfel*, 861 F.2d at 567 (internal citation and quotation marks omitted); *Verrilli v. City of Concord*, 557 F.2d 664, 665–66 (9th Cir. 1977) (treating injustice as a sufficient factor justifying recall of a mandate and withdrawing part of a decision for discretion of district court).

II. The Order Should Be Vacated and Mandate Recalled Because Youth Plaintiffs Were Denied Oral Argument

The panel granted Defendants' petition and issued the Order without oral argument, without any indication the panel had agreed unanimously that oral argument was unnecessary, and despite the fact that petitions for writ of mandamus must "be given preference over ordinary civil cases." Fed. R. App. P. 21(b)(6); *see* Order. This violated Rule 34, which provides in relevant part as follows:

Reconsideration En Banc," arose on June 17, 2024 with the filing of the en banc petition. Youth Plaintiffs, through undersigned counsel, promptly emailed opposing counsel to ascertain their position on this Motion. As of the time of filing, however, no response has been received.

> (2) Standards. Oral argument **must be allowed in every case** unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a)(2) (emphasis added). If the panel had considered the three exceptions to the Court's default position of mandatory oral argument, it would have determined that none applied here.

With respect to Rule 34(a)(2)(A), Defendants filed a petition for a writ of mandamus, not an appeal. Moreover, Youth Plaintiffs—who had successfully defeated six prior petitions for writs of mandamus over the course of nearly a decade of litigation—plainly did not assert frivolous positions in opposition to Defendants' seventh petition (fifth before this Court). *See* Dockets 17-71692, 18-71928, 18-72776, 18-73014, & 24-684 (9th Cir.); S. Ct. Dockets 18A-65 & 18-505. Indeed, Youth Plaintiffs anticipate several briefs from reputable *amici curiae*, including law professors, will soon be filed in support of Youth Plaintiffs' position.

With respect to Rule 34(a)(2)(B), "the dispositive issue" of whether the writ of mandamus factors have been satisfied to allow for this Court's review has been "authoritatively decided" by this Court in two Opinions not even referenced in the Order. *See In re United States*, 884 F.3d 830 (9th Cir. 2018); *In re United States*,

895 F.3d 1101 (9th Cir. 2018). On the merits question, which the panel should not have addressed before the district court's final judgment—whether leave to amend is futile or not—only the district court has addressed that dispositive issue, not this Court. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 3750334, at *5–9 (D. Or. June 1, 2023) (extensively addressing futility); *compare Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (zero mention of futility or Rule 15 leave to amend). Thus, it was unjust to deny oral argument on the question of futility and not even examine Youth Plaintiffs' amended complaint or the authoritative Opinions of this Court on whether leave to amend was within the discretion of the district court to grant. *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019); *see* Dkt. 25.1 at 3, 7–13.

With respect to Rule 34(a)(2)(C), Youth Plaintiffs requested oral argument precisely because Defendants had mischaracterized the standard of review in their petition for writ of mandamus by pointing to *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); *see* Dkt 1.1 at 18, 23, 30, 46. Defendants insisted that the Court's prior mandate left no opportunity for leave to amend and they refused to contend with the amended complaint's new allegations on the relief declaratory judgment would afford. The Order itself demonstrates how much "the decisional process would [have

been] significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(C). The panel made no mention of the lengthy procedural history preceding its decision, except to the extent it criticized the district court for misreading the 2020 mandate—which, despite the panel's ruling to the contrary, neither ordered dismissal with prejudice nor foreclosed amendment of the complaint. If undersigned counsel had been afforded the opportunity to argue, they could have brought these issues to the panel's attention, and conceivably persuaded the panel to interpret the 2020 mandate accurately and according to its terms.

Likewise, oral argument would have afforded the parties an opportunity to address the applicability of the *Cheney-Bauman* factors, which the panel erroneously disregarded pursuant to inapposite authority. *See Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977). As Youth Plaintiffs establish in their En Banc Petition, filed contemporaneously herewith, Defendants' petition fell substantially short of the standards governing a writ of mandamus, widely recognized as one of the "most potent weapons in the judicial arsenal." *Cheney*, 542 U.S. at 380; Dkt. 25.1.

As for "facts," if the panel was going to make a de novo ruling on futility of amendment, as it did, it was required to take all allegations of fact in the amended complaint as true at this stage of the proceedings, which oral argument would have illuminated. But the panel did not even look at Youth Plaintiffs' amended complaint. In short, the panel's willingness to order the immediate dismissal of this case without

oral argument cannot be reconciled to the plain language of Fed. R. App. P. 34; the plain language of Fed. R. App. P. 21(b)(6) (petitions for writ of mandamus must "be given preference over ordinary civil cases"); the absence of any indication from the panel that it had reached a unanimous decision to deny oral argument; the procedural history and posture of this case; the complexity and importance of the issues presented on the merits; and the absence of any "extraordinary" circumstances necessitating the "drastic" remedy of mandamus. *See Bauman*, 557 F.2d at 654. There is good cause to vacate and recall to protect against a significant injustice to these 21 young people who have been seeking access to justice for their injuries caused by Defendants for nearly a decade.

III. The Order Should Be Vacated and Mandate Recalled Because Circuit Rules Require the Panel's Order Be Designated an Opinion

Under Circuit Rule 36-2, "[a] written, reasoned disposition shall be designated an OPINION if it:

> (a) Establishes, alters, modifies or clarifies a rule of federal law, or
> . . .
> (d) Involves a legal or factual issue of unique interest or substantial public importance, or
> (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case . . . ."

First, the panel's Order should be designated as an Opinion because it "alter[ed] . . . federal law" when it issued "one of the most potent weapons in the judicial arsenal" without holding that the requisite conditions justifying the extraordinary remedy of mandamus have been satisfied. *See Cheney*, 542 U.S. 367 (2004); *Bauman*, 557 F.2d 650 (9th Cir. 1977). As set forth more fully in Youth Plaintiffs' En Banc Petition, the Order not only conflicts with *Cheney* and *Bauman*, it conflicts with other authoritative decisions of the U.S. Supreme Court and this Court regarding the broad discretion district courts enjoy to liberally grant leave to amend after a jurisdictional dismissal and that declaratory relief can provide sufficient redress for constitutional violations. Dkt. 25.1 at 12–17. The panel's Order thus alters existing federal law.

Second, the *Juliana* case involves a factual issue of unique interest and substantial public importance. The facts of this case involve what the 2020 panel characterized as "an environmental apocalypse" where "[t]he government by and large has not disputed the factual premises of the plaintiffs' claims." *Juliana,* 947 F.3d at 1164, 1167. In three short pages, the panel summarily dispensed with a case that has been widely cited and studied as "no ordinary lawsuit."[2] *Juliana v. United*

[2] *Juliana* is written up in casebooks used in an array of law school classes. *See, e.g.*, JAMES MAY, MODERN ENVIRONMENTAL LAW (2023); ROBERT L. FISCHMAN ET AL., COGGINS & WILKINSON'S FEDERAL PUBLIC LAND AND RESOURCES LAW (8th ed.

States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016). *Juliana* is cited by federal and state courts around the country and the world, it is taught in every law school, and it will stand as an important precedent for decades to come. Finally, the Order alters and modifies how *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), a published opinion, is to be interpreted and applied, justifying designation of the Order as an Opinion. If the Court intends to resolve the merits of Defendants' mandamus petition de novo, it serves the interests of justice to do so in an Opinion, by a merits panel (like the prior mandamus panel or interlocutory appeal panel, which are most familiar with this case) before any Mandate is issued.

IV. The Order Should Be Vacated and Mandate Recalled Because the Mandate to Dismiss "Forthwith" Was Erroneously Issued

This Court's Mandate, as stated in the Order, "instruct[s]" the district court "to dismiss the case **forthwith** for lack of Article III standing, without leave to amend." Order at 4–5 (emphasis added). The Order, as the writ of mandate, which the district court took it to be, became effective as soon as it was issued. Fed. R.

2022); BARRY HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE (5th ed. 2022); ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY (9th ed. 2021); JOHN SPRANKLING ET AL., PROPERTY: A CONTEMPORARY APPROACH (5th ed. 2021); ALISON RIESER ET AL., OCEAN AND COASTAL LAW: CASES AND MATERIALS (5th ed. 2020); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW (10th ed. 2019); CRAIG JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT (4th ed. 2018).

App. P. 41(c). As in *In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022), other than the Order acting as the writ of mandate, no separate mandate appears set to issue. As such, once the Order and Mandate issued, jurisdiction returned to the district court, who dismissed and entered final judgment.

This Court, however, may not issue its mandate until after the deadline to file a petition for rehearing expires, after such petition has been denied, or, if the court stays its mandate pending a petition for certiorari, after the Supreme Court issues its final disposition. Fed. R. App. P. 41(b), (d); 9th Cir. R. 41-2. The panel's Order violated General Order 4.6 by issuing the writ of mandate and ordering dismissal "forthwith." Specifically, "FRAP 40 and 41 direct that, following a decision by this Court, the mandate should not issue forthwith, but that time should be allowed after entry of judgment for the filing of a petition for rehearing en banc, or petition for writ of certiorari. Therefore, only in exceptional circumstances should a panel order the issuance of mandate forthwith upon the filing of a disposition." General Order 4.6(a). No such "exceptional circumstances" exist to justify dismissal "forthwith."

CONCLUSION

For the reasons stated herein, Youth Plaintiffs respectfully request that the May 1, 2024 Order be vacated and the Mandate recalled.

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the length limit of Federal Rule of Appellate Procedure 27(d)(2)(A) and Ninth Circuit Rule 27-1 because it contains 2,514 words and does not exceed 20 pages.

s/ Julia A. Olson
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