No. 24-684

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re United States

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 in Case No. 6:15-cv-01517-AA (D. Or.)

CONSENT MOTION TO FILE AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND PROPOSED BRIEF

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Pursuant to Fed. R. App. P. 29 and Circuit Rule 29-3, Conservation Law Foundation, Inc. ("CLF"), and a group of law school clinics, law professors, and climate legal advocates (collectively "Prospective Amici") hereby respectfully move for leave to file an amicus curiae brief in the above-titled case in opposition to Petitioners' petition for writ of mandamus (the "Petition"), Dkt. 1.1.

Circuit Advisory Committee Note to Rule 29-3 states that a motion for leave to file is not necessary when all parties consent. Prospective Amici received consent to file an amicus brief from Petitioners and Real Parties in Interest by email on March 21, 2024. However, because Circuit Rule 29-3 arguably does not apply to an amicus curiae filing related to a petition for a writ of mandamus, in an abundance of caution, Prospective Amici have filed this consent motion for leave to file the attached brief.

I. Background

In the underlying case, *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or.), youth plaintiffs allege the federal government's enabling of fossil fuel activities that has spurred climate change violates their constitutional rights and the federal public trust doctrine. After six previously unsuccessful attempts, *see* Dkt. 1.1, 14.2 at 7–8, Petitioners now request the Court for mandamus relief to avoid discovery and re-litigate Article III standing.

Prospective Amici request to file the attached brief opposing mandamus relief on March 28, 2024, the seventh day after Real Parties in Interest filed their Answer. Fed. R. App. P. 26(a)(1)(c).

II. Argument

Prospective Amici address why mandamus relief is unwarranted in the attached brief. Under Fed. R. App. P. 29(a)(3), a motion for leave to file an amicus curiae brief must include the "(1) movant's interest; and (2) reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." "An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Southcentral Found. v. Alaska Native Tribal Health Consortium*, No. 3:17-cv-00018-TMB, 2022 WL 1184079, at *2 (D. Alaska Apr. 21, 2022) (citing *Cmty. Ass'n for Restoration of Env't v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

Prospective Amici request that they be allowed to submit the attached brief for the following reasons:

First, Prospective Amici have a substantial and unique interest in the disposition of the petition. Prospective Amici are a non-profit organization, and a group of law school clinics, law professors, and climate legal advocates, who are all dedicated to maintaining an equitable litigation process and combatting climate

change and its far-reaching impacts. Prospective Amici are uniquely situated to provide relevant analysis to the Court on why the Petition should be denied. A detailed description of each Prospective Amicus follows.

Prospective Amicus CLF is a New England-based non-profit organization working to protect public health and the environment for current and future generations. CLF is uniquely invested in the outcome of this litigation for multiple reasons: CLF uses various forms of advocacy to transition New England to a clean energy future. CLF frequently engages in litigation against government defendants and industry polluters and frequently faces standing challenges as a plaintiff. The underlying case has been ongoing for nine years and has mainly focused on the issue of standing. CLF is invested in the outcome of yet another challenge to standing by Petitioners and the overall impact on the standing burden this case concerns. Relatedly, CLF is a plaintiff in complex civil litigation involving significant pretrial motion practice against government and fossil fuel industry defendants. Whether or not a government defendant can receive the extraordinary remedy of a writ of mandamus to escape the ordinary course of litigation is relevant to CLF's advocacy.

Prospective Amici law school clinics run practicums where law students work with attorneys to support litigation. Prospective Amici law professors and scholars teach, research, and publish in the subject areas of constitutional, environmental, human rights, and administrative law. Prospective Amici climate legal advocates are

members of nonprofits working toward a sustainable climate. Each prospective amicus has a mission related to, interest in, or experience with using the law to combat environmental degradation or climate change.

Second, Prospective Amici provide a relevant and unique perspective that should be useful to the Court in rendering its decision on the Petition. Prospective Amici's attached brief argues four new reasons why the Court should deny the petition for mandamus.

First, Petitioners are not prejudiced by having to undergo the ordinary course of litigation and cannot self-inflict harm through unnecessary motion practice under *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977). Second, Petitioners' proposed use of mandamus goes against the historical and contemporary understanding of the mandamus relief's purpose as protection against derelict government officials. Third, "novelty" does not excuse Petitioners from undergoing the ordinary course of litigation; district courts routinely apply existing legal principles to new sets of facts and should be able to do so in the underlying case. Fourth, Petitioners' attempt to re-litigate standing increases burden on pre-merits standing, which prevents plaintiffs from reaching the merits of their case. Therefore, Petitioners are not entitled to mandamus relief.

III. Conclusion

Because of Prospective Amici's substantial interest, unique perspective, and relevant brief, Prospective Amici respectfully request that this Court grant them this motion for leave to file the attached amicus curiae brief.

Dated: March 28, 2024

Respectfully Submitted,

s/ Ameya Gehi

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AMICUS CURIAE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT AND RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Conservation Law Foundation, Inc. ("CLF") is a nongovernmental corporate entity and makes the following disclosure:

1. CLF has no parent corporation; and
2. No publicly held corporation owns 10% or more of CLF's stock.

Amici law school clinics, law professors, and climate legal advocates are also nongovernmental corporate entities and do not have a parent corporation or relation to a publicly held company.

Amici received the written consent of Petitioners and Real Parties in Interest to file this brief. No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than Amici has made a monetary contribution intended to fund its preparation or submission.

(s) *s/ Ameya Gehi*

Attorney for Amici Curiae

Dated: March 28, 2024

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IDENTITY AND INTEREST OF AMICI

Conservation Law Foundation, Inc. ("CLF") and a group of law school clinics, law professors, and climate legal activists submit this amicus curiae brief pursuant to Fed. R. App. P. 29 in opposition to Petitioners' Petition for a Writ of Mandamus (the "Petition") and in support of Real Parties in Interest.

Amicus CLF, a nonprofit, member-supported organization, advocates for New England's public health and environment. CLF engages in federal litigation involving federal government agencies and industry polluters regarding climate change and pollution, and regularly faces attacks to its Article III standing.

Amici law school clinics run practicums where law students work with attorneys to support litigation. Amici law professors and scholars teach, research, and publish in the subject areas of constitutional, environmental, human rights, and administrative law. Amici climate legal advocates are members of nonprofits working toward a sustainable climate.[1]

SUMMARY OF ARGUMENT

Amici present four points: (1) Petitioners are not prejudiced under *Bauman*; (2) the history and current use of mandamus weigh against granting relief; (3) the facts' "novelty" supports the need for a full evidentiary record, not mandamus relief; and (4) Petitioners cannot functionally avoid the merits by re-litigating standing.

[1] A full list of amici appears on the signature page.

ARGUMENT

I. Petitioners Have Failed to Demonstrate Prejudice Under *Bauman*.

Courts look to the five *Bauman* factors to determine whether to grant a mandamus petition. *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977); *see also* Dkt. 14.1 at 17–19.[2] The second factor is whether the petitioner will be "damaged or prejudiced in any way not correctable on appeal." *Bauman*, 557 F.2d at 654. Petitioners cite the number of hours expended (actual and projected) as evidence of prejudice if denied mandamus relief. Dkt. 1.1 at 57–58. Much of Petitioners' time has been spent on six unsuccessful mandamus petitions and attempts to file interlocutory appeals (hereinafter "Appellate Review Attempts"). Dkt. 14.2 at 7–8 (seven mandamus petitions and fifteen motions to stay); *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or.), ECF No. 172 (June 8, 2017, denying first motion to certify district court's standing order); No. 418 (Nov. 5, 2018, moving for reconsideration of denying request to certify standing order for interlocutory appeal); No. 547 (June 22, 2023, preemptively moving to certify a future standing order); No. 551 (July 7, 2023, moving to certify district court's most recent standing order for interlocutory appeal). But neither resources spent (actual or projected) in the ordinary course of litigation nor manufactured harm constitute prejudice.

[2] Pincites to the record refer to the DktEntry or ECF header page number.

A. Petitioners Are Not Prejudiced by Undergoing the Ordinary Course of Complex Litigation.

No undue prejudice exists where a party is required to undergo the ordinary course of complex litigation, as "most cases that proceed to litigation" are "complex, expensive, and time-consuming," with discovery lasting "many months" and costing "several hundreds of thousands of dollars." *White Mountain Apache Tribe v. United States*, No. 17-359 L, 2018 WL 6293242, at *4 (Fed. Cl. Dec. 3, 2018) (denying government's attempt at interlocutory appeal). Indeed, the federal government is well-resourced to take on complex civil litigation and routinely files such cases, such as the Deepwater Horizon oil spill and recent Apple antitrust cases.[3]

Here, Petitioners will not be prejudiced by having to spend 7,300 hours conducting trial if this Court denies mandamus relief. Dkt. 1.1 at 57–58.[1] Tens of thousands of hours of work is within the range of normal for complex civil litigation. *See, e.g.*, *Tait v. BSH Home Appliances Corp.*, No. 8:10-cv-00711, 2015 WL 4537463, at *11 (C.D. Cal. July 27, 2015) (18,000 hours); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) (17,000 hours). This Court already refused to insulate Petitioners from normal legal processes "simply because" they are the

[3] *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010*, 21 F. Supp. 3d 657, 730–31 (E.D. La. 2014) (suing oil giants in a multi-year complex case with a planned three-phase trial); Compl., *United States v. Apple Inc.*, No. 2:24-cv-04055-MEF-LDW (D.N.J. Mar. 21, 2024), ECF No. 1 (instigating massive litigation against world's second-largest company just last week).

federal government. *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018). Petitioners should be treated as any other litigant and follow the normal course of litigation.

B. Petitioners Are Not Prejudiced by Self-Inflicted Harm.

Parties cannot manufacture their own prejudice and are not entitled to relief for unnecessary work. By way of analogy, in awarding attorneys' fees to a prevailing party, courts decrease the award for work that is "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988); *see Detwiler v. Astrue*, No. CV07-192-TUC-RCC, 2008 WL 5114315, at *1 (D. Ariz. Dec. 4, 2008) (reducing hourly rate for "excessive and unreasonable" attorney time). Courts also refuse to award attorneys' fees for work performed on unsuccessful claims. *Hensley*, 461 U.S. at 434–35 (noting partially victorious parties are not entitled fees for work on unsuccessful claims); *Fox v. Vice*, 563 U.S. 826, 834 (2011) (holding that defendants were entitled only to costs incurred on non-frivolous claims).

In the discovery context, courts refuse to excuse parties from their obligations where their own record-keeping practices create a substantial burden in producing records. *See, e.g.*, *Black Love Resists in the Rust by & Through Soto v. City of Buffalo*, 334 F.R.D. 23, 34 (W.D.N.Y. 2019) ("[T]he burden that results from disorganized record-keeping does not excuse a party from producing relevant

documents."); *Pom Wonderful LLC v. Coca-Cola Co.*, No. CV08-6237 SJO (FMOx), 2009 WL 10655335, at *3 (C.D. Cal. Nov. 30, 2009) (holding that defendants cannot excuse compliance with discovery rules by using a record-keeping system that renders document production "excessively burdensome and costly").

Here, Petitioners have manufactured their alleged prejudice: their Appellate Review Attempts are excessive, redundant, and a byproduct of the government's own decision-making. They assert that the 7,300 hours estimated for trial would be on top of the 21,000 hours already dedicated to this case. Dkt. 1.1 at 57–58. But the supposed prejudice stemming from most[4] of their already-expended hours is self-inflicted.[5] The government's delay and re-litigation tactics are not unlike tactics deployed by big oil defendants in CLF's cases. For example, for several years, ExxonMobil attempted to re-litigate standing in CLF's citizen suit, which never entered fact discovery and settled after eight years.[6] Petitioners, through their

[4] The bulk of the time spent on this case has been dedicated to interlocutory appeals and petitions for writ of mandamus since the Parties have litigated only two motions to dismiss and have not even begun fact discovery.

[5] *Cf. Castro v. Aguilar*, No. 2:23-cv-01387-GMN-BNW, 2024 WL 81388, at *1 (D. Nev. Jan. 8, 2024) (denying standing where plaintiff "creat[ed] his own injury in order to manufacture standing" by enlisting as a candidate just to later challenge Trump's eligibility for president).

[6] *Conservation L. Found., Inc. v. ExxonMobil Corp.*, No 1:16-cv-11950 (MLW) (D. Mass.), ECF Nos. 29 (Sept. 13, 2017, denying in large part first motion to dismiss); No. 71 (Mar. 14, 2019, denying in large part second motion to dismiss); No. 106 (Mar, 21, 2020, granting ExxonMobil's motion to stay based on abstention doctrine); No. 112 (July 7, 2021, First Circuit vacating the stay because abstention was

Appellate Review Attempts, also dedicated an inordinate amount of time to repeated failed pleas for extraordinary and highly unlikely relief. Therefore, Petitioners are not prejudiced under *Bauman*.

II. Petitioners' Plea for Mandamus Relief is Contrary to Its Historical and Contemporary Use.

Tracing back to thirteenth century England, mandamus has always been an extraordinary remedy granted in rare and drastic circumstances. Audrey Davis, *A Return to the Traditional Use of the Writ of Mandamus*, 24 LEWIS & CLARK L. REV. 1527, 1529 (2020). This high burden carried over to the United States judiciary, where mandamus relief is granted in only "exceptional circumstances amounting to judicial usurpation of power, or clear abuse of discretion . . . ." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (citing *Cheney v. U.S. Dist. Ct. for the D.C.*, 542 U.S. 367, 380 (2004)). Judicial discretion also maintains this high burden. *In re United States*, 895 F.3d 1101, 1104 (9th Cir. 2018) ("Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition."). Because Petitioners cannot point to exceptional circumstances and simply seek to avoid the normal course of litigation, the Petition should be denied in accordance with the historic and contemporary use of mandamus.

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improper); No. 131 (Dec. 22, 2022, rejecting ExxonMobil's request for the parties to re-litigate standing on a motion to dismiss); No. 143 (Aug. 4, 2022, ExxonMobil arguing CLF's case is moot and thus lacks standing after ExxonMobil contracted to sell its facility); No. 182 (Jan. 3, 2024, dismissing case after parties settled).

English courts would not grant mandamus simply because the alternative was too burdensome. Davis, *supra*, at 1537. For example, in *R v. Marquis of Stafford*, (1790) 100 Eng. Rep. 782, 785; 3 T.R. 646 (KB), the petitioner requested mandamus because the alternative remedy available required the petitioner to join about 100 individuals as parties to the action. Davis, *supra*, at 1536–37. The court denied the mandamus request because there was an alternative remedy available, despite the "burden" of joining 100 additional parties. *Id*.

In the U.S., mandamus is traditionally a tool of enforcement against government officials for failing to perform a mandatory duty, typically after inexcusable delay. *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987); *see e.g.*, *Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1066–68 (N.D. Cal. 2014) (mandamus relief granted after petitioner waited six years for U.S. Citizenship and Immigration Services to adjudicate his request for citizenship); *In re Nat. Res. Def. Council*, 956 F.3d 1134, 1136 (9th Cir. 2020) (mandamus relief granted to cure EPA's "unreasonabl[e] and egregious[] delay[]" of ten years to address plaintiff's petition).

In the narrow circumstances when the government successfully brings mandamus petitions, relief is narrowly tailored to address a discrete issue and not intended for sweeping decisions that would end cases before they begin, such as what Petitioners seek here. Rather, relief typically touches minor discovery issues like preventing depositions of high-ranking individuals or privileged and sensitive

material. *See e.g.*, *In re United States*, 542 F. App'x 944, 947 (Fed. Cir. 2013) (collecting cases) ("[M]andamus may properly be used as a means of immediate appellate review of a denial of a protective order to prevent deposition of high-ranking government officials."); *In re Perez*, 749 F.3d 849, 851 (9th Cir. 2014) (granting the government mandamus relief from three interrogatories to protect identities of government informants investigating child abuse cases).

In the context of mandamus's historic role as an extraordinary remedy meant to protect the public from a derelict government officer—and not for government to entirely avoid litigation and discovery—the Petition should be denied.

III. The "Novel" Merits of This Case Weigh Against Mandamus Relief; District Courts Routinely Address New Sets of Facts with Existing Legal Principles Based on a Fully Developed Evidentiary Record.

Contrary to Petitioners' argument that mandamus is warranted because the merits of this case are "novel," Dkt. 1.1 at 47, 48, 60, novel facts actually support the need for a full evidentiary record developed at trial so the court can issue a decision on the merits. District courts are well-equipped to apply legal precedents to new facts. *Nat'l Tr. Ins. Co. v. S. Heating & Cooling Inc.*, 12 F.4th 1278, 1289 (11th Cir. 2021) ("[F]ederal courts routinely decide novel [] issues . . . ."); *cf. DeGeorge v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 219 F.3d 930, 940 (9th Cir. 2000) (holding that question of first impression weighed against mandamus relief because the district court adequately addressed the question).

District courts' function is to resolve complex, novel cases based on a full evidentiary record after the parties conduct discovery. *See White Mountain Apache Tribe v. United States*, No. 17-359 L, 2018 WL 6293242, at *4 (Fed. Cl. Dec. 3, 2018) (noting courts' ability to handle "complex, expensive, and time-consuming" cases with months-long discovery). This function is unique to district courts—not appellate courts, which generally lack fact-finding authority. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) ("The district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard . . . .") (cleaned up). If mandamus relief allowed defendants to escape a lawsuit based on the alleged novelty of its facts, higher courts would be clogged with mandamus petitions merely because a decision with identical facts does not already exist.

Notably, district courts routinely deny dispositive motions in cases presenting novel facts because courts need a full evidentiary record to resolve legal issues. *See, e.g.*, *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, No. MDL 2:18-mn-2873-RMG, 2022 WL 4291357, at *15 (D.S.C. Sept. 16, 2022) (denying defendants' motion for summary judgment in novel firefighting foam case because "a full factual presentation at trial" was necessary); *Delaware v. BP Am. Inc.*, No. N20C-09-097 MMJ CCLD, 2024 WL 98888, at *22 (Del. Super. Ct. Jan. 9, 2024) (denying anti-SLAPP motion to dismiss based on limited factual record in novel climate accountability case); Decision, *Rhode Island v. Chevron Corp.*, No. PC-2018-4716

(R.I. Super. Ct. Apr. 28, 2023) (delaying decision on motion to dismiss to allow limited discovery in novel climate accountability case).

Furthermore, the government's approach of repeatedly sidestepping normal legal processes is dangerous as it prevents harmed individuals from using litigation to enforce their rights. Petitioners' Appellate Review Attempts seek to terminate the case pre-discovery and keep Real Parties in Interest out of court. Legal rights are meaningless unless enforced, and litigation is "one of the most prominent enforcement tool[s]." John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 2 (2013); *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 HARV. L. REV. 1222, 1222–23 (2023). Private rights of action against the government also serve as a meaningful check on "abuse of power." Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1419 (2008); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (asserting that allowing aggrieved individuals to sue Constitution-violating government officials and agencies deters "future abuses" of governmental power).

Litigation provides a toolkit to help correct the power imbalance between an individual and the government. For example, discovery provides otherwise-inaccessible information regarding violations to create a robust factual record. Fed. R. Civ. P. 26 & advisory committee's note to 2015 amendment (describing

information asymmetry); *Torres-Estrada v. Cases*, 88 F.4th 14, 26 (1st Cir. 2023) (highlighting the government's control over the "majority of the information" related to constitutional violations). Allowing Petitioners to avoid normal litigation processes will allow them to continue exploiting the power imbalance between an individual and the government—the very imbalance against which courts guard.

Petitioners' Appellate Review Attempts are similar to the fossil fuel industry's attempts at 1) piecemeal litigation, which courts and Congress condemn,[7] and 2) avoiding climate change litigation, which courts have denounced. *Compare* Defs.' Mot. for Protective Ord. & Stay of All Discovery, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. May 9, 2018), ECF No. 196, *with* Defs.' Memo. in Supp. of Mot. to Clarify & Strike Portions of Disc. Order, *Rhode Island v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. June 7, 2023) (climate accountability case); *cf.* Order, *Cnty. of San Mateo v. Chevron Corp.*, No. 18-80049 (9th Cir. May 22, 2018), Dkt. 7 (denying motion for interlocutory appeal on federal court removal in climate accountability case); *Anne Arundel Cnty. v. BP P.L.C.*, 94 F.4th 343, 346 (4th Cir. 2024) ("The companies have sought—over and over and over—to remove the cases to federal court. By our count, that gambit has failed in at least ten cases already.

[7] The Supreme Court classifies mandamus relief as "chary" because it "has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (discussing congressional intent behind the Judiciary Act of 1789) (citation omitted).

The eleventh time is not the charm."). Petitioners' seventh mandamus petition here is also not the charm.

Allowing powerful entities, such as the federal government, to disrupt normal litigation processes and evade developing an evidentiary record leaves harmed individuals with no avenue for an adequate remedy against well-resourced defendants through the legal system.

IV. Petitioners Cannot Re-Litigate Standing to Functionally Avoid the Merits and Prevent Courts from Adjudicating Justiciable Cases.

Petitioners again appear before this Court to gamble their way into dismissing the case for lack of standing through multiple unwarranted rounds of re-litigation in hopes of a different outcome. Petitioners' mandamus petition is yet another of their several Appellate Review Attempts to prematurely re-litigate standing before waiting to appeal final judgment. *See* 28 U.S.C. § 1291. For two reasons, Petitioners should not be allowed another roll of the dice.

First, there is nothing special about this case that grants the government a right to immediate appellate review of orders denying motions to dismiss for lack of standing. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1025 (9th Cir. 2010) (holding denial of motion to dismiss for lack of standing "is neither a final decision nor appealable under the collateral order doctrine"). Contrast orders denying qualified immunity—where the government does enjoy the right of immediate review. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 518, 530 (1985). This difference

exists because qualified immunity serves not only to shield the government from "standing trial," but also from "the burdens of [all] pretrial matters," like discovery. *Dahlia v. Stehr*, 491 F. App'x 799, 801 (9th Cir. 2012). That is not true with standing: unlike denials of immunity, denials of motions to dismiss for lack of standing "can be adequately addressed after a final decision is entered." *Sierra Nat. Ins. Holdings, Inc. v. Credit Lyonnais S.A.*, 64 F. App'x 6, 7 n.1 (9th Cir. 2003). Simply put, Petitioners must follow the ordinary course of litigation and wait until after final judgment to appeal an adverse standing decision.

Second, if Petitioners succeed in bypassing the ordinary course of litigation through unwarranted interlocutory appeals and mandamus petitions following adverse standing decisions, they will add to the hurdles plaintiffs already have for standing. This addition will result in a nearly impossible threshold for plaintiffs to clear before even reaching the merits. The burden on plaintiffs to show standing begins the day the lawsuit is filed—through motion practice on dismissal, discovery, summary judgment, and possibly appeal—and lasts until the case is closed. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 191 (2000). Re-litigation of standing (which is not meant for immediate appellate review) not only prolongs this timeline, but also delays relief and increases costs for plaintiffs who are already at the mercy of the government's harmful actions.

Numerous hurdles to standing already exist at the district court level. Fashioned by the Supreme Court less than 100 years ago,[8] standing has since become "increasingly stringent" and "restrictive," shrinking federal court jurisdiction to vindicate individual rights. *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 HARV. L. REV. 1222, 1222–23 (2023). Now, through their Appellate Review Attempts, Petitioners want to add to these hurdles by re-litigating and requesting review of extensively-briefed standing decisions. Increasing hurdles to show and maintain standing will do so for all litigants *regardless of the merits of the underlying claim* since courts must address standing before the merits. *Langer v. Kiser*, 57 F.4th 1085, 1091 (9th Cir. 2023).

Extensive re-litigation of standing is especially problematic because courts serve as individuals' avenue of last resort in situations where the government continuously violates individual rights. *See, e.g.*, *Taylor v. Riojas*, 592 U.S. 7, 8 (2020) (deeming unconstitutional government-run prison that forced an inmate to live in a feces-covered cell); *Kouropova v. Gonzales*, 200 F. App'x 692, 693–94 (9th Cir. 2006) (deeming unconstitutional government delay in processing an asylee's immigration appeal for more than nine years); *Friends of Earth, Inc. v. Watson*, No. 3:02-cv-04106-JSW, 2005 WL 2035596, at *3 (N.D. Cal. Aug. 23, 2005) (finding

[8] John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (summarizing how recent three-element standing is).

grounds for federal law violation where government overlooked harm to citizens when financing fossil fuel extraction). Petitioners cannot continue re-litigating pre-merits standing decisions, which invents an additional barrier for meritorious claims to surmount where judicial intervention may be an aggrieved individual's last resort to justice.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitioners' petition for a writ of mandamus.

March 28, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,516 words (excluding the parts of the brief that are exempted from the word count by Fed. R. App. P. 32(f)) based on the word-processing system used to prepare the brief. I also certify that this amicus brief complies with the word limit of Fed. R. App. P. 29(a)(5).

(s) *s/ Ameya Gehi*

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