No. 24-684

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Petitioners,

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 to the United States District Court
for the District of Oregon (No. 6:15-cv-1517)

REPLY IN SUPPORT OF PETITION FOR MANDAMUS

TODD KIM
Assistant Attorney General
ROBERT J. LUNDMAN
SEAN C. DUFFY
FRANK J. SINGER
CHRISTOPHER ANDERSON
DANIEL HALAINEN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-4081
daniel.j.halainen@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The fundamental question presented by this mandamus petition is whether *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), is a controlling decision of this Court. The district court has rejected the government's efforts to vindicate the Court's decision and mandate, and Plaintiffs' answer to the petition treats the Court's holding that the district court lacks Article III jurisdiction as a minor detour on an inevitable path to trial. But this Court's determination that federal courts cannot award a remedy for Plaintiffs' claims was not a mere paperwork exercise that Plaintiffs can dispense with by adding a few conclusory assertions to an amended complaint. The Court should issue a writ of mandamus to correct the district court's violation of the mandate and to enforce the limits of Article III.

Climate change is an urgent crisis that the government continues to take steps to address.[1] The urgency of the crisis, however, does not alter the district courts' role in enforcing this Court's judgments or the role of the Judicial Branch in maintaining the separation of powers. The district court's determination to proceed with trial without jurisdiction—and despite this Court's judgment and mandate—is an extraordinary situation that warrants extraordinary relief.

---

[1] *See, e.g.*, *Final Rule: Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles*, Environmental Protection Agency (Mar. 20, 2024), https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-multi-pollutant-emissions-standards-model.

ARGUMENT

I. Mandamus is warranted to correct the district court's violation of the mandate.

A. The *Bauman* factors are irrelevant when mandamus is sought to enforce this Court's mandate.

As the United States explained in its Petition, the district court's orders granting leave to amend and denying the government's motion to dismiss the Second Amended Complaint violated this Court's mandate in the prior appeal. Mandamus is the appropriate remedy for enforcing an appellate court's mandate, *Gen. Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978), and "*Bauman* [*v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977)] does not apply when mandamus is sought on the ground that the district court failed to follow the appellate court's mandate," *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 719 (9th Cir. 1999); *accord Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1079 (9th Cir. 2010).

Plaintiffs fail to distinguish *Vizcaino*. As in *Vizcaino*, the prior appeal in this case resulted in a final judgment; it is immaterial that the judgment was for lack of jurisdiction, rather than on the merits. The district court in this case was no more free to circumvent that mandate by allowing Plaintiffs to proceed on a materially identical amended complaint than the district court in *Vizcaino* was free to flout the mandate by amending the class certification. *See Vizcaino*, 173 F.3d at 721-22. And nothing in *Vizcaino* suggests that its rationale is limited to the class

certification context. Indeed, this Court has issued writs of mandamus to enforce its mandate in a variety of circumstances in which neither a final judgment on the merits nor class certification was at issue. *See, e.g.*, *Brown v. Baden*, 815 F.2d 575, 577 (9th Cir. 1987) (mandate to reassign case to a different district judge); *ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985) (mandate to arbitrate choice-of-law determination). Having secured a final judgment in this Court that these Plaintiffs lack standing to bring these claims against these defendants, the government is entitled to enforce that judgment if the district court fails to honor it. Nothing in *Vizcaino* or subsequent cases is to the contrary.[2]

Nor does law of the case apply to the current petition. The government's previous petitions did not concern enforcement of the mandate. And in any event, Plaintiffs' law of the case argument lacks merit (pp. 17-18). *Vizcaino* therefore controls, and the *Bauman* factors have no application to the government's petition to enforce the mandate.

B. The district court's orders violated this Court's mandate.

"The rule of mandate requires a lower court to act on the mandate of an appellate court, without variance or examination, only execution," *United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006), and the mandate is

---

[2] *Perry v. Schwarzenegger*, 602 F.3d 976 (9th Cir. 2010), does not aid Plaintiffs. In that case, the mandate the petitioners sought to enforce did not decide the issue in dispute and did not bind the real parties in interest. *Id*. at 980.

"controlling as to all matters within its compass," *Firth v. United States*, 554 F.2d 990, 993 (9th Cir. 1977). A district court must heed not only the letter, but also the "spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Creech v. Tewalt*, 84 F.4th 777, 787 (9th Cir. 2023) (quotation omitted).

In addition to serving "an interest in consistency, finality, and efficiency," the rule of mandate "serves an interest in preserving the hierarchical structure of the court system." *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007); *see also Brown*, 815 F.2d at 576 (granting "mandamus to compel compliance with [this Court's] prior decision," lest "anarchy … prevail within the federal judicial system" (quotation omitted)).

1. The district court violated the mandate by granting leave to file *this* Second Amended Complaint.

The district court violated this Court's mandate when it allowed Plaintiffs to file a Second Amended Complaint that pleads the same claims and seeks functionally identical relief as the First Amended Complaint, after this Court held that those claims are not redressable by the federal courts. Plaintiffs' argument that the district court properly granted leave to amend "because dismissal for jurisdiction is *always* without prejudice" thus misses the point. Answer 22. The district court did not merely grant leave to amend in the abstract, but granted leave to file *this* Second Amended Complaint, which suffers from the same deficiencies

this Court identified in its prior opinion. The district court then compounded its error by denying the government's motion to dismiss. Those orders are irreconcilable with this Court's prior decision and violate the Court's mandate.

As Plaintiffs acknowledge, ECF No. 462 at 9, the only material difference between the First and Second Amended Complaints is that Plaintiffs have withdrawn their requests for specific injunctive relief and replaced them with a prayer both for a broad declaration that "the United States' national energy system … has violated and continues to violate [the Fifth Amendment and the Public Trust Doctrine]," and for unspecified injunctive relief "restraining Defendants from carrying out policies, practices, and affirmative actions that render the national energy system unconstitutional in a manner that harms Plaintiffs." Petition Exhibit 2 (ECF No. 542) at 144.

That prayer is as amorphous as it is broad. The Second Amended Complaint defines "the national energy system" vaguely as "[t]he systematic conduct" that "has caused and is causing Plaintiffs' ongoing injuries, includ[ing] government policies, practices, and aggregate actions, such as permits, licenses, leases, subsidies, standards, and authorizations for the extraction, development, processing, combustion, and transportation of fossil fuel." Petition Exhibit 2

¶ 95-B. With one exception,[3] Plaintiffs refuse to identify any particular "policy" or "action[]" that they allege violates their rights. Indeed, Plaintiffs assert that the "vastness" of the national energy system makes it "infeasible" for them to do so. *Id.* ¶ 12. In other words, Plaintiffs seek a declaration that federal energy policy as a whole—but no particular federal action—is unconstitutional, as well as to-be-determined injunctive relief restraining the government from taking "affirmative actions" to implement that policy. *Cf. Allen v. Wright*, 468 U.S. 737, 759-60 (1984) ("[S]uits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations … are rarely if ever appropriate for federal-court adjudication.").

That requested relief suffers from the same defects this Court previously found fatal. For the requested declaration to have any meaning—indeed, to save it from being an impermissible advisory opinion (pp. 10-12)—there would need to be a mechanism for the district court to assess the government's compliance with the declaration and to enforce it if necessary. *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023) ("[R]edressability requires that the court be able to afford relief *through the*

---

[3] Plaintiffs assert that section 201 of the Energy Policy Act of 1992, 15 U.S.C. § 717b, is unconstitutional. Plaintiffs have not argued that the presence of that claim is sufficient to avoid dismissal and have forfeited any argument to the contrary. In any event, the Natural Gas Act deprives the district court of jurisdiction to consider that claim. 15 U.S.C. § 717r(b); *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979).

exercise of its power ….” (quotation omitted)). And Plaintiffs acknowledge they intend to seek such relief. Petition Exhibit 2 ¶ 12. But as this Court held, any such evaluation “would necessarily require” the district court to weigh “a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches.” *Juliana*, 947 F.3d at 1171. And ultimately it would “require the judiciary to pass judgment on the sufficiency of the government’s response to the order, which necessarily would entail a broad range of policymaking.” *Id*. at 1172. As the district court itself correctly observed, this Court “found plaintiffs’ injuries beyond redress because, in its view, plaintiffs’ requested relief requires the district court to evaluate competing policy considerations and supervise implementation over many years.” Petition Exhibit 3 (ECF No. 540) at 12. The district court’s failure to recognize that those considerations apply equally to the Second Amended Complaint was clear error.

Plaintiffs cannot avoid this conclusion by refusing to specify until after trial the “contours of relief”—including injunctive relief—that they intend to seek. Answer 29. Plaintiffs boldly assert that “it is premature for … this Court to presume what declaratory relief, if any, the district court would issue.” Answer 29 n.13. But whether the district court is capable of redressing Plaintiffs’ injuries is a threshold issue of standing, and Plaintiffs must allege, in a nonconclusory fashion,

that some meaningful form of relief is available. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

Nor does the district court's proposal for an "innovative judicial role" at the remedy stage fix the redressability problem because any role involving judicial oversight of the government's entire climate policy, untethered from specific agency action, is irreconcilable with the mandate. Despite this Court's holding that the federal courts may not "order, design, supervise, or implement" a "remedial plan" to govern the nation's response to climate change, *Juliana*, 947 F.3d at 1171, the district court announced its intention to "supervise the parties in crafting a plan" to implement whatever declaration may issue and then to retain "ongoing jurisdiction so that parties can challenge aspects of the remedy implementation without bringing a new lawsuit," Petition Exhibit 1 (ECF No. 565) at 33. In other words, the district court announced its intention to order the very relief this Court held is unavailable. *Id.* at 33-34. That was a clear violation of the mandate and warrants correction through mandamus.

2. An unenforceable declaratory judgment cannot provide redress within the meaning of Article III.

Plaintiffs' entire effort to reconcile the Second Amended Complaint with this Court's prior opinion rests on a distinction between declaratory and injunctive relief, and an argument that the former is sufficient even if the latter is unavailable. But as just explained, there is no such distinction between the two complaints

because the Second Amended Complaint, like the First Amended Complaint, seeks *both* declaratory *and* injunctive relief, and the district court's orders assume the availability of both forms of relief. Plaintiffs cannot avoid this Court's mandate by putting new labels on the same suit.

Even if Plaintiffs were to limit their prayer to declaratory relief, however, it would not cure the redressability problem this Court previously identified for three reasons: First, this Court has already held that a declaration, standing alone, is insufficient to redress Plaintiffs' alleged injuries. Second, the Declaratory Judgment Act does not expand the jurisdiction of the federal courts, and the district court has no jurisdiction to entertain a declaratory judgment action if it would not have jurisdiction in a non-declaratory action between the same parties addressing the same claims. And third, a declaration cannot provide redress within the meaning of Article III unless it would be enforceable in a subsequent suit between the parties.

a. As this Court already held, "[a] declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely *by itself* to remediate their alleged injuries absent further court action." *Juliana*, 947 F.3d at 1170 (emphasis supplied). Plaintiffs wrongly characterize that holding as dictum, but it was essential to the Court's judgment. Plaintiffs' First Amended Complaint requested a declaration, and this Court could not have concluded that Plaintiffs' injuries were

not redressable without concluding that a declaration alone would not suffice. The fact that the Court did not discuss its conclusion at length is immaterial, particularly when the point is well-established. *Brackeen*, 599 U.S. at 294 ("It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[P]sychic satisfaction is not an acceptable Article III remedy …."); *United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (holding that the precedential effect of a declaration is insufficient for redressability).

b. In any event, Plaintiffs' requested declaratory judgment cannot solve Plaintiffs' redressability problem because the district court has no jurisdiction to award it. The Declaratory Judgment Act is procedural, and "a declaratory judgment … is the very kind of relief that cannot alone supply jurisdiction otherwise absent." *California v. Texas*, 593 U.S. 659, 673 (2021). In other words, jurisdiction to award a declaratory judgment only exists if the court would have jurisdiction over a non-declaratory suit between the parties on the same claims. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). Accordingly, courts "look to the nature of the threatened action in the absence of the declaratory judgment suit to determine whether jurisdiction exists." *California*, 593 U.S. at 673 (quotation omitted).

The relevant "threatened action" in this case would be a suit for injunctive relief—but this Court has already dismissed that suit for lack of redressability. *Juliana*, 947 F.3d at 1175. It necessarily follows that district court also lacks jurisdiction to hear Plaintiffs' suit for a declaratory judgment on the same claims. *California*, 593 U.S. at 672 ("[The Declaratory Judgment Act] does not confer jurisdiction over declaratory actions when the underlying dispute could not *otherwise* be heard in federal court." (quotation omitted)); *see also Skelly Oil*, 339 U.S. at 671 ("[T]he Declaratory Judgment Act … enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. … '[J]urisdiction' means the kinds of issues which give right of entrance to federal courts."). For this reason, too, the Court's mandate controls the disposition of this case. *Id*.

c. Even if the district court had jurisdiction, an unenforceable declaratory judgment does not redress any injury within the meaning of Article III. To redress an injury, a declaratory judgment must provide "specific relief through a decree of *conclusive* character." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (emphasis supplied). A declaration of a party's rights without a corresponding declaration of the adverse party's obligations does not meet that test. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (finding no jurisdiction to issue a declaratory judgment when "[a]ny judgment in this action … would not resolve the entire case

or controversy … but would merely determine a collateral legal issue"). Nor would a declaration that the "national energy system" is unconstitutional have any meaningful preclusive effect in a future suit over whether any particular government action in furtherance of that system is constitutional, because the constitutionality of those actions will not have been decided. And "[w]ithout preclusive effect, a declaratory judgment is little more than an advisory opinion." *Brackeen*, 599 U.S. at 293.

Plaintiffs argue that a declaration would redress their alleged injuries, despite its unenforceability, because "there is an expectation in our democracy that government officials will comply with a declaratory judgment." Petition Exhibit 2 ¶¶ 12, 276-A. But the Supreme Court recently rejected that theory of redressability, which derives from Justice O'Connor's plurality opinion in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), when it endorsed Justice Scalia's opinion in *Franklin* disagreeing with Justice O'Connor on this point. *Brackeen*, 599 U.S. at 294. And in *Utah v. Evans*, 536 U.S. 452 (2002), cited by Plaintiffs, both declaratory and injunctive relief were available, unlike this case. *Id*. at 463. Plaintiffs' theory thus finds no support in Supreme Court case law.

Regardless, that a declaratory judgment might prompt the government to alter its policies in a way that benefits Plaintiffs is not enough. "[R]edressability requires that the court be able to afford relief *through the exercise of its power*, not

through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Brackeen*, 599 U.S. at 294; *see also Juliana*, 947 F.3d at 1175 (finding Plaintiffs' claims unredressable, even assuming "broad judicial relief" could "goad" the political branches into action).

Even if Plaintiffs' theory were valid in the abstract, however, it fails in this case. While it is of course true that the government complies with declaratory judgments entered by the courts, a broad declaration in this case that "the national energy system" is unconstitutional would be of an exponentially different order. Any declaratory judgment, even if one could be entered, would only be as between Plaintiffs and the defendant officials and agencies. The entire Executive Branch could not be expected, much less ordered, to restructure itself in a way affecting the entire country on the basis of Plaintiffs' asserted interests. And such a declaration would not provide any meaningful guidance on what steps are required to comply with constitutional requirements or impose readily discernible constraints on the government's discretion. But to establish redressability, Plaintiffs must—at a minimum—establish that this declaration would cause the government to change its policies *and* that those changes would meaningfully ameliorate their injuries. *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018); *Mayfield v. United States*, 599 F.3d 964, 972 (9th Cir. 2010). Plaintiffs have not even attempted to make that showing.

Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021), does not change the foregoing analysis. That case held only that nominal damages are sufficient to redress wholly past injuries within the meaning of Article III. *Id*. at 802. The Court noted that nominal damages served as "a form of declaratory relief" at common law, but it did not address the remedial function of declaratory judgments. *Id*. at 798. The Court did not suggest that nominal damages and declaratory relief are interchangeable or that its analysis also applied to prospective declaratory judgments. And it never held that "to the extent a complaint seeks nominal damages or declaratory relief … the redressability prong of Article III standing is met." *Contra* Answer 24. Indeed, that assertion cannot be squared with the Court's opinion in *California*, decided just three months after *Uzuegbunam* (pp. 10-11).

Additionally, several aspects of *Uzuegbunam* distinguish it from this case. First, the Court held that nominal damages, despite their small amount, are a form of coercive relief. 141 S. Ct. at 801. But a declaratory judgment, by its nature, does not command any action. *Nashville, Chattanooga & St. Louis Ry v. Wallace*, 288 U.S. 249, 263 (1933). Second, the Court relied heavily on the fact that "nominal damages were available at common law in analogous circumstances" to conclude that they satisfy Article III's redressability requirements. 141 S. Ct. at 801-02. Plaintiffs have cited no similar historical precedent for issuing a

declaration on the constitutionality of an entire field of federal policy, however. Finally, the Court noted that when nominal damages are sought, compensatory damages are also typically available. *Id*. at 800. By contrast, neither damages nor an injunction are available to Plaintiffs. For those reasons, *Uzuegbunam* does nothing to support Plaintiffs' case.

Plaintiffs find it "[r]emarkabl[e]" that the government did not discuss this Court's decision in *Platt v. Moore*, 15 F.4th 895 (9th Cir. 2021). Answer 26. But the reason is plain. *Platt*—like *Uzuegbunam* itself—is irrelevant to the disposition of the petition. The Court in *Platt* only predicted that the Arizona Courts would hold that Arizona's "notice of claim" statute would not apply to claims for nominal damages. *Id*. at 904. Although the Court relied primarily on Arizona precedents to reach that conclusion, the Court cited *Uzuegbunam* for the proposition that nominal damages can have a declaratory function. *Id*. at 902. The Court did not address federal jurisdiction to enter declaratory judgments.

Plaintiffs also cite eleven out-of-circuit cases for the unremarkable proposition that a proper declaratory judgment can be a form of forward-looking relief. Answer 27-28. None of those cases, however, held that a declaratory judgment satisfies Article III's redressability requirement *per se*. In most of the cited cases, the plaintiff sought both declaratory *and* injunctive relief and there was

no suggestion that injunctive relief was unavailable.[4] In two cases, the courts held only that a declaratory judgment cannot redress a wholly past wrong.[5] And the remaining cases involved situations in which the requested declaration would clearly have preclusive effect in contemplated future litigation between the parties.[6] None of the cases addressed the district court's jurisdiction to hear a declaratory judgment action, and none addressed a situation like this case, in which Plaintiffs seek a declaration that no federal court could enforce.

As this Court has already held, a declaratory judgment—without more—is simply insufficient to provide redress to Plaintiffs within the meaning of Article III, and Plaintiffs cannot cure the jurisdictional defect this Court identified by casting their prayer as one for declaratory, rather than injunctive relief. This

---

[4] *Kareem v. Cuyahoga Cnty. Bd. of Elections*, No. 23-3330, 2024 WL 1110208, at *6 (6th Cir. Mar. 14, 2024); *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 779 (4th Cir. 2023); *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019); *Frost v. Sioux City*, 920 F.3d 1158, 1161-62 (8th Cir. 2019); *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 382 (2d Cir. 2015); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 904-06 (10th Cir. 2012); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990).

[5] *Efreom v. McKee*, 46 F.4th 9, 21 (1st Cir. 2022); *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999).

[6] *Am. Clinical Lab'y Ass'n v. Becerra*, 40 F.4th 616, 622 (D.C. Cir. 2022) (invalidity of superseded regulation that the agency threatened to reinstate); *Apotex, Inc. v. Daiichi Sankyo, Inc.*, 781 F.3d 1356, 1371 (Fed. Cir. 2015) (patent infringement).

Court's mandate therefore required dismissal of the Second Amended Complaint, and the district court's refusal to do so was a clear violation of the mandate.

II. Mandamus is otherwise warranted to confine the district court to its lawful jurisdiction.

The Court should issue a writ of mandamus to correct the district court's violation of the rule of mandate under *Vizcaino*, but mandamus also is warranted to confine the district court to its lawful jurisdiction under this Court's five-factor test set forth in *Bauman v. U.S. District Court*. Plaintiffs object that mandamus is reserved for extraordinary circumstances and observe that the government rarely invokes this Court's mandamus jurisdiction. Answer 6-9. Although the government is indeed sparing in its resort to this remedy, mandamus is appropriate in this case precisely because the district's orders are extraordinary. The district court is determined to proceed to trial on Plaintiffs' unprecedented and unfounded claims in contravention of this Court's clear holding that the district court lacks jurisdiction, and all five *Bauman* factors support mandamus.

A. The law of the case does not resolve the *Bauman* factors.

Plaintiffs contend that this Court's resolution of the *Bauman* factors is largely controlled by the law of the case, but that argument is incorrect. The "law-of-the-case doctrine precludes a court from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *In re Williams Sports Rentals, Inc.*, 90 F.4th 1032, 1039 (9th Cir. 2024) (quotation omitted). This

Court previously denied without prejudice the government's mandamus petitions, given (among other things) that additional avenues for relief remained in district court. *In re United States*, 895 F.3d 1101 (9th Cir. 2018); *In re United States*, 884 F.3d 830 (9th Cir. 2018). But the Court emphasized that it was declining to grant mandamus only at that early "stage of the litigation." *In re United States*, 884 F.3d at 838.

The circumstances have changed. Despite Plaintiffs' best efforts to discount its significance, this Court's decision in *Juliana*—which came down after the Court ruled on the government's earlier mandamus petitions—reached fundamental conclusions about the limits of the district court's Article III jurisdiction. The government's petition, in turn, is centrally concerned with the district court's violation of the Court's mandate and disregard for this Court's holding. The law-of-the-case doctrine does not control those issues, which were not before the Court in the earlier mandamus proceedings. *See, e.g.*, *United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014) (law-of-the-case doctrine applies only to issues decided explicitly or by necessary implication). If anything, the law-of-the-case doctrine would bar Plaintiffs from urging the district court to reconsider the Article III standing issues decided by this Court in this same case. *See, e.g.*, *Grand Canyon Trust v. Provencio*, 26 F.4th 815, 821 (9th Cir. 2022).

B. The government has no other adequate means of relief from a lengthy trial designed to set government policy.

Mandamus is also the only "adequate way to obtain the relief sought," the first *Bauman* factor. *In re U.S. Dep't of Educ.*, 25 F.4th 692, 698 (9th Cir. 2022). The government seeks relief from a trial held in a court without jurisdiction, and the district court denied relief and declined to certify an appeal. Because further proceedings in district court will be futile,[7] the government has exhausted the avenues available for relief from trial short of mandamus. Petition 46-47. Plaintiffs respond that the government may appeal the district court's adverse rulings after trial. Answer 37-38. But Plaintiffs misconstrue the nature of the relief the government seeks, which is to prevent the district court from conducting proceedings without jurisdiction on claims that lack any basis at law or in equity, not simply to correct a flawed order. The court essentially seeks to commandeer federal agencies away from the statutory roles to which Congress has confined them and force them to participate in an abstract, amorphous, and sprawling exploration of climate constitutional theories "without standards to guide in the exercise of such authority." *Juliana*, 947 F.3d at 1173. This Court already

[7] Indeed, the district court agreed that this factor was "plainly met" during the earlier mandamus proceedings. *See* District Court Letter in Response at 1, Case No. 17-71692 (Aug. 25, 2017) (attached as Exhibit 1).

corrected the district court's jurisdictional errors on interlocutory appeal; mandamus is the appropriate remedy at this stage.

C. The district court's nullification of this Court's judgment cannot be corrected on direct appeal.

Absent mandamus relief, the government will "suffer damage or prejudice that cannot be corrected on appeal," the second *Bauman* factor. *In re U.S. Dep't of Educ.*, 25 F.4th at 698. The district court has taken the extraordinary step of nullifying this Court's decision that Article III courts lack jurisdiction over Plaintiffs' claims by proceeding to trial regardless. In effect, the district court has deprived the government of the benefit of its successful appeal to this Court. That error cannot be remedied on direct appeal; at best, an appeal at final judgment would yield the same decision that the Court already issued. *Cf. In re Mersho*, 6 F.4th 891, 903 (9th Cir. 2021) (no adequate means where harm "will not be meaningfully corrected on appeal" even if petitioners "could technically challenge the district court's order on direct appeal").

If this petition is denied, the government will be obliged to participate in discovery and a lengthy trial on issues that the district court has no jurisdiction to decide. Petition 48; *see also* Petition Exhibit 7 (Declaration of Guillermo A. Montero) ¶¶ 2-3; Petition Exhibit 6 (Supplemental Declaration of Guillermo A. Montero) ¶ 3. Such substantial expenditure of public resources, when the district court's error is plain, should not be countenanced lightly.

Of course, the ordinary burdens of discovery and trial generally do not support an extraordinary writ, *see, e.g.*, *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000), as the government has emphasized, Petition 48-49, 52. But this is not an ordinary case. The sweeping nature of Plaintiffs' claims, their desire to supervise government policymaking writ large, and their effort to impose obligations on federal agencies without regard to the statutory authorities and procedures to which Congress has confined them impose unique burdens on the government. If this case proceeds to trial, the government will be required to take positions on important issues without public participation and deprive the government of its lawful authority to weigh the many factors involved.

Nor is the posture of the case ordinary. Given this Court's mandate, the government's circumstances are analogous to those of litigants who seek to vindicate a right not to go to trial. *See, e.g.*, *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) (denial of motion to compel arbitration); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (tribal sovereign immunity); *United States v. LaMere*, 951 F.2d 1106, 1108 (9th Cir. 1991) (double jeopardy). At this stage, the relevant harm is not the ordinary burdens of litigation but the nullification of this Court's judgment that the district court may not exercise jurisdiction to proceed to trial.

D. The district court clearly erred by proceeding to trial on Plaintiffs' sweeping and unprecedented claims after this Court held that the district court lacks jurisdiction.

The district court also "clearly erred as a matter of law," the third and most important factor. *In re U.S. Dep't of Educ.*, 25 F.4th at 698. The district court most clearly erred in granting leave to amend in violation of this Court's mandate, but the district court also clearly erred by denying the government's motion to dismiss for lack of standing and failure to state a claim.

1. The district court concluded that Plaintiffs adequately pleaded Article III redressability by seeking declaratory relief, contrary to this Court's decision (pp. 4-17). This Court expressly held that "a declaration that the government is violating the Constitution" is "not substantially likely to mitigate [Plaintiffs'] asserted concrete injuries," *Juliana*, 947 F.3d at 1170, and the district court clearly erred by reaching a different conclusion after this Court "has already directly addressed the question at issue," *In re U.S. Dep't of Educ.*, 25 F.4th at 698. Plaintiffs' primary response is to argue that this holding is dictum, but the Court's ruling on declaratory relief was necessary to its judgment. Regardless, the district court's planned "declaratory" relief would, in fact, amount to a coercive injunction that would subject national energy policy to indefinite judicial supervision, on penalty of sanction, contrary to this Court's decision in *Juliana* (pp. 6-8).

2. The district court also clearly erred in permitting Plaintiffs to proceed to trial on their due-process and public-trust claims, which the Supreme Court has noted are "striking" in their "breadth." *United States v. U.S. Dist. Ct.*, 139 S. Ct. 1 (2018); *see also In re United States*, 139 S. Ct. 452, 453 (2018). Because these claims lack any basis at law or in equity, proceeding to trial on Plaintiffs' amorphous challenge to the "national energy system" writ large constitutes a "judicial usurpation of power" that "threaten[s] the separation of powers" and warrants mandamus. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004).

Plaintiffs' due-process claim seeks to establish a new federal constitutional right to a stable climate system. No federal court has accepted that argument. Petition 39-42. To the contrary, federal courts have consistently rejected arguments that the Due Process Clause is a vehicle for litigating environmental protections. *See id.* Plaintiffs respond that those courts did not address the specific, emissions-based formulation of the claim they advance in this case. Answer 32. But Plaintiffs nowhere identify authority for this contention—that the Due Process Clause is concerned with greenhouse gases specifically, even if it is not concerned other pollutants—or any basis for recognition of a new right. *See id.* Nor did the district court. Petition Exhibit 1 at 40. The only relevant opinion cited by either the Plaintiffs or the district court remains a dissenting opinion in a state-court proceeding. *Id.*

Similarly, there is no federal public-trust doctrine, and the district court clearly erred in permitting Plaintiffs to proceed to trial on a claim without any basis in law. Plaintiffs respond that no case squarely forecloses their argument but fail to engage with decisions from the Supreme Court and this Court disclaiming a federal public-trust doctrine. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012); *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 283-85 (1997); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012); *see also, e.g.*, *Alec L. v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014). Plaintiffs have failed to distinguish these cases or otherwise establish a federal public-trust doctrine.

3. At bottom, Plaintiffs' argument is that the district court's decision to proceed with trial on these claims is not a judicial usurpation of power warranting mandamus because no higher court has squarely foreclosed the district court's rulings on the merits. Of course, this Court's holding that the district court lacks Article III jurisdiction is controlling contrary authority, and the government identified contrary authority on the merits issues as well. Petition 39-45. But more fundamentally, the district court's decision amounts to a judicial usurpation of power not simply because the district court's rulings are erroneous, but because Plaintiffs seek to use the unprecedented nature of their claims as a basis for

pursuing unprecedented supervision of the Executive Branch's policymaking, in contravention of the separation of powers.

E. The district court expressly disregarded the limits of its jurisdiction as defined by this Court.

The district court's refusal to recognize this Court's binding holding and the limits of Article III jurisdiction amounts to an "often repeated" error and a "disregard for the federal rules," the fourth *Bauman* factor. *In re U.S. Dep't of Educ.*, 25 F.4th at 698. Plaintiffs respond that this Court "reversed the district court only once, on a single, narrow issue" and point to the district court's track record on the bench. Answer 40. But Plaintiffs are mistaken in asserting that *Juliana*'s determination that the district court lacks jurisdiction is a "narrow" holding on a minor matter, rather than a dispositive, threshold issue in this proceeding. And Plaintiffs have nothing to say about the district court's suggestion that this Court merely "balk[ed]" at the district court's "approach" when the Court reversed the district court's jurisdictional ruling. Petition Exhibit 1 at 7. Nor do Plaintiffs offer any defense of the district court's suggestion, citing *Juliana*, that its decision was motivated, in part, by a determination that the judiciary has "failed to measure up" to the challenges of the climate crisis. *Id.*

Instead, Plaintiffs favorably cite a pending case in the Fifth Circuit and that court's conclusion that a district court's questionable scheduling orders did not justify mandamus. Answer 41-43 (citing *United States v. Abbott*, 92 F.4th 570,

571 (5th Cir. 2024)). But Plaintiffs fail to acknowledge the key distinction: this Court already resolved the jurisdictional issue before the district court, and the district court acted contrary to the *Juliana* decision. The district court also declined—without explanation—to certify its decision, notwithstanding multiple signals from the Supreme Court and from this Court that the issues in this case meet the standard for certification. *See, e.g.*, *United States v. U.S. Dist. Ct.*, 139 S. Ct. at 1 (observing that "the justiciability of [Plaintiffs'] claims present[ed] substantial grounds for difference of opinion"). At bottom, the district court's repeated rejection of the government's proper jurisdictional objections, including after this Court confirmed the Article III defect, weighs in favor of mandamus.

F. The district court's orders raise new and important issues.

The district court's orders also raise "new and important issues," the fifth *Bauman* factor. *In re U.S. Dep't of Educ.*, 25 F.4th at 698. The climate crisis is unquestionably important, as reflected by the Executive Branch's efforts to address it. *See* Petition 1. And the parties and the courts have emphasized that the climate issues in this case are new and significant.[8] *See, e.g.*, *United States v. U.S. Dist. Ct.*, 139 S. Ct. at 1. The challenged orders, in particular, raise new and important issues given the district court's creation of an "innovative" new declaratory remedy

[8] The district court agreed that this factor was "plainly met" during the earlier mandamus proceedings. *See* Exhibit 1 at 1.

to manufacture jurisdiction that *Juliana* held was absent. Petition Exhibit 1 at 33-34. Although this supposed "innovation" is simply to apply a declaratory label to an injunctive remedy, the propriety of this approach to Article III redressability is a new issue that warrants this Court's attention. In assessing this factor, this Court has found it "highly relevant" that a district court's conduct "could, if allowed to continue, burden the Executive in the performance of its duties," *In re United States*, 791 F.3d 945, 960 (9th Cir. 2015), and the district court's plan to supervise the government's climate policy indefinitely would undoubtedly meet that standard.

Plaintiffs observe that the "fourth and fifth factors are rarely present at the same time," given that a new issue generally will not yield a pattern of errors. *In re Kirkland*, 75 F.4th 1030, 1051 (9th Cir. 2023). But the Court has nonetheless found both factors to be present when a district court makes repeated errors on a new issue in a case in which this Court's intervention is warranted. *See, e.g.*, *Barnes v. Sea Haw. Rafting, LLC*, 889 F.3d 517, 542 (9th Cir. 2018) (district court's repeated errors on novel issue supported mandamus). And here, the district court's repeated failure to acknowledge *Juliana* and the limits of Article III jurisdiction have created new and important issues for this Court to resolve.

CONCLUSION

The Court should grant the government's petition for a writ of mandamus and direct the district court to dismiss this case without leave to amend.

Respectfully submitted,

/s/ *Daniel Halainen*
TODD KIM
Assistant Attorney General
ROBERT J. LUNDMAN
SEAN C. DUFFY
FRANK J. SINGER
CHRISTOPHER ANDERSON
DANIEL HALAINEN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-4081
daniel.j.halainen@usdoj.gov

March 28, 2024
DJ 90-1-4-14528

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

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

I am the attorney or self-represented party.

This brief contains 6,467 **words,** including _____ words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ◉ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Daniel Halainen **Date** 3/28/2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*

No. 24-684

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, et al.

UNITED STATES OF AMERICA, et al.,
Petitioners,

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 to the United States District Court
for the District of Oregon (No. 6:15-cv-1517)

EXHIBIT TO REPLY IN SUPPORT OF PETITION FOR MANDAMUS

TODD KIM
Assistant Attorney General
ROBERT J. LUNDMAN
SEAN C. DUFFY
FRANK J. SINGER
CHRISTOPHER ANDERSON
DANIEL HALAINEN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-4081
daniel.j.halainen@usdoj.gov

Exhibit 1

District court's response to mandamus petition
in Case No. 17-71692 (Aug. 25, 2017)

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

August 25, 2017

Re: *United States v. United States District Court for the District of Oregon*
Case No. 17-71692

Pursuant to the Ninth Circuit's invitation and Federal Rule of Appellate Procedure 21(b)(4), the District Court respectfully submits this letter in response to the United States' mandamus petition. We appreciate this opportunity to provide information about how we are managing this unusual case.

The Ninth Circuit has established five factors to consider in deciding whether to invoke the "extraordinary" remedy of mandamus. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010). Those factors require the appellate court to consider whether (1) the party seeking the writ has "no other adequate means, such as direct appeal, to attain the relief he or she desires"; (2) the petitioner "will be damaged or prejudiced in a way not correctable on appeal" if the writ does not issue; (3) the district court's order is "clearly erroneous as a matter of law"; (4) the district court's order is an "oft-repeated error" or "manifests a persistent disregard of the federal rules"; and (5) the district court's order "raises new and important problems, or issues of law of first impression." *Bauman v. United States District Court*, 557 F.2d 650, 654–55 (9th Cir. 1977).

Here, two of those factors are plainly met: the first, that petitioners have no other means to obtain the desired relief, and the fifth, that the district court's order raises new and important issues of first impression. The fourth factor, by contrast, is not present because any error in the denial of the motion to dismiss is not an oft-repeated error.[1] Regarding the third factor, whether the district court has committed clear error, we have nothing to add to the analysis set forth in our previous orders.

In this letter, we focus on the remaining factor: whether the petitioner will be damaged or prejudiced in any way not correctable on appeal. In short, we do not believe that the government will be

[1] The government does not appear to contend that the fourth factor is met; that is unsurprising, given that the fourth and fifth factors "are rarely, if ever, present at the same time." *SG Cowen Secs. Corp. v. United States District Court*, 189 F.3d 909, 914 (9th Cir. 1999) (citation omitted).

irreversibly damaged by proceeding to trial. In our view, any error that we may have committed (or may commit in the future) can be corrected through the normal route of a direct appeal following final judgment. Indeed, we believe that permitting this case to proceed to trial will produce better results on appeal by distilling the legal and factual questions that can only emerge from a fully developed record.

This is a complex case involving vital interests on both sides. On one hand, plaintiffs allege that the United States has violated—and is continuing to violate—their constitutional rights, despite clear evidence that the government's actions are causing serious harm. On the other hand, the government raises important considerations regarding the separation of powers and the appropriate role of the courts. Our discovery and trial management plan gives due weight to each of these considerations.

First, we agree that discovery in this case can and should be narrowed from its current scope. During status conferences, Judge Coffin has repeatedly remarked on the breadth of plaintiffs' discovery requests and has encouraged plaintiffs to narrow those requests, questioning the utility of, for example, production of documents going back to the Johnson Administration. We note, however, that the scope of plaintiffs' discovery requests stemmed, in part, from the former intervenors' broad denial of all allegations in the complaint. The intervenors' exit from the case should pave the way for plaintiffs to winnow their discovery requests substantially.

We are hopeful that the talented attorneys on both sides will be able to resolve any remaining discovery disputes through conferral. Should the parties reach an impasse, this Court stands ready to rule on any discovery dispute they may have. The government asserts that "[n]either the magistrate judge nor the district court can be expected to rein in this improper discovery." Mot. Writ Mandamus 36. But the government has not brought a single substantive discovery dispute to the Court for resolution.[2] The absence of any allegedly objectionable discovery rulings stands in stark contrast to the typical case in which the Ninth Circuit concludes mandamus is warranted. *See, e.g.*, *Perry*, 591 F.3d at 1157–58 (awarding mandamus to correct the district court's denial of a protective order because "the disclosure itself" in the absence of such an order would violate petitioners' First Amendment rights and chill association and political expression generally); *Credit Suisse v. United States District Court*, 130 F.3d 1342, 1346 (9th Cir. 1997) ("The district court's order compelling the Banks to respond to the

[2] The parties have only asked the Court to resolve disputes about the *timing* of discovery. When faced with such disputes, Judge Coffin generally has struck a balance between the parties' positions.

discovery requests therefore places the Banks in the position of having to choose between being in contempt of court . . . or . . . violating Swiss law[.]").

Second, as Judge Coffin has explained to the parties, we plan to hold a bifurcated trial. The trial's first phase will focus on liability, including a reexamination of the causation and redressability arguments raised in the government's motion to dismiss. If in this first phase the plaintiffs carry their burden to prove that they have standing to sue and that the government is liable on at least one of their claims, the trial will then proceed to the remedial phase. This bifurcated approach will permit counsel and the Court to first concentrate on the factual complexity of the liability phase, then turn to the difficult separation of powers questions that would be posed should this case proceed to the remedy phase.

Collectively, we have more than fifty years of experience on the bench. We have managed countless complex lawsuits and have recognized from the beginning that this action raises special and significant concerns regarding the appropriate role of the courts in protecting constitutional rights. We are managing this case mindful of those concerns. In our view, permitting this case to proceed through the usual process of trial and appeal will present the Ninth Circuit with a superior record to review, facilitating better decisionmaking on these novel and vitally important issues.

Ann Aiken
U.S. District Court Judge

Thomas Coffin
U.S. Magistrate Judge