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,

and

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

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

RESPONSE BRIEF OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY
(CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS
(OSB No. 041029)
Our Children's Trust
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Attorneys for Real Parties in Interest

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Our Children's Trust states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

Date: March 21, 2024

s/ Julia A. Olson
JULIA A. OLSON

Attorneys for Real Parties in Interest

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INTRODUCTION

For the *seventh* time in the nearly nine-year history of this case, Defendants file another Petition for Writ of Mandamus to avoid the rules of civil and appellate procedure and constitutional accountability for their actions that are causing ongoing physical harm to the 21 youth Plaintiffs. Defendants' seventh Petition ("Pet.") again challenges every aspect of Plaintiffs' case, from its justiciability to the merits as if this were an interlocutory or final appeal. Defendants, prematurely, seek reversal of two orders of the district court which largely granted Plaintiffs leave to amend and denied in part Defendants' motion to dismiss Plaintiffs' Second Amended Complaint. Those orders can be reviewed, and fully reversed if in error, in the ordinary course of appeal after final judgment, as Congress directed, with no irreparable harm to Defendants. There are no discovery or injunctive relief orders at issue. That should end the inquiry into using the most extreme tool in a court's equitable toolbox reserved for the most extreme abuses of judicial power—mandamus. This Court denied Defendants' prior mandamus petitions in this case on several identical grounds, *In re United States*, 884 F.3d 830 (9th Cir. 2018), *In re United States*, 895 F.3d 1101 (9th Cir. 2018), *In re United States*, No. 18-72776, Dkt. 5 (9th Cir. Nov. 2, 2018), and should, therefore, not entertain this seventh Petition given the absence of any change in mandamus law, with no evidence of irreparable cognizable harm to Defendants, where Defendants cannot meet the high

bar to establish "clear error," and with Plaintiffs' unrebutted allegations of their substantial injuries caused in large part by Defendants.

While Plaintiffs have the burden to establish Article III standing through appeal of final judgment, including redressability, Defendants have the burden by this Petition to establish this Court has jurisdiction to award mandamus, a rarely used form of relief. Defendants have utterly failed to satisfy their burden, meeting none of the required conditions set forth in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004) or the necessary factors in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977). While Defendants can later appeal after final judgment from the exercise of the district court's jurisdiction, Plaintiffs have no appellate recourse as of right should this Court improperly exercise its extraordinary jurisdiction at this stage in this manner.

The great irony of Defendants' seventh Petition is that they are simultaneously arguing to *limit* the authority of the federal courts to contemplate awarding declaratory relief in a constitutional case where this Court has already found there is substantial injury to young Plaintiffs and government causation, while asking the federal courts to *expand* the use of the rare and "most potent weapons in the judicial arsenal" to prevent a lower court from even hearing the young Plaintiffs' case through final judgment and evading all of the ordinary rules of civil and appellate procedure. This tactic weights the remedial powers of the courts to the benefit of the

government, at the expense of young people and their liberty. Defendants ask this Court to disregard Federal Rule of Civil Procedure 15, the Final Judgment Rule, and the Declaratory Judgment Act, and to fully embrace the All Writs Act for all purposes, irrespective of the command of *Cheney* and *Bauman* limiting its application. Allowing Defendants to use writs of mandamus to challenge district court orders granting leave to amend or denying a motion to dismiss would upend the ordinary administration of litigation by trial courts and risk overwhelming appellate courts. Defendants should not be permitted to expand the use of the All Writs Act or use it as an alternative means to seek what is in essence an interlocutory appeal.

JURISDICTIONAL STATEMENT

Petitioners ("Defendants") seek mandamus relief from the district court's orders granting leave to file a Second Amended Complaint ("SAC") (issued on June 1, 2023) and denying a motion to dismiss and to certify for interlocutory appeal (issued on December 29, 2023). Dkt. 1.1.[1] The district court (Aiken, J.) has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and under the Declaratory Judgment Act. 28 U.S.C. §§ 2201, *et seq*. This Court does not have jurisdiction yet to hear this matter under 28 U.S.C. § 1291 because there is no final

[1] "Dkt." refers to a docket entry in the Ninth Circuit. "ECF" refers to a docket entry in *Juliana, et al. v United States of America, et al.*, No. 6:15-cv-01517-AA (D. Or. 2024).

judgment from the district court. As a matter of law, this Court's specific jurisdiction under 28 U.S.C. § 1651 is of a limited nature and is more constrained than the district court's broad jurisdiction to award declaratory relief in "a case of actual controversy." 28 U.S.C. § 2201. Because there is no "necessary or appropriate" writ "agreeable to the usages and principles of law" that can issue in this case, jurisdiction does not lie to award relief to the government before final judgment. 28 U.S.C. §§ 1291, 1651.

ISSUES PRESENTED

1. This case returned to the district court by the issuance of the mandate, Ninth Circuit No. 18-36082 Dkt. 200, 204; *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), where Plaintiffs had demonstrated their "injury in fact" was "fairly traceable" to Defendants' actions—two of three requirements to establish standing under Article III. However, in a starkly divided 2-1 decision, a panel of this Court found Plaintiffs' First Amended Complaint ("FAC") failed to demonstrate "redressability" because the court did not have power to order or design the requested remedial plan. *Id*. at 1171. After that panel's decision remanding the case with instructions to dismiss for lack of standing, Plaintiffs moved for leave to file the SAC, both to plead factual allegations demonstrating that relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, is sufficient to establish partial redressability, to eliminate the specific injunctive relief request the court found it did

not have the power to grant, and based on an intervening change in controlling law. Based on the new intervening Supreme Court opinion on the redressability prong of Article III standing in another case brought by youth, and Plaintiffs' amended allegations and request for relief, the district court exercised its discretion and granted leave to amend. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023). Have Defendants met their high burden to invoke this Court's jurisdiction to obtain mandamus relief against the district court's order granting Plaintiffs leave to file the SAC?

2. After Plaintiffs filed their SAC, Defendants moved to dismiss and to certify for another interlocutory appeal, advancing the same legal arguments previously decided by the district court, while ignoring the new allegations in Plaintiffs' SAC and disregarding the intervening Supreme Court precedent. Based in large part on its prior decisions left untouched by this Court in 2020, and in light of the new Supreme Court precedent, the district court denied the Motions to Dismiss and Certify. Have Defendants met their high burden to invoke this Court's jurisdiction to obtain mandamus relief against the district court's order denying their Motion to Dismiss and Motion to Certify?

SUMMARY OF THE ARGUMENT

This Court should deny Defendants' Petition because (1) this Court has already ruled conclusively against Defendants on nearly identical arguments; and (2)

Defendants do not meet their high burden to invoke this Court's jurisdiction to award mandamus. In 2018, this Court ruled:

> The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial. This distinguishes this case from others in which we have granted mandamus relief. . . .
>
> The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836. As we stated in our prior opinion, allowing the usual legal processes to go forward will not threaten the separation of powers in any way not correctable on appeal. *Id*. No new circumstances disturb that conclusion.

In re United States, 895 F.3d at 1105–06 (citations omitted). That is law of the case and governs this Petition. Further, this Court's interlocutory appeal mandate dismissing the FAC "for lack of Article III standing" does not mandate dismissal of the SAC, a new pleading which this Court has not reviewed, and should not review until final judgment. This Petition, seeking to invoke this Court's rare mandamus jurisdiction, is not an interlocutory appeal and should not be treated as such.

This case does not present "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion" justifying invocation of mandamus. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Applying the factors in *Cheney* and *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977): (1) Defendants will have a full opportunity to appeal the district court's orders stemming from Plaintiffs' SAC, after trial, in the

normal course of litigation in accordance with the final judgment rule; thus, Defendants have "other means" to obtain the desired relief; (2) Defendants will not be "damaged or prejudiced in any way not correctable on appeal" as the only prejudice or damage Defendants assert is an unfounded fear of "intrusive discovery" and the burden of trial and associated litigation costs, an argument which must be rejected under the law of the case. *See In re United States*, 884 F.3d at 834; *In re United States*, 895 F.3d at 1105–06. Defendants here challenge no discovery order or dispute; (3) The district court's orders are not clearly erroneous as a matter of law because dismissals for lack of Article III standing are by their nature dismissals *without* prejudice. Defendants cite no precedent to support the proposition that this Court's jurisdictional dismissal should have been "with prejudice," and even here Defendants still do not seek dismissal "with prejudice." *See Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (quoting *Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1106–07 (9th Cir. 2006)) ("[D]ismissals for lack of Article III jurisdiction must be entered without prejudice because a court that lacks jurisdiction 'is powerless to reach the merits.'"); *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990) (district court abused its discretion by denying leave to amend after complaint was dismissed for lack of standing). After carefully applying this Court's interlocutory ruling and new Supreme Court precedent to the new allegations in Plaintiffs' SAC, the district court

correctly determined amendment was proper, an issue this Court should not yet address until final judgment. *Juliana,* 2023 WL 3750334; Fed. R. Civ. P. 15(a)(2); (4) The two orders challenged here cannot meet the "oft-repeated errors" factor because in eight years of litigation, this Court has reversed the district court only once, on a single, narrow redressability issue—in a 2-1 decision with a powerful dissent—and that redressability issue no longer exists in the SAC. Further, in 36 years on the bench, the district court judge has not been mandamused. *See* Olson Decl. ¶ 11; and (5) There is no novel issue of first impression here regarding leave to amend and the availability of declaratory relief to provide partial redress. The only "novel" issue cited by Defendants relates to the *merits* of Plaintiffs' constitutional claims, which the district court has not yet decided on final judgment and is not presently before this Court. Pet. at 51.

This Court developed guardrails to prevent the "dangers of unprincipled use" of the extraordinary mandamus power, dangers which include undermining the "mutual respect" that "marks the relationship between federal trial and appellate courts." *Bauman*, 557 F.2d at 653–54. In the past three years, this Court has only used mandamus as a tool in one civil case against the United States to stop a deposition of a cabinet-level official. *In re U.S. Dep't of Educ*., 25 F.4th 692 (9th Cir. 2022); *see* Olson Decl. ¶¶ 5–6. Defendants' extraordinary seven petitions for writ of mandamus—five to this Court—singling out this specific case, and these

specific Plaintiffs, without any evidence of cognizable harm to the government should not be sanctioned. *See* Olson Decl. ¶¶ 2–10. Defendants have now repeatedly engaged in conduct that is heavily disfavored by the Ninth Circuit and ignores the law of the case and precedent. *See id.*; *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) ("We have held that bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent.") (cleaned up). This Petition should be denied regardless of whether the Court agrees or disagrees with the district court's orders. Judicial restraint requires letting the youth Plaintiffs finally be heard, and reserving judgment until the district court resolves the case in controversy.

PROCEDURAL HISTORY

Defendants unprecedented use of the All Writs Act in this case,[2] has spanned three presidential administrations, leading to unwarranted delays on urgent constitutional claims challenging government conduct that continues to harm young people. *See* Olson Decl. ¶¶ 2–7; *Juliana*, 947 F.3d at 1168 (acknowledging "[a]t least

[2] Of the 40,000+ cases in which the United States is currently a defendant, in ***no other case*** has defense counsel—the DOJ—taken the extraordinary step of filing a petition for writ of mandamus to stop a trial. *See* Olson Decl. ¶¶ 3–6. Since 2021, the DOJ has only used a petition for writ of mandamus in ***one other case***, to quash a subpoena for the deposition of the Secretary of Education. *Id*. ¶¶ 5–6; *In re U.S. Dep't of Educ*., 25 F.4th 692.

some plaintiffs claim concrete and particularized injuries."); *see also* Declarations of Plaintiffs and Experts in Supp. of Pls.' Mot. to Strike or in the Alternative Resp. to Mot. for Stay, Dkt. 7.3–7.13.

The original Complaint was filed in August 2015, ECF No. 1, and the FAC, as of right, was filed on September 10, 2015. ECF No. 7. After Defendants' motion to dismiss was denied by the district court on November 16, 2016, ECF No. 83, the parties commenced discovery. In 2017, Defendants filed a similar petition for writ of mandamus as here, asking this Court to direct the district court to dismiss Plaintiffs' complaint. *In re United States*, 884 F.3d at 833–34. In March 2018, this Court denied that petition. The opinion by then-Chief Judge Thomas found Defendants did not meet "the high bar for mandamus relief," *id*. at 833, holding: "The issues that the defendants raise on mandamus are better addressed through the ordinary course of litigation." *Id.* at 834, 837. Furthermore:

> 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.

Id. at 837.

This case was then set for trial beginning October 29, 2018. ECF No. 192. In response to a petition for another writ of mandamus and application for stay filed

with the Supreme Court by Defendants, on October 19, 2018, the Supreme Court issued an administrative Order staying trial and all discovery. *In re United States*, 139 S. Ct. 16 (2018) (mem). Pursuant to that Order, the district court vacated trial and all related deadlines. ECF No. 404. On November 2, 2018, the Supreme Court denied Defendants' application for stay. *In re United States*, 139 S. Ct. 452, 453 (2018) (mem).

Following additional motions and petitions, the district court certified this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). ECF No. 444. While this Court granted Defendants' petition for permission to appeal, *Juliana v. United States*, 949 F.3d 1125 (9th Cir. 2018), Judge Friedland dissented, writing that appellate review of legal issues is appropriate only "if and when they are presented [ ] after final judgment." *Id.* at 1128 (Friedland, J., dissenting). Judge Friedland observed: "It is also concerning that allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts." *Id.* at 1127 n.1.

On interlocutory appeal, in a 2020 decision, a three-judge panel of this Court largely affirmed the district court that:

1. Plaintiffs need not bring their constitutional claims under the Administrative Procedure Act ("APA"). *Juliana*, 947 F.3d at 1167–68.

2. For standing, "The district court correctly found the injury requirement met," *id.* at 1168, and "[t]he district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment." *Id.* at 1169.
3. The Panel did not award summary judgment to Defendants and there was no merits ruling. *Id.* at 1175.

In its sole disagreement with the district court, the Panel, in a 2-1 decision, reversed the district court only 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 1171. In *dicta*, the majority noted: "A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action." *Id*. at 1170. Importantly, the Panel did not mandate dismissal *with prejudice*. *Id.* at 1175.

On remand, Plaintiffs were granted leave to amend to cure jurisdictional deficiencies in their Complaint, in part based upon the recently decided Supreme Court case of *Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S. Ct. 792, 797 (2021).[3] *Juliana*, 2023 WL 3750334. In their amendment, Plaintiffs omitted the "specific relief" the panel majority found to be outside of Article III authority to award,

[3] Showing a lack of exigency, Defendants waited over six months to petition for review of the June 1, 2023 order granting leave to amend and to move for a stay.

namely the remedial plan, and other specific remedial requests. Plaintiffs also amended factual allegations, in conformance with *Uzuegbunam's* analysis, to demonstrate that declaratory judgment alone would be substantially likely to provide partial redress of asserted and ongoing concrete injuries, even if further relief is later deemed unavailable. For instance, redress for Plaintiff Alex's physical and emotional health, and the security and longevity of his family farm in Oregon depend on the declaratory judgment he seeks. SAC, ¶ 30-A; *see also* ¶¶ 19-A, 22-A, 34-A, 39-A, 43-A, 46-A, 49-A, 52-A, 56-A, 59-A, 62-A, 64-A, 67-A, 70-A, 72-A, 76-A, 80-A, 85-A, 88-A, 90-A, 95-A to 95-D.

Finally, Plaintiffs' SAC requests relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and other constitutional cases, as follows:

> 1. Pursuant to 28 U.S.C. § 2201 and this Court's Article III authority, enter a judgment declaring the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law;
> 2. Pursuant to 28 U.S.C. § 2201 and this Court's Article III authority, enter a judgment declaring the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the public trust doctrine;
> 3. Pursuant to 28 U.S.C. § 2201 and this Court's Article III authority, enter a judgment declaring that § 201 of the Energy Policy Act has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law.

Thereafter, Defendants moved to dismiss the SAC, repeating the same arguments Defendants raised in seeking to dismiss the FAC, which motion was denied. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339 (D. Or. Dec. 29, 2023). After eight years of litigation and to avoid more delay on a time-sensitive constitutional issue, the district court declined to certify its orders granting leave to amend and denying Defendants' motion to dismiss. *Id.* at *21. The district court *granted* Defendants' motion to dismiss Plaintiffs' claims for injunctive relief and their Equal Protection and Ninth Amendment claims. *Id.* at *12, 20. The only claims for relief that the December 29 order did not dismiss were for declaratory relief. *Id.* at *15.

STANDARD OF REVIEW

Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney*, 542 U.S. at 380 (cleaned up). This Court reviews "the district court's order for clear error and grants the writ only where the district court has usurped its power or clearly abused its discretion." *Plata v. Brown*, 754 F.3d 1070, 1076 (9th Cir. 2014) (citation omitted). It is the petitioner's burden to show that their right to the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Because "the writ is one of the most potent weapons in the judicial arsenal, three conditions ***must be satisfied*** before it may issue." *Id.* at 380 (citations omitted, emphasis added).

> 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.

Id. at 380–81 (cleaned up). The Supreme Court issued *Cheney* after this Circuit articulated its five-factor *Bauman* balancing test. *See Bauman*, 557 F.2d at 654–55.[4] This Court now applies the *Bauman* factors in a manner "consistent with" *Cheney*.

[4] Defendants improperly rely on *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999), for the proposition that "the Court may issue the writ to enforce its own mandate without consideration of [the *Bauman*] factors," Pet. at 46, because "litigants who have proceeded to judgment in higher courts—like the government here—should not be required to go through that entire process again to obtain execution of the judgment." *Id.* at 23. The principle stated in *Vizcaino* does not apply here because that principle was about avoiding re-litigation of *final judgments*. 173 F.3d at 720 (emphasis added) ("The appeal before us . . . was taken from a *judgment on the merits denying relief to plaintiffs and the members of the class* certified by the district court[;] . . . that judgment would be res judicata with respect to the claims not only of the plaintiffs and other workers . . . ."). Here, by contrast, there has been no final judgment on the merits, even under the rule of mandate, because dismissals for lack of jurisdiction can never be res judicata on the merits and are inherently without prejudice. *See* Section II.A, *infra*. Moreover, class certification cases are distinguishable from the present case because, in the class certification context, there is no further remedy for the excluded class members after a decision on the merits pursuant to Rule 23(c)(1). Here, Defendants have full rights of appeal after final judgment on the merits. *Cf. Vizcaino*, 173 F.3d at 721–22. "Under these circumstances, the *Vizcaino* principle that mandamus is available to assure compliance with a prior mandate has no application." *Perry v. Schwarzenegger*, 602 F.3d 976, 980 (9th Cir. 2010).

In re United States, 791 F.3d 945, 955 n.7 (9th Cir. 2015).[5, 6]

ARGUMENT

Defendants' Petition must fail because the law of the case already resolved nearly identical arguments ***against*** Defendants. In addition, the challenged orders—granting leave to amend and denying a motion to dismiss—were not "clearly erroneous" as a matter of law (*Bauman* factor 3 and the second *Cheney* condition). Moreover, Defendants will not be damaged or prejudiced in any cognizable way before they seek relief through the normal appeals process (*Bauman* factors 1 and 2, and the first *Cheney* condition). Further, Defendants fail to meet *Bauman* factors 4 and 5 (the third *Cheney* condition) because the district court has not committed an oft-repeated error, and no new novel question of law is before this Court. Therefore, this Court should deny the Petition.

I. This Court Has Already Rejected Defendants' Central Mandamus Argument in What is Now Law of the Case Several Times Over.

The only prejudice or damage Defendants assert is an unfounded fear of "intrusive discovery" and the burden of trial and associated litigation costs. Both of

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[5] *See In re Bozic*, 888 F.3d 1048, 1055 (9th Cir. 2018) ("weigh[ing]" the *Bauman* factors in a manner informed by *Cheney*); *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (analyzing the *Bauman* factors in a manner not "separate" from the three *Cheney* conditions).

[6] Defendants' brief relies on outdated characterizations of the *Bauman* test that pre-date *Cheney*. *See* Pet. at 17 ("Not every *Bauman* factor is relevant in every case, and the writ may be issued even if some of the factors point in different directions," citing *Christensen v. U.S. Dist. Ct.*, 844 F.2d 694 (9th Cir. 1988).).

these arguments must be rejected under the law of the case.[7]

Regarding claims of "intrusive discovery," in March 2018, this Court denied Defendants' petition similar to their Petition here, finding Defendants did not meet "the high bar for mandamus relief." *In re United States*, 884 F.3d at 833. This Court ruled:

> [T]he defendants argue that mandamus is their only means of obtaining relief from potentially burdensome discovery. The defendants' argument fails because the district court has not issued a single discovery order, nor have the plaintiffs filed a single motion seeking to compel discovery.

Id. at 834. Today, the same is true—there is no discovery order or dispute at issue here. Olson Decl. ¶¶ 8–10; Dkt 1.1 at 516–17; *cf. In re U.S. Dep't of Educ.*, 25 F.4th at 697–98.

Later, in July 2018, despite there being "[n]o new circumstances," Defendants filed a second petition for writ of mandamus similar to the first, which this Court again denied, concluding:

> **The government has made no showing that it would be meaningfully prejudiced by engaging in discovery or trial**. This distinguishes this case from others in which we have granted mandamus relief.

In re United States, 895 F.3d at 1104–06 (citations omitted, emphasis added). Today,

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[7] *See Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) ("[U]nder the 'law of the case' doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case.").

the same remains true: this Petition makes no showing that Defendants would be meaningfully prejudiced by engaging in discovery or trial. Olson Decl. ¶¶ 8–10. Both of this Court's prior rulings are law of the case, governing this Petition where Defendants make no new showing of discovery and trial harming them akin to *Credit Suisse v. U.S. Dist. Ct*., 130 F.3d 1342, 1346 (9th Cir. 1997).

Similarly, this Court has also already rejected Defendants' argument that separation of powers entitles them to protection from the burdens of litigation and trial. In denying Defendants' March 2018 petition for mandamus, this Court ruled:

> The second *Bauman* factor is whether the petitioner "will be damaged or prejudiced in any way not correctable on appeal." *Perry*, 591 F.3d at 1156. To satisfy this factor, the defendants "must demonstrate some burden . . . other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000) (alteration in original) (quoting *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 535 (9th Cir. 1998) (en banc)). Prejudice serious enough to warrant mandamus relief "includes situations in which one's 'claim will obviously be moot by the time an appeal is possible,' or in which one 'will not have the ability to appeal.'" *Id*. (quoting *Calderon*, 163 F.3d at 535). . . .
>
> To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, 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. The United States is a defendant in close to one-fifth of the civil cases filed in federal court. The government cannot satisfy the burden requirement for mandamus simply because it, or its officials or agencies, is a defendant.

In re United States, 884 F.3d at 835–36. Defendants again raised separation of powers in their July 2018 petition, and this Court ***again*** rejected it:

> The government also argues that proceeding with discovery and trial will violate the separation of powers. The government made this argument in its first mandamus petition, and we rejected it. *In re United States*, 884 F.3d at 836.

In re United States, 895 F.3d at 1106. These rulings are law of the case and dictate resolution of this Petition, where Defendants make no new showing that discovery or trial in this case impermissibly burdens the separation of powers and no new precedent in their favor. Defendants' Petition should be denied under the law of the case.

II. The District Court's Orders are Not Clearly Erroneous as a Matter of Law.

Defendants have not "satisf[ied] the[ir] burden of showing that [their] right to issuance of the writ is clear and indisputable." *Cheney*, 542 U.S. at 381. Defendants needed to show "[t]he district court's order is clearly erroneous as a matter of law," *Bauman*, 557 F.2d at 654–55, which is "necessary for granting the writ." *In re Boon Glob. Ltd.*, 923 F.3d 643, 649 (9th Cir. 2019); *see also In re Bozic*, 888 F.3d at 1052. "Even if the trial court made an error of law . . . that fact itself does not render its decision subject to correction by mandamus, for 'then every interlocutory order which is wrong might be reviewed under the All Writs Act.'" *United States v. Mehrmanesh*, 652 F.2d 766, 770 (9th Cir. 1981) (quoting *Bankers Life & Cas. Co.*

v. Holland, 346 U.S. 379, 383 (1953)); *see also In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011) ("Mandamus will not issue merely because the petitioner has identified legal error."). This standard of review is ***highly deferential*** to the district court, requiring this Court to "have a definite and firm conviction that the district court's interpretation . . . was incorrect." *In re Grice*, 974 F.3d 950, 954–55 (9th Cir. 2020) (omission in original). "Where no prior Ninth Circuit authority prohibits the district court's ruling, or where the issue in question has not yet been addressed by any circuit court in a published opinion, the ruling cannot be clearly erroneous." *Id.* at 955 (citing *In re Swift*, 830 F.3d 913, 917 (9th Cir. 2016)); *see also In re Morgan*, 506 F.3d 705, 713 (9th Cir. 2007); *In re Mersho*, 6 F.4th 891, 898 (9th Cir. 2021).[8]

A. The district court did not *clearly* err or violate the rule of mandate by granting leave to amend.

Federal Rule of Civil Procedure 15 instructs "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Trial courts have discretion in deciding whether to grant leave to amend, "guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (citing *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957)). "It is not unreasonable that plaintiffs

[8] Defendants incorrectly turn the rule for "clear error" on its head, as if it required the district court or real parties in interest to show that the district court's order was *clearly correct*. *See e.g.*, Pet. at 40. The "clear error" rule requires no such thing.

may seek amendment after an adverse ruling, and in the normal course district courts should freely grant leave to amend when a viable case may be presented." *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002).

When the district court granted Plaintiffs' motion for leave to amend, it "consider[ed] plaintiffs' new factual allegations under the Declaratory Judgment Act, and amended request for relief, in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal." *Juliana*, 2023 WL 3750334, at *5. The district court found this Court's "mandate did not address whether amendment, if permitted, would cure the deficiency it identified in plaintiffs' complaint." *Juliana*, 2023 WL 9023339, at *8. The 2020 opinion also did not instruct the district court to dismiss without leave to amend: "Accordingly, its mandate to dismiss did not foreclose that opportunity, and the Court, on reconsideration, finds that in permitting plaintiffs to proceed with their second amended complaint, the rule of mandate is not contravened. *S.F. Herring*, 946 F.3d at 574; *see also Creech v. Tewalt*, 84 F.4th 777, 783 (9th Cir. 2023) (where appellate court remanded and stated that plaintiff should have leave to amend, district court did not violate rule of mandate by dismissing *without* leave to amend, because appellate court did not expressly foreclose that option)." *Id.*

Here, the Petition's core assignment of error is "the district court clearly erred in concluding that this Court's [2020] mandate permitted further amendment[.]" *See*

Pet. at 24. The district court did not violate the rule of mandate by granting leave to amend because dismissal for lack of jurisdiction is *always* without prejudice and this Court's 2020 order did not, and could not, stray from that standard rule by dismissing with prejudice. *See Juliana*, 947 F.3d at 1175. It would have been clear error to infer a dismissal *with prejudice* into a jurisdictional dismissal because "dismissals for lack of Article III jurisdiction must be entered without prejudice because a court that lacks jurisdiction is powerless to reach the merits." *Barke*, 25 F.4th at 721 (cleaned up). "[D]ismissal for want of standing must be without prejudice." *Fleck & Assocs.*, 471 F.3d at 1107 (cleaned up); *see also Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam); *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1314 (9th Cir. 2022).

Here, because the dismissal was for lack of one element of standing, the district court was required to interpret this Court's remand order as a dismissal without prejudice. Defendants' request to convert this Court's prior dismissal order to one with prejudice is foreclosed by binding precedent. *Barke*, 25 F.4th at 721; *Fleck & Assocs.*, 471 F.3d at 1107; *see also United Union*, 919 F.2d at 1402 (district court abused its discretion by denying union leave to amend after complaint was dismissed for lack of standing). It simply cannot be said that the district court erred—

let alone *clearly* erred—by interpreting the 2020 dismissal order as being without prejudice.[9] *See Juliana*, 2023 WL 3750334, at *4–5, 8.

Defendants' Petition fails to meet its first burden to show the district court's order granting leave to amend *clearly erred* as a matter of law. Because such a showing "is necessary for granting the writ," the Petition should be denied. *In re Boon*, 923 F.3d at 649.

B. The district court did not *clearly* err by denying Defendants' motion to dismiss for lack of standing.

Defendants once again improperly seek to invoke this Court's jurisdiction to take an early appeal of the district court's denial of their motion to dismiss on the jurisdictional issue of standing, s*ee* Pet. at 30–38, parroting many of the arguments in their previous petitions already rejected by this Court. *See In re United States*, 884 F.3d at 837.

In 2020, the divided panel "reluctantly" concluded the redressability prong was not satisfied by Plaintiffs' FAC because Plaintiffs did not establish that the "crux" of "the specific [injunctive] relief they seek is within the power of an Article III court." *Juliana*, 947 F.3d at 1175, 1170–71. With respect to declaratory relief, in

[9] Indeed, this Court has previously instructed the district court, J. Aiken, that it is erroneous to dismiss a case for lack of jurisdiction *with* prejudice. *Strubel v. SAIF Corp.*, 848 F. App'x 745, 746 (9th Cir. 2021) ("We affirm the dismissal [for lack of jurisdiction], and instruct the district court to amend the judgment to reflect that the dismissal of this action is without prejudice.").

dicta, the panel majority wrote that it was "not substantially likely to mitigate the plaintiffs' asserted concrete injuries" as alleged in the FAC, without any analysis as to Plaintiffs' past, present, or foreseeable injuries. *Id.* at 1170.

Shortly thereafter, in *Uzuegbunam*, the Supreme Court, in an opinion by Justice Thomas, held nominal damages, "'a form of declaratory relief in a legal system with no general declaratory judgment act,' . . . satisfies the redressability element of standing" under Article III, regardless of whether the complained-of injury is prospective or retrospective. 592 U.S. 279, 141 S. Ct. 792, 798, 802 (2021) (quoting D. Laycock & R. Hasen, Modern American Remedies 636 (5th ed. 2019)). The Supreme Court explained: "early courts routinely awarded nominal damages alone. Certainly, no one seems to think that those judgments were without legal effect. Those nominal damages necessarily must have provided redress." *Uzuegbunam*, 141 S. Ct. at 801. Accordingly, this intervening precedent clarified that to the extent a complaint seeks nominal damages or declaratory relief under a declaratory judgment act, the redressability prong of Article III standing is met.[10]

[10] *Uzuegbunam* squarely rejected the argument that allowing these forms of relief to satisfy the redressability prong of Article III standing weakens the standing inquiry or guarantees any plaintiff entry to an Article III court: "Our holding concerns only redressability. It remains for the plaintiff to establish the other elements of standing (such as particularized injury); plead a cognizable cause of action, . . . and meet all other relevant requirements." 141 S. Ct. at 802.

This Court has favorably quoted *Uzuegbunam*'s treatment of nominal damages as a form of declaratory relief and emphasized that nominal damages and declaratory relief are analogous: "As this observation recognizes, before nominal damages can be granted, a court must . . . as in a declaratory judgment action, declar[e] the applicable law." *Platt v. Moore*, 15 F.4th 895, 902 (9th Cir. 2021).

> There is **scant difference** between a claim for declaratory relief and incidental damages and one for nominal damages, **except that the nominal damages are more like pure declaratory relief** because they are by definition minute and so of no budgetary consequence.

Id. at 903 (emphasis added); *see also Pac. Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 896 (9th Cir. 2021); *Clark v. Weber*, 54 F.4th 590, 592 (9th Cir. 2022).

In denying Defendants' motion to dismiss the SAC, the district court, citing *Uzuegbunam* as intervening binding precedent, concluded Plaintiffs' amended factual allegations and claims for declaratory relief satisfied the redressability prong of the standing inquiry. *Juliana*, 2023 WL 9023339, at *13. The district court explained:

> *Uzuegbunam* illustrates that when a plaintiff shows a completed violation of a legal right, as plaintiffs have shown here, standing survives, even when relief is nominal, trivial, or partial.

Id. at *13. The district court's interpretation of intervening Supreme Court precedent as to declaratory relief sufficing for the redressability prong of standing cannot be

deemed clearly erroneous. Defendants cite no binding precedent subsequent to *Uzuegbunum* that contradicts the district court's analysis.

Defendants incorrectly characterize *Uzuegbunam* as only a case about nominal damages and ignore the Supreme Court's analysis that nominal damages are a "form of declaratory relief," and therefore are equivalent forms of redress for purposes of Article III standing. Pet. at 28-29; *cf. Uzuegbunam*, 141 S. Ct. at 798, 802. Remarkably, Defendants do not cite, let alone distinguish, the *Platt* case in their Petition.

Because the intervening precedents of *Uzuegbunam* and *Platt* are irreconcilable with the 2020 panel majority's earlier *dicta* in the instant case regarding redressability as to declaratory relief in the FAC, the district court did not err by concluding that the declaratory relief requested in the SAC is sufficient to satisfy the redressability prong of Article III standing. However, even if an appellate court could find the district court did err, it did not *clearly* err, because it is reasonable for a district court to interpret and rely on intervening binding precedent alongside the Declaratory Judgment Act, none of which is cited in this Court's 2020 *dicta* on declaratory relief.[11] Because mandamus cannot lie without a showing of

[11] Moreover, any assertion of "clear" error on the question of standing is premature because the district court has reached no final decision on standing. This district court is required to continue to evaluate, at every stage of the litigation, whether

clear error, Defendants' Petition should be denied with respect to Defendants' motion to dismiss for lack of jurisdiction.[12]

All six sister circuits that have expressly addressed this question have held that declaratory relief for a continuing or impending injury satisfies the redressability prong of standing. *Efreom v. McKee*, 46 F.4th 9, 21 (1st Cir. 2022) (cleaned up), *cert. denied*, 143 S. Ct. 576 (2023); *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019); *Kareem v. Cuyahoga Cnty. Bd. of Elections*, __ F.4th __, No. 23-3330, 2024 WL 1110208, at *6 (6th Cir. Mar. 14, 2024); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that "declaratory relief would prevent future violations of

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Plaintiffs have established standing. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1141 (9th Cir. 2010). Because the district court here remains free to revisit its conclusion on standing at any time, there is not yet any final appealable decision available for this Court to evaluate. However, the ability to fully appeal that decision is preserved.

[12] Defendants inappropriately treat *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023) as if it stood for the proposition that declaratory relief can only provide redress if the declaration has "preclusive effect on a traditional lawsuit that is imminent." *See* Pet. at 32, 34. *Brackeen* held no such thing. In *Brackeen*, the Supreme Court held that a declaratory judgment against the federal Secretary of the Interior would not redress injuries caused by *states'* enforcement of a particular statute because a declaratory judgment against the Secretary would not be binding against states. 599 U.S. at 291–294. It was in that context that the Supreme Court obliquely implied its analysis might be different if the requested declaration could preclude a separate imminent lawsuit. *Id.* Because Plaintiffs here—unlike the *Brackeen* plaintiffs—have named as Defendants the entities whose affirmative conduct is causing Plaintiffs' constitutional injury, Defendants' reliance on *Brackeen* is in error. *See also Green v. Mansour*, 474 U.S. 64, 73 (1985) (noting that it is only in situations where there is no ongoing violation and the "**past** lawfulness of" a defendant's conduct is at issue, that declaratory judgment is inappropriate unless it could preclude a traditional lawsuit) (emphasis added).

the Indiana certification law."); *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999); *Am. Clinical Lab'y Ass'n v. Becerra*, 40 F.4th 616, 622 (D.C. Cir. 2022). Similarly, all five sister circuits that have indirectly addressed this question have implied that declaratory relief for a continuing or impending injury satisfies redressability. *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 390 (2d Cir. 2015); *Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th 770 (4th Cir. 2023); *Frost v. Sioux City, Iowa*, 920 F.3d 1158, 1162 (8th Cir. 2019); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906 (10th Cir. 2012); *Apotex, Inc. v. Daiichi Sankyo, Inc.*, 781 F.3d 1356, 1371 (Fed. Cir. 2015). In short, if this Court were to hold that declaratory relief for a continuing or impending injury caused by Defendants is not sufficient, on its own, to satisfy the redressability prong of standing, this Court would be contradicting **all eleven of its sister circuits** that have addressed this issue either directly or indirectly, in addition to the Supreme Court. Yet that is precisely what Defendants' Petition asks this Court to do. *See* Pet. at 34 (asking this Court to hold before final judgment that declaratory relief cannot even partially redress Plaintiffs' continuing and impending injuries caused by Defendants).

As the December 29 order noted, "'It is emphatically the province and duty of the judicial department to say what the law is,'" *Juliana*, 2023 WL 9023339, at *13 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "Declaratory

judgments are [] firmly sited within the core competences of the courts in a way that structural injunctions are not." *Id.* at *14. Article III courts routinely provide declaratory judgment in constitutional cases. *See, e.g.*, *Martin v. City of Boise*, 902 F.3d 1031, 1049 (9th Cir. 2018), *op. amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019) (reversing and remanding district court's dismissal of claim for declaratory relief for prospective constitutional injury); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59 (1978). The district court's December 29 order described the need for a fact-intensive liability stage, bifurcated from the remedial stage, where the trier of fact would "defin[e] plaintiffs' basic rights and defendants' consequent obligations." *Juliana*, 2023 WL 9023339, at *14. The district court correctly explained it was premature to fashion the contours of relief prior to trial. *Id.* at *15 (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)) ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial.").[13]

[13] Although the December 29 order speculated about possibly appointing "a special master to handle complex **factual** issues," the order reached no conclusion about what the second stage of trial will entail. *Juliana*, 2023 WL 9023339, at *14 (emphasis added). Because there has been no trial yet, and declaratory relief can be flexible, it is premature for Defendants to purport to predict, or this Court to presume,

Despite Defendants' mischaracterization of the scope of the December 29 order and of Plaintiffs' requested relief, this case falls within the traditional power of Article III courts to say what the law is. As the December 29 order emphasizes: "There is no need for the Court to step outside its prescribed role to decide this case. At its heart, this lawsuit asks the Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." *Id.* at *15. By holding that an Article III court has the power to issue declaratory relief in a constitutional case with past, present, and ongoing violations, the December 29 order did not "clearly" exceed the power of an Article III court.

C. No binding precedent prohibits the district court's ruling that Plaintiffs stated claims under the Due Process Clause to a life-sustaining climate system.

Defendants argue the district court erred by concluding Plaintiffs stated a claim under the Due Process Clause regarding a right to a "stable climate system." Pet. at 39. Issues of first impression like this one are by definition issues on which

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what declaratory relief, if any, the district court would issue. *See* Pet. at 2–3, 35–38. The December 29 order is a far cry from attempting to force the government to take particular action. Plaintiffs' SAC does not seek to control the government's overall response to climate change. The SAC makes claims against the systematic policies and practices in operating the national energy system and one section of the Energy Policy Act. *See e.g.*, SAC ¶¶ 95-A to 95-D (emphasis added). It seeks to clarify Plaintiffs' rights in the context of Defendants' systematic infringement of those rights in an active case in controversy.

there is no binding or strongly persuasive precedent—and on such issues, district courts are free to make the first attempt at resolving such questions. *See In re Grice*, 974 F.3d at 954–55; *In re Swift*, 830 F.3d at 917. If the district court's resolution is incorrect, the appellate court can review the error *de novo* after final judgment. *See, e.g.*, *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 62 F.3d 280, 282 (9th Cir. 1994).

As an issue of first impression, there can be no *clear* legal error. For example, in *In re Morgan*, this Court considered whether the district court's categorical rejection of certain plea bargain agreements was proper. 506 F.3d at 710. The Court recognized that, although the "precise issue" had not previously been considered by the Court, this Court's "cases provide[d] the necessary guidance to resolve [the disputed] question." *Id*. The Court held that, although the district court erred, it did not *clearly* err, because "no prior Ninth Circuit authority prohibited the course taken by the district court." *Id*. at 713. In the absence of clear error, the Court denied the mandamus petition. *Id*.

The present case is even further removed from the circumstances in *Morgan*. Here, Defendants have not shown that the district court's ruling on the Due Process Clause is clearly prohibited by any prior Ninth Circuit authority, and the issue has not been addressed by any circuit court in a published opinion.

Defendants moreover misrepresent Plaintiffs' Due Process claim by equating the narrow right that Plaintiffs assert—namely, a right to a stable climate system—with the entirely different and broader "right" to a pollution-free environment that has been rejected by some courts. Pet. at 40. Under Defendants' characterization, a right to a pollution-free environment is violated by pollutants of *any* kind in *any* amount—an extreme position Plaintiffs do not assert. By contrast, the right to a stable climate implicates only one kind of pollutant—greenhouse gases—at levels that knowingly destabilize the climate system and human civilization. SAC. ¶¶ 95-C, 202, 205, 241*; accord Juliana*, 947 F.3d at 1164 ("The plaintiffs in this case have presented compelling evidence that climate change has brought th[e] eve [of destruction] nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."). Defendants have failed to show the district court's denial of their motion to dismiss the Due Process claim was clearly in error, by supporting that argument with any contrary binding precedent to the specific life-sustaining climate right asserted.[14]

[14] Moreover, even if Defendants had made that showing, Plaintiffs have other constitutional claims at issue in this case, and dismissing a single claim would not dismiss Plaintiffs' entire case. *See* SAC ¶¶ 277–310 (raising several substantive

D. No binding precedent prohibits the district court's ruling on Plaintiffs' Public Trust Doctrine claim.

Review on mandamus is not *de novo* review, as Defendants treat it. The same precedent that invalidates Defendants' assertion of clear error under the Due Process Clause is also fatal to Defendants' similar assertion regarding Plaintiffs' Public Trust Doctrine claim. Pet. at 42; *See In re Grice*, 974 F.3d at 954–55; *In re Swift*, 830 F.3d at 917; *In re Morgan*, 506 F.3d at 713; *In re Mersho*, 6 F.4th at 898. Defendants' Petition fails to cite any prior Ninth Circuit authority, or any prior published opinion from a sister circuit, that forecloses the district court's interpretation of the law. *Cf. In re Grice*, 974 F.3d at 954–55. Accordingly, Defendants fail to show clear error regarding Plaintiffs' Public Trust claim.

E. Defendants make no showing of judicial usurpation of power.

Defendants suggest the district court erred so extremely as to "amount to a judicial usurpation of power." *See* Pet. at 38. Defendants cite *Cheney* for this proposition. 542 U.S. at 381. However, *Cheney* dealt with intrusive discovery orders against high-ranking government officials, whereas there are no discovery orders at issue here. *See id.* at 388. Moreover, the Supreme Court concluded *Cheney*'s facts did not amount to a judicial usurpation of power, and the writ did not issue. *Id.* at

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claims for relief); *Juliana*, 2023 WL 9023339, at *17, 19–21 (dismissing only Equal Protection and Ninth Amendment claims, leaving intact the Fifth Amendment right to life, liberty, personal security and state-created danger and Public Trust claims).

391. Thus, *Cheney* forecloses rather than supports Defendants' suggestion that there is a judicial usurpation of power here.

It is not a judicial usurpation of power every time a court assumes jurisdiction to hear a systemic injury case against the executive branch. The case originating the proposition that mandamus is appropriate for a "judicial usurpation of power" also undermines Defendants' argument. *See De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945). In *De Beers*, a district court granted, as preliminary relief, an injunction that the authorizing statutes would not have permitted as a final injunction. *Id.* at 220. Because the district court issued the preliminary injunction in clear violation of the letter of the statute that plaintiffs relied on for their final relief, the order "[wa]s not mere error but usurpation of power." *Id.* at 217, 220. Here, by contrast, the district court has not yet even issued a declaratory judgment and even if it did, declaratory judgment is consistent with—not violative of—its authority under the Declaratory Judgment Act.

In short, on each of the assignments of error noted by Defendants—the district court's grant of leave to amend; its finding that declaratory judgment can partially redress constitutional injuries alleged in the ***Second*** Amended Complaint; and its conclusion that Plaintiffs have stated a claim under the Due Process Clause and the Public Trust Doctrine—Defendants failed to meet their heavy burden to show that the district court's decision was *clearly* erroneous. Because "the absence of the third

[*Bauman*] factor is dispositive," the Petition should be denied. *In re Boon*, 923 F.3d at 649.

III. The Challenged Orders are Reviewable Through the Normal Appeals Process, and Ordinary Burdens of Litigation are Not Cognizable Damage.

Even if Defendants were able to show clear legal error, that showing is "not sufficient[] for issuance of the writ." *In re Bozic*, 888 F.3d at 1052. "[T]he party seeking issuance of the writ must [also] have no other adequate means to attain the relief he desires[.]" *Cheney*, 542 U.S. at 380 (cleaned up). "It is . . . well settled, that the writ is not to be used as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial[.]" *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (citations omitted).

The Supreme Court has made clear that this firm rule for mandamus derives from the appellate courts' duty to abide by the procedural statutes enacted by Congress:

> **[M]andamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record.** Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts. [Plaintiffs] stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. **But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable.** Where the appeal statutes establish the

> conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions . . . . As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times, before there would be a final judgment.' . . . Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27–31 (1943) (cleaned up) (emphasis added).

Here, Defendants are clearly using mandamus as a substitute for an ordinary appeal that can later resolve all of their issues. They completely fail to make the required showing for two reasons. First, regarding the first *Bauman* factor, both district court orders challenged by Defendants are appealable through the normal process. Second, with respect to the second *Bauman* factor, the relief that Defendants seek—namely, to be spared from the ordinary burdens of litigation—has already been found by this Court in this case not to be a cognizable "damage" for mandamus purposes. Because Defendants cannot show that they face a cognizable damage not correctable on appeal, and because that condition must be met for the writ to issue, Defendants' failure to meet that condition is fatal to their Petition.

A. *Bauman* Factor 1: The district court's orders granting leave to amend and denying Defendants' motion to dismiss are reviewable through the ordinary appeals process.

"From the very foundation of our judicial system, the general rule has been that the whole case and every matter in controversy in it must be decided in a single appeal" to "preserve[] the proper balance between trial and appellate courts, minimize[] the harassment and delay that would result from repeated interlocutory appeals, and promote[] the efficient administration of justice." *Microsoft Corp. v. Baker*, 582 U.S. 23, 36–37 (2017) (cleaned up); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (the finality principle protects the independence of the district court, avoids harassment of litigants and cost of successive appeals, and promotes judicial efficiency). Even in situations where, unlike here, the second *Bauman* factor (prejudice or damage not correctable on appeal) is satisfied, "[t]he availability of a direct appeal would weigh strongly against a grant of mandamus." *Bauman*, 557 F.2d at 656. This nearly 9-year long case stuck in pre-trial proceedings is emblematic of the lack of judicial efficiency and harassment of these youth Plaintiffs, some of whom have spent half their young lives waiting for their day to be heard in court. Levi Decl., Dkt. 7.8 ¶ 2.

Both the order granting leave to amend and the order denying Defendants' motion to dismiss are not final because they do not terminate the claims and the decisions "may be revised at any time before the entry of a judgment adjudicating

all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Appeal is available "from all final decisions of the district courts of the United States[.]" 28 U.S.C. § 1291. Under the merger doctrine, "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984). The merger doctrine encompasses orders addressing leave to amend and orders denying motions to dismiss. *See, e.g.*, *Kamal v. Eden Creamery, LLC*, 88 F.4th 1268, 1275 (9th Cir. 2023) (holding that order regarding leave to amend merged with final judgment); *Portland Feminist Women's Health Center*, 62 F.3d at 283–84, 286 (reversing, on appeal after trial and final judgment, a district court's denial of motion to dismiss). Hence, both orders challenged by Defendants will merge into the final judgment after summary judgment or trial and will be reviewable on appeal at that time.

In short, the review Defendants seek is available to them on "direct appeal," *Bauman*, 557 F.2d at 656, through "the regular appeals process." *Cheney*, 542 U.S. at 381. For that reason, the first *Bauman* factor is not satisfied.

B. *Bauman* Factor 2: The ordinary burdens of litigation are not cognizable "damage or prejudice" for purposes of mandamus.

In denying mandamus, this Court has already ruled in this case that "the defendants 'must demonstrate some burden . . . ***other than the mere cost and delay*** that are the regrettable, yet normal, features of our imperfect legal system.'" *In re United States*, 884 F.3d at 835 (emphasis added) (quoting *DeGeorge*, 219 F.3d at

935 (alteration in original); *Calderon*, 163 F.3d at 535 (en banc)). Like groundhog day, the only prejudice or damage Defendants assert in this seventh Petition repeats (1) an unfounded and hyperbolic fear of "intrusive discovery," with no discovery order to challenge and (2) the burden of trial and associated litigation costs. Pet. at 52. Both issues are inadequate to satisfy the second *Bauman* factor and have already been rejected by this Court. *See* Section I *supra*; Olson Decl. ¶¶ 8–10; Dkt 1.1 at 516–17; *cf. In re U.S. Dep't of Educ*., 25 F.4th at 697–98; *See also In re Boon*, 923 F.3d at 654–55 (holding that even "enormous" expense of continued proceedings does not constitute "damage[] or prejudice[] not correctable on appeal"). Granting Defendants' Petition would be contrary to law and law of the case.

Moreover, from October 17, 2018 to today, the government has spent over 8,000 hours just on the appellate process alone, making a mockery of its argument that early appeals will save public resources.[15] Pet. Ex. 7, Montero Decl. ¶¶ 2–3; *see also* Stiglitz Decl., Dkt. 7.3 ¶ 6.b (describing Defendants' argument as "ludicrous.").

These deficiencies are fatal to the Petition, which should end the inquiry.

[15] Had the case gone to trial in 2018, Defendants claim they would have expended 7,300 hours of professional time at a ten-week trial. Pet. at 48; Pet. Ex. 6, Montero Decl. ¶ 7. Defendants have spent more than that amount of time since 2018 seeking extraordinary appeals and stays. Pet. Ex. 7, Montero Decl. ¶¶ 2–3. Indeed, Defendants could have had 10 people spending more than 15 hours per day for 50 days to achieve that many hours of work (10x15x50 = 7,500 hours). This case could have reached final judgment after trial in 2018 for the same amount of time Defendants have spent on their delay tactics.

IV. The District Court Has Not Committed an Oft-Repeated Error, and No New Novel Question of Law is Before This Court.

If the inquiry even gets this far, this Court determines whether the exercise of its discretion is warranted by applying the fourth and fifth *Bauman* factors—namely, by examining whether "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules," and whether it "raises new and important problems, or issues of law of first impression." *Bauman*, 557 F.2d at 654–55. "The fourth and fifth *Bauman* factors are rarely, if ever, present at the same time." *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989).

The fourth *Bauman* factor examines whether the district court judge has a persistent habit of "similar and erroneous rulings." *Bauman*, 557 F.2d at 660. But where the Ninth Circuit and the Supreme Court have not held that the type of order being reviewed is erroneous, this factor does not apply. *Id.* at 661. Here, the district court judge below has no history in her 36 years on the bench (26 as a federal judge) of being overturned for granting leave to amend and has never been mandamused. Olson Decl. ¶¶ 11–12. However, this district court judge has been found to abuse her discretion by *denying* leave to amend. *See, e.g.*, *OSU Student All. v. Ray*, 699 F.3d 1053 (9th Cir. 2012). Moreover, in eight years of litigation in the instant case, this Court has reversed the district court only once, on a single, narrow issue—in a "reluctant[]" 2-1 decision with a powerful dissent. *Juliana*, 947 F.3d at 1175.

Because the district court has no history of error similar to the type that Defendants assert here, the fourth *Bauman* factor is not met.

A recent decision from the Fifth Circuit Court of Appeals illustrates how far the district court's conduct is from satisfying the fourth *Bauman* factor. On February 9, the Fifth Circuit denied a petition for writ of mandamus brought by the State of Texas. *United States v. Abbott*, 92 F.4th 570, 571 (5th Cir. 2024) (Willett, J., concurring). Previously, the Fifth Circuit had reversed a district court and stayed a preliminary injunction against Texas pending rehearing *en banc*. *Id.* Shortly thereafter, the district court set a drastically expedited pretrial schedule that would allow the district court to rule on the merits of a permanent injunction before the *en banc* rehearing, thereby potentially mooting the Fifth Circuit proceedings. *Id.* at 572. The district court's order gave "the parties only . . . seven days[] to designate expert witnesses; allowed less than a month for general discovery"; required "multiple expert depositions [to] be undertaken in one week"; required "experts' rebuttal reports . . . almost instantaneously"; and "required the parties to file proposed findings of fact and conclusions of law . . . less than a week after the close of expert discovery." *Id.* at 572–73.

On Texas's petition for mandamus, 11 of 18 Circuit Judges found the district court "abused its discretion," behaved "questionabl[y]," or was "insupportable." *See id*. at 571 (Jones, J., concurring); *id*. (Willett, J., concurring); *id*. at 581 (Oldham, J.,

dissenting). Nevertheless, the Fifth Circuit **denied** Texas's petition in a 13-5 decision. *Id*. at 571. Circuit Judge Willett explained: "The district court's scheduling orders, although questionable, fall shy of showing a 'persistent disregard of the Rules of Civil Procedure' or a pattern of noncompliance that could justify mandamus relief." *Id*. at 573 (Willett, J., concurring) (citing *Roche*, 319 U.S. at 31; *Will v. United States*, 389 U.S. 90, 104–05 (1967)).

The district court's conduct here raises none of the issues present in *Abbott*. There, Texas "attempted to voice concerns during the status conference— and was repeatedly interrupted by the district court before it could finish its comments or requests." *Abbott*, 92 F.4th at 572 (Willett, J., concurring). Here, by contrast, the district court took Defendants' arguments about the rule of mandate seriously; devoted many pages to considering them; and explained why its order was consistent with the rule of mandate. *Juliana*, 2023 WL 3750334, at *4–9; *Juliana*, 2023 WL 9023339, at *5, 7–8; *see also*, *e.g.*, *Fleck & Assocs.*, 471 F.3d at 1106–07. Defendants have failed to satisfy the fourth *Bauman* factor.

The fifth *Bauman* factor examines whether the district court's order raises "issues of first impression and create new and important problems[.]" *Bauman*, 557 F.2d at 661. Here, the only "novel" issue of law Defendants point to relates to the merits of two of Plaintiffs' constitutional claims, which the district court has not yet decided on final judgment. Pet. at 51. The other questions of law involve leave to

amend and redressability. The issue of leave to amend has already been decided by the black letter law that dismissals for lack of jurisdiction are without prejudice. *Barke*, 25 F.4th at 721. That relief like declaratory judgment meets Article III redressability has already been decided by the Supreme Court in *Uzuegbunam*, 141 S. Ct. at 800–02; by this Court in *Platt*, 15 F.4th at 902; and by the sister circuit precedents cited in Section II.B *supra*. The fifth *Bauman* factor is not met.

In sum, even if the Petition had demonstrated clear error and cognizable damage not correctable on appeal—which it has not—the fourth and fifth *Bauman* factors would still counsel in favor of denying Defendants' Petition.

V. Mandamus Cannot Lie to Order the District Court to Certify Its Order for Interlocutory Appeal Because Certification Decisions are at the District Court's Discretion.

In a footnote citing no authority, Defendants ask this Court, "[i]n the alternative," to issue a writ of mandamus ordering the district court to certify the challenged orders for interlocutory appeal. Pet. at 18. That request is improper because mandamus cannot direct how a court's discretion shall be exercised, *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 697 (9th Cir. 1999), and certification for interlocutory appeal is at the discretion of the district court. *See Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th Cir. 1994) ("We review the refusal to certify an interlocutory appeal under Rule 54(b) for an abuse of discretion[.]"). Moreover, in examining whether a district court abused its discretion by refusing to certify an

order for interlocutory appeal, this Court must "give substantial deference to the district court." *Id.* Because Defendants' Petition does not meet its heavy burden to overcome that deference, this request should be denied.

CONCLUSION

The law of the case and an analysis of every factor under *Cheney* and *Bauman* are fatal for Defendants' seventh Petition. While they would strongly prefer not to stand trial and await an appeal after final judgment, Defendants are not above the law. Their conduct has been extraordinarily prejudicial to these 21 youth Plaintiffs and has wasted enormous resources, while flouting bedrock law. For the foregoing reasons, this Court should deny Defendants' Petition and refuse to entertain another, eighth petition for writ of mandamus, making clear such a petition under the same theory would be sanctionable. Plaintiffs respectfully request the opportunity to present oral arguments should the Court not reject jurisdiction under the All Writs Act and deny the Petition outright.

DATED this 21st day of March, 2024, at Eugene, OR.

Respectfully submitted,

s/ Julia A. Olson

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Our Children's Trust
1216 Lincoln Street

Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY
(CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS
(OSB No. 041029)
Our Children's Trust
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Attorneys for Real Parties in Interest

STATEMENT OF RELATED CASES

This case was previously before this Court and is a related case within the meaning of Circuit Rule 28-2.6.

Defendants' prior petitions for writs of mandamus: *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692*); In re United States*, 895 F.3d 1101 (9th Cir. 2018) (No. 18-71928); *In re United States*, No. 18-72776, Dkt. 5 (9th Cir. 2018); *In re United States*, No. 18-73014.

Defendants' prior appeal: *Juliana v. United States*, 949 F.3d 1125 (9th Cir. 2018) (No. 18-80176); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082).

DATED this 21st day of March, 2024, at Eugene, OR.

Respectfully submitted,

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JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY
(CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
Tel: (650) 278-2957

ANDREA K. RODGERS
(OSB No. 041029)
Our Children's Trust
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Attorneys for Real Parties in Interest

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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