No. 21-7634

IN THE

Supreme Court of the United States

In Re Lin Ouyang, Petitioner.

On Petition for a Writ of Mandamus
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF MANDAMUS

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PETITIONER IN PRO SE

Dated: April 9, 2022

QUESTION PRESENTED

Court of Appeals for the Ninth Circuit dismissed petitioner's appeal as frivolous and stated that "No further filing will be entertained in this closed case", however the court of appeals did not order its mandate to be issued forthwith. Petitioner timely filed a motion for reconsideration seeking reversal of the court of appeals' dismissal order. Six months later, the court of appeals struck the motion for reconsideration refusing to rule it.

The question presented is whether a writ of mandamus should issue directing the court of appeals to rule the motion for reconsideration? (Whether the court of appeals has reached a genuinely final judgment?)

PARTIES TO THE PROCEEDINGS BELOW

Petitioner in this Court (plaintiff-appellant in the court of appeals) is Lin Ouyang.

Respondent in this Court is the United States Court of Appeals for the Ninth Circuit.

RELATED PROCEEDINGS

Ouyang v. Manella, et al, U.S. Court of Appeals for the Ninth Circuit, Nos. 20-56071, 21-55252. Dismissal order issued August 20, 2021. Order striking timely motion for reconsideration issued March 9, 2022.

Ouyang v. Manella, et al, U.S. District Court for the Central District of California, 2:20-05707 SVW (ADS). Order denying request to proceed in forma pauperis issued September 15, 2020; order denying motion to vacate judgment issued November 6, 2020, and order denying motion for leave to appeal in forma pauperis issued November 10, 2020; order denying second motion to vacate judgment issued February 16, 2021, and order denying second motion for leave to appeal in forma pauperis issued February 16, 2021.

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PETITION FOR WRIT OF MANDAMUS

Petitioner respectfully petitions for a writ of mandamus to the United States Court of Appeals for the Ninth Circuit, requesting that the Ninth Circuit be directed to rule petitioner's motion for reconsideration. In the alternative, petitioner respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's order striking filings of motion for reconsideration, appellant's correspondence: status of motion for reconsideration, motion to recall mandate, and appellant's correspondence: status of motion for reconsideration (the Appendix to this Petition ("Pet. App.") 1a) is reported as *Lin Ouyang v. Manella*, No. 20-56071, 21-55252; 2022 U.S. App. LEXIS 6101 (9th Cir. Mar. 9, 2022).

The Ninth Circuit's order of dismissal (Pet. App. 4a-5a) is reported as *Ouyang v. Manella*, No. 20-56071, 21-55252; 2021 U.S. App. LEXIS 25051 (9th Cir. Aug. 20, 2021); 2021 WL 4206410 (9th Cir. Aug. 20, 2021).

The order of district court denying motion for leave to appeal IFP (Pet. App. 6a) is reported as *Ouyang v. Manella*, No. 2:20-05707 SVW (ADS); 2021 U.S. Dist. LEXIS 54741 (C.D. Cal. Feb. 16, 2021). The prior order of district court denying motion for leave to appeal IFP (Pet. App. 20a) is not reported.

The opinion of district court denying motion to vacate (Pet. App. 7a-19a) is reported as *Ouyang v. Manella*, No. 2:20-05707 SVW (ADS); 2021 U.S. Dist. LEXIS 54644 (C.D. Cal. Feb. 16, 2021). The prior opinion of district court denying motion to vacate (Pet. App. 21a-35a) and opinion denying request to proceed IFP (Pet. App. 36a-39a) are not reported.

JURISDICTION

The court of appeals dismissed the appeal on August 20, 2021, (4a-5a), and issued mandate on January 10, 2022 (2a-3a). Timely filed motion for reconsideration and motion to recall mandate were stricken on March 9, 2022 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1651 or, in the alternative, 28 U.S.C. 1254(1).

COURT RULES AND STATUTARY PROVISIONS INVOLVED

Rules of Supreme Court, Rule 13.3 provides that "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance

date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment."

28 USC §2101 (c) provides that "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree..."

STATEMENT OF THE CASE

I. Background facts

Petitioner appealed in California Courts of Appeal her misdemeanor conviction entered by Los Angeles Superior Court with unlimited civil jurisdiction. California Courts of Appeal waived petitioner's filing fees but denied her request of a court appointed appellate counsel. Petitioner submitted arguments herself.

California Courts of Appeal dismissed petitioner's misdemeanor appeal with a written opinion basing on a false statement that the charge that petitioner was convicted was a civil contempt that is non-appealable. In other word, to dismiss petitioner's misdemeanor appeal the court falsely stated that petitioner was not convicted a charge of misdemeanor.

At the same time, California Courts of Appeal, also basing on false statements, dismissed petitioner's all other appeals that could collaterally attack the misdemeanor conviction. In addition, California Courts of Appeal fabricated arguments challenging two lower court orders that petitioner did not contend in her briefs.

Petitioner filed a complaint with California Courts of Appeal complaining that the court disposed her appeals without a due process hearing by making false statement of records, while appeals with representations are treated differently. Clerk/Executive officer of the court took no action, and his decision was adopted by Judicial Council of California.

D. Ct. No. 2:20-cv-05707, Dkt. 8 at 6-8, 11-19.

II. Proceedings in the District Court

A. Complaint and request to proceed to in forma pauperis

On June 26, 2020, petitioner filed a civil right suit in the United States District Court for the Central District of California. D. Ct. No. 2:20-cv-05707, Dkt. 1. Together with the original complaint, petitioner filed a request to proceed to in forma pauperis and a declaration in support of the request. D. Ct. No. 2:20-cv-05707, Dkt. 3.

On August 26, 2020, petitioner filed her first amended complaint ("the complaint"). D. Ct. No. 2:20-cv-05707, Dkt. 8. The complaint is against California state courts' judicial officials seeking both equitable relief and damages. D. Ct. No. 2:20-cv-05707, Dkt. 8.

The claims seeking equitable relief against the officers in their official capacities include: 1. California Penal Code §1466 that provides no right to court appointed counsel for indigent misdemeanants in their first appeal as a matter of right is in violation of the Equal Protection Clause of the Fourteenth Amendment to the US Constitution; 2. California Rules of Court Title 8, Division 1, Chapter 2, Article 4 "Hearing and Decision in the Court of Appeal" that contains no provision to secure a hearing before an appeal is disposed by a written opinion is in violation of the Due Process

Clause of the Fourteenth Amendment to the US Constitution; 3. A custom of California Courts of Appeal that provides no hearing for appeals filed by self-represented appellants who generally are poor and unable to afford an attorney is in violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the US Constitution. D. Ct. No. 2:20-cv-05707, Dkt. 8 at 20-26.

The claims seeking damages against the officers in their individual capacities are: 1. Clerk/Executive Officer of California Court of Appeal is liable pursuant to the Civil Rights Act of 42 U.S.C. §1983 in his personal capacity for his act of taking no action on complaint of constitutional violations; 2. Judges of state appellate court are liable pursuant to the Civil Rights Act of 42 U.S.C. §1983 in their personal capacities for their acts of making false statement of the charge convicted to dismiss petitioner's misdemeanor appeal without a hearing. D. Ct. No. 2:20-cv-05707, Dkt. 8 at 20-26.

Exhibits attached to the complaint include a commitment order showing that petitioner was convicted of Cal. P.C. §166, misdemeanor contempt of the court. D. Ct. No. 2:20-cv-05707, Dkt. 8 at 33-35. Besides stating facts how a civil trial court entered a misdemeanor conviction, petitioner also states in the complaint that jail raised the question of charge convicted at the time of booking and requested trial

court to clarify, and trial court confirmed that petitioner was convicted of the charge of P.C. §166, a misdemeanor contempt of the court. D. Ct. No. 2:20-cv-05707, Dkt. 8 at 11-12. To show that the court knowingly made false statement to dismiss petitioner's misdemeanor appeal, the complaint states facts that petitioner informed California Courts of Appeal including the three judges who decided her appeal that she was convicted of a misdemeanor. D. Ct. No. 2:20-cv-05707, Dkt. 8 at 13-14.

Petitioner provided citations to the court records to support the facts in the complaint and the truth of the facts in the complaint can be verified by taking judicial notice of those court records. D. Ct. No. 2:20-cv-05707, Dkt. 8.

B. District Court's order denying request to proceed IFP, order of dismissal, Petitioner's two motions to vacate and District Court's orders denying motions to vacate.

On September 15, 2020, District Court denied Petitioner's request to proceed IFP and dismissed the complaint. Pet. App. 36a-39a. On October 9, 2020, Petitioner filed a timely motion to vacate. D. Ct. No. 2:20-cv-05707, Dkt. 10. On November 6, 2020, District Court denied motion to vacate. Pet. App. 21a-35a. On November 30, 2020, petition filed a second motion to vacate. D. Ct. No. 2:20-cv-05707,

Dkt. 19. On February 16, 2021, District Court denied the second motion to vacate. Pet. App. 7a-19a.

With regards to the claims for equitable relief, District Court found that "the main problem" is that judicial immunity barred equitable relief against state judicial officers asserting that *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996) supported its decision. Pet. App. 11a-12a. Because immunity is an affirmative defense, the dismissal is on the ground of failure to state a claim. *Jones v. Bock*, 549 U.S. 199, 215 (2007) ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief.) When District Court ruled the same in its prior order, Pet. App. 29a, petitioner objected in her motion to vacate/alter identifying the page number and quoting the original texts of *Moore,* "state officials enjoy judicial or quasi-judicial immunity from damages only", showing that *Moore* does not support District Court's decision, D. Ct. No. 2:20-cv-05707, Dkt. 19 at 23; *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996). However, District Court insisted its decision. Pet. App. 11a-12a. ("As already explained, the main problem is…Judicial immunity is not limited to claims for monetary damages and extends to claims for declaratory or

injunctive relief. *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996)"])

As to claims for damages against defendant Clerk/Executive Officer of California Court of Appeal-Second District, District Court dismissed claim finding that the allegations are not adequate to state a claim for liability. Pet. App. 16-17a. When District Court ruled similarly in its prior order that "state officials are not vicariously liable for the violations of constitutional rights by employees", Pet. App. 26a, petitioner objected in her motion to vacate/alter that the complaint stated facts that defendant Clerk/Executive Officer was notified of the constitutional violations, but he took no action while he has a duty and authority to do so, thus defendant, with his deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused petitioner constitutional harm, accordingly the complaint stated a claim for liability on theories recognized in a line of Supreme Court cases *Pembaur v. City of Cincinnati*, 475 U.S. 469 and *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978). D. Ct. No. 2:20-cv-05707, Dkt. 19 at 27-31. However, in its order denying motion to vacate/alter finding that petitioner failed to state a claim against the Clerk/Executive Officer, District Court omitted the facts stated in the complaint that

defendant Clerk/Executive Officer knew of the complaint of constitutional violations that the court dismisses self-represented appellant's appeal without a due process hearing by making false statement of the records. Pet. App. 16-17a; D. Ct. No. 2:20-cv-05707, Dkt. 8 at 18-19.

For claims for damages against defendants, judges of California Court of Appeal, District Court dismissed the claims finding that judicial immunity barred the claim for their act of adjudicating that a civil contempt conviction is a non-appealable order. Pet. App. 15a-16a. District Court ruled in its prior order that allegation that state appellate court justices "fabricated a lower court conviction and presented it to themselves for an opinion" "appears to be a disagreement with the California Court of Appeals judges over whether an order was appealable or not." Pet. App. 30a-32a. Petitioner objected in motion to vacate/alter that statements that petitioner was convicted of a charge of misdemeanor contempt of the court, but state appellate court justices falsely stated that petitioner was convicted of civil contempt are statements of facts, an appellate court judge absolutely has no jurisdiction to decide what charge petitioner was convicted of, even though the judge has jurisdiction to decide whether petitioner should be convicted of a misdemeanor

contempt of the court. D. Ct. No. 2:20-cv-05707, Dkt. 19 at 24-27. In making its decision to dismiss the claim on the ground of immunity, District Court omitted the facts stated in the complaint that petitioner was convicted of misdemeanor contempt of the court, and petitioner's misdemeanor conviction was affirmed by appellate court because of the dismissal that was based on defendants' false statement that petitioner was not convicted of a charge of misdemeanor. Pet. App. 15a-16a; D. Ct. No. 2:20-cv-05707, Dkt. 8 at 11-18.

District Court did not make any findings that the facts in the complaint are untrue, Pet. App. 7a-19a, 21a-39a, and the truth of the facts in the complaint can be verified by taking judicial notice of court records, D. Ct. No. 2:20-cv-05707, Dkt. 8.

C. Notice of appeal, statement of issues to be raised on appeal, and District Court's order denying appeal IFP.

Petitioner filed with District Court timely notices of appeal, D. Ct. No. 2:20-cv-05707, Dkt. 12, 21, 25. Petitioner twice requested leave to appeal in forma pauperis with the District Court and listed the issues to be raised on appeal with her request. D. Ct. No. 2:20-cv-05707, Dkt. 11, 20.

District Court denied both requests and stated, "The Court certifies that the proposed appeal is not taken in good faith under 28 U.S.C. 1915(a) and is frivolous." Pet. App. 6a, 20a.

III. Proceedings in the Court of Appeals

A. Statement that appeal should go forward.

Petitioner's appeals were docketed in Court of Appeals for the Ninth Circuit under two case numbers: 20-56071 and 21-55252. Petitioner filed a request for leave to appeal in forma pauperis with Court of Appeal. Ct. A. No. 21-55252, Dkt. 3, 4. Petitioner also filed in each case a statement that the appeal is not frivolous and should go forward and petitioner argued in the statements that the dismissal order should be reversed because none of District Court 's grounds of dismissal is correct. Ct. A. No. 21-55252, Dkt. 5; Ct. A. No. 20-56071, Dkt. 11.

With regards to dismissal of the claims for equitable relief, relying on *Pulliam v. Allen*, 466 U.S. 522 and *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996), petitioner raised the issue that District Court erred in finding that judicial immunity, "the main problem" identified by District Court, barred equitable relief against state judicial officers. Ct. A. No. 21-55252, Dkt. 5-1 at 29-31.

For dismissal of claims for damages against judges of California Courts of Appeal because of judicial immunity, petitioner raised the issue that District Court erred in dismissing the claim because District Court omitted the facts that petitioner was convicted a charge of misdemeanor, but state appellate court justices falsely stated that petitioner was convicted of civil contempt in making decision to dismiss petitioner's misdemeanor appeal, as a result District Court did not meet its burden to justify the omitted acts for its proposed judicial immunity. *Garmon* v. *Cty. of Los Angeles*, 828 F.3d 837, 843 (9th Cir. 2016), *Kalina* v. *Fletcher*, 522 US 118. In addition, relying on *Marbury* v. *Madison*, 1 Cranch, 137, 175, petitioner argued that an appellate court judge absolutely has no jurisdiction to decide what charge petitioner was convicted of, even though the judge has jurisdiction to decide whether petitioner should be convicted of a misdemeanor contempt of the court, accordingly, judicial immunity does not bar damages claims against the judges for their acts of making false statement of lower court's conviction, *Lopez v. Vanderwater*, 620 F. 2d 1229 (7th Circuit 1980); *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099 (1978). Ct. A. No. 21-55252, Dkt. 5-1 at 31-37.

As to dismissal of claims for damages against defendant Clerk/Executive Officer of California Court of Appeal, petitioner raised the issue that in finding that the allegations are not adequate to state a claim for liability, District Court omitted the facts in the complaint that defendant Clerk/Executive Officer was notified of the constitutional violations, but he took no action while he has a duty and authority to do so, and by being deliberate indifferent to the consequences of violations, defendant established and maintained a policy, practice or custom which directly caused petitioner constitutional harm, thus is liable. *Pembaur v. City of Cincinnati*, 475 U.S. 469 and *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978). In addition, petitioner also raised the issue that District Court erred in finding that Clerk/Executive Officer of the court is entitled to judicial immunity for his administrative duties, *Hafer v. Melo*, 502 U.S. 21, 29, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Morrison v. Lipscomb*, 877 F. 2d 463. Ct. A. No. 21-55252, Dkt. 5-1 at 37-43.

B. Court of appeals' dismissal order.

On August 20, 2021, Ninth Circuit dismissed petitioner's appeal as frivolous. Pet. App. 4a-5a.

The court of appeals misstated that, "The district court denied appellant leave to proceed in forma pauperis because it found the action was frivolous. See 28 U.S.C. § 1915(a)." Pet. App. 4a. District Court's grounds of dismissal of action and denial of proceed in forma pauperis are that the action fails to state a claim on which relief may be granted, and that the action seeks monetary relief against a defendant who is immune from such relief. Pet. App. 7a-19a; *Jones v. Bock*, 549 U.S. 199, 215 (2007) (A complaint is subject to dismissal for failure to state a claim if the complaint is subject to an affirmative defense.) And those grounds are not frivolous under 28 USC §1915. *Jones v. Bock*, 549 US 199, 127 S.Ct. 910, 920 (2007) (Failure to state a claim and seeking monetary relief from a defendant immune from such relief are not frivolous under § 1915(d), renumbered as 28 USC §1915(e)(2)). Even though those grounds are listed under 28 USC §1915(e)(2) together with the ground of "frivolous", the court of appeals did not adopt them in its order of dismissal. Pet. App. 4a-5a; 28 USC §1915(e)(2); *Jones v. Bock*, 549 US 199, 127 S.Ct. 910, 920 (2007) ("In the PLRA, Congress added failure to state a claim and seeking monetary relief from a defendant immune from such relief as grounds for sua sponte dismissal of in forma pauperis cases, § 1915(e)(2)(B) (2000 ed.)") Court of Appeal did not explain why the

appeals are frivolous when it did not adopt District Court's ground of dismissal of the action. Pet. App. 4a-5a, 7a-19a.

Court of Appeal stated in its dismissal order, "No further filing will be entertained in this closed case", however the court did not order its mandate to be issued forthwith. Pet. App. 5a. If the court intends to suspend rehearing proceedings and to make its judgment final, Ninth Circuit General Order 4.6.b requires the court to issue its mandate forthwith. Ninth Circuit General Order 4.6.b ("Exceptional circumstances may include, but are not limited to, ..., to effectuate a just result, the action of the Court should become final, and mandate issue, at once...")

C. Motion for reconsideration.

On September 20, 2021, petitioner filed a timely motion for reconsideration and motion for reconsideration en banc. Pet. App. 40a-57a. Petitioner requested a reversal of dismissal of the appeal relying on *Boag v. MacDougall*, 454 U. S. 364 (1982). Petitioner raised the question that the court of appeals cannot exercise its broad discretion to dismiss the appeal as frivolous because District Court's dismissal of the action is based on erroneous legal conclusions and neither the court of appeals nor District Court made any findings that the facts in the complaint are untrue and the truth of the facts in the

complaint can be verified by taking judicial notice of court records. Pet. App. 40a-57a.

Petitioner also raised the issue that the court of appeals erred in not setting aside District Court's certification that the appeal was not taken in good faith. Pet. App. 53a-54a. The record shows no finding of improper motive and petitioner raised meritorious arguments on appeal. Pet. App. 4a-5a, 7a-19a.

Petitioner argued that a published opinion of District Court for the Central District of California *Schweitzer v. Scott*, 469 F. Supp. 1017, 1020 suggests that her appeal was dismissed not because it does not have merit, but because it is an in forma pauperis action seeking money damages, Pet. App. 53a, and such practices of applying double standard by the court to paid action and in forma pauperis action conflict with this Court 's precedent *Neitzke v. Williams*, 490 US 319.

Petitioner requested reconsideration en banc together with motion for reconsideration. Pet. App. 55a.

D. Mandate and motion to recall mandate.

On Jan. 10, 2022, Court of Appeals issued its mandate while the motion for reconsideration was pending. Pet. App. 2a-3a.

On Jan. 11, 2022, petitioner filed motion to recall mandate informing the court that a motion for reconsideration was still pending and the timely motion for reconsideration stays the issuance of mandate until its disposition pursuant to FRAP 41(b). Pet. App. 61a-68a.

E. Correspondence to the court of appeals regarding the status of motion for reconsideration and finality of the court of appeals' judgment.

On November 1, 2021, petitioner emailed the clerk office of the court of appeals asking whether the court would make a ruling of the motion for reconsideration. The clerk office of the court of appeals responded, "I don't think the issue a decision or order on the motion [for reconsideration] because no further filing will be entertained in the closed cases". Pet. App. 59a-60a.

Petitioner then called the clerk office of this Court asking whether she could file a petition for a writ of certiorari assuming her motion for reconsideration was denied since court of appeals would not make a ruling of the motion. The clerk office of this Court told petitioner to wait for an order on her motion for reconsideration to file the petition. Pet. App. 59a-60a.

Petitioner emailed the clerk office of the court of appeals, "According to my conversation with the office of the Supreme Court, I need to wait for the court's order on the motion for reconsideration before I can file a petition for a writ of certiorari with the Supreme Court. Could you please bring this matter to the court's attention?" The clerk office of the court of appeals responded, "Per this court's pervious orders, no further filings will be entertained in these closed cases." Petitioner raised the issue of finality to the office of the court of appeals, "Pursuant to Supreme Court Rule 13.3 ... An order on the motion for reconsideration still should be issued when the court would not entertain the filing, so that I am notified of the date the judgment becomes final." The clerk office of the court of appeals responded, "The clerk's office is not given advance notice as to when a disposition or order/judgement will be delivered or filed and, therefore, cannot supply such information to the parties. If you are requesting the status of a motion, please file correspondence to the Court. The clerk's office does not have additional information on pending motions" Pet. App. 59a-60a.

On November 2, 2021, petitioner filed a letter to the court of appeals querying the status of motion for reconsideration. In the letter, petitioner raised the issue that if the court of appeals did not rule the

motion for reconsideration, there would be no court rule to apply to determine the finality of the judgment. Pet. App. 58a-60a. The court of appeals made no response to the letter.

Advisory committee note to Ninth Circuit Rule 25-2 recommends a party to communicate to the court when a petition for rehearing has been pending for longer than 6 months.

On March 4, 2022, petitioner filed a letter to the court of appeals again querying the status of motion for reconsideration. In the letter, petitioner again raised the issue of finality of the court's judgment. Pet. App. 69a-71a.

F. Order striking filings.

On March 9, 2022, the court of appeals ordered that filing of motion for reconsideration, appellant's correspondence: status of motion for reconsideration, motion to recall mandate, and appellant's correspondence: status of motion for reconsideration be stricken. Pet. App. 1a.

REASON FOR GRANTING THE PETITION

The issuance of a writ of mandamus to a lower court is warranted when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance

of the writ is "clear and indisputable," ' and (3) 'the writ is appropriate under the circumstances.' " *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). Each of those prerequisites for mandamus relief is met here.

First, by striking a timely filed motion for reconsideration, the court of appeals has practically nullified this Court's Rule 13.3 that determines the finality of a judgment for the purpose to be reviewed by this Court, because the rule does not address the situation a timely filed rehearing petition is neither denied nor granted. At the same time, the court of appeals' order raised an important question of first impression whether the court of appeals reached a genuinely final judgment when it struck a motion for reconsideration instead of adjudicating it. This Court's adjudication is necessary to provide guidance to judges, litigants, and lawyers. No other adequate means exist to attain the relief desired.

Second, the court of appeals clearly and indisputably erred in striking petitioner's timely motion for reconsideration, while the court of appeals did not make any findings of exceptional circumstances listed under Ninth Circuit General Order 4.6.b to justify suspension of rehearing proceedings nor did the court order its mandate to be issued

forthwith to suspend rehearing proceedings as required by the General Order. With the motion for reconsideration stricken, the questions raised in the motion whether the court of appeals should reverse its order of dismissal remains open. As a result, "`there is no "judgment" to be reviewed'" by this Court. *Hibbs* v. *Winn*, 542 U.S. 88, 98, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). Thus, the writ will be in aid of this Court's appellate jurisdiction.

Third, refusal of the court of appeals to exercise its authority to adjudicate a timely motion for reconsideration when it has a duty to do so justifies issuance of a writ.

This Court should issue a writ of mandamus to the court of appeals correcting these errors. Supreme Court Rule 20.

A. Petitioners' right to issuance of a writ is clear and indisputable

Petitioner's right to a writ of mandamus directing the Ninth Circuit to rule petitioner's timely motion for reconsideration is clear and indisputable. The court of appeals clearly and indisputably erred in striking petitioner's timely motion for reconsideration. With the motion for reconsideration stricken by the court of appeals, the questions raised in the motion whether the court of appeals should reverse its order of dismissal that conflicts with this Court's

precedents *Boag* v. *MacDougall*, 454 U. S. 364 (1982) and *Neitzke* v. *Williams*, 490 US 319 (1989) remains open. As a result, "`there is no "judgment" to be reviewed'" by this Court. *Hibbs* v. *Winn*, 542 U.S. 88, 98, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004).

It is clear from the record that the court of appeals did not suspend rehearing proceedings and did not make its judgment final when it dismissed the appeal as frivolous because that the court of appeals did not order its mandate to be issued forthwith, Pet. App. 4a-5a, and Ninth Circuit General Order 4.6.a and 4.6.b provides that to suspend rehearing proceedings and to make its judgment final, the court of appeals is required to issue its mandate forthwith. Ninth Circuit General Order 4.6.a ("... only in exceptional circumstances should a panel order the issuance of mandate forthwith upon the filing of a disposition."); Ninth Circuit General Order 4.6.b ("Exceptional circumstances may include, but are not limited to, instances where it appears from the record that a petition for rehearing en banc[1], or petition for writ of certiorari would be legally frivolous, where the losing litigant is attempting to defeat a just result by interposing delaying tactics, or where an emergency situation requires that, to effectuate a just result, the action of the Court should become final,

[1] In Ninth Circuit, a rehearing proceeding is generally treated as a part of a rehearing en banc proceeding. Ninth Circuit General Order 5.4.b.3 "Procedure When Only a Petition for Panel Rehearing is Filed"

and mandate issue, at once. In such a case, the panel may close the disposition with the following language: "No petition for rehearing will be entertained and mandate shall issue forthwith. See Fed. R. App. P. 2."")

In addition, the record contains no findings that a petition for rehearing or rehearing en banc, or petition for writ of certiorari would be legally frivolous: the court of appeals did not adopt district court's grounds of dismissal and did not state its own findings to support its conclusion that the appeal is frivolous, Pet. App. 4a-5a, 7a-19a; *Jones* v. *Bock*, 549 US 199, 127 S.Ct. 910, 920 (2007) (Failure to state a claim and seeking monetary relief from a defendant immune from such relief are not frivolous under § 1915(d), renumbered as 28 USC §1915(e)(2)). And the entire record contains no findings of other exceptional circumstances listed in Ninth Circuit General Order 4.6.b as well. Pet. App. 4a-5a, 7a-19a. Thus, without issuing its mandate forthwith, the court of appeals retained its jurisdiction to adjudicate subsequent filings indicating that the court of appeals did not want to violate the policy against immediate issuance of mandate. Ninth Circuit General Order 4.6.a ("... only in exceptional circumstances should a panel order the issuance of mandate forthwith upon the filing of a disposition."); *Mariscal-Sandoval* v. *Ashcroft*, 370 F. 3d 851, 856

(9th Cir. 2004) ("Although it is true that "Nothing requires the court to wait until the mandate issues [,]" ..., [the aggrieved party] still retains the ability to petition this panel for rehearing, or to petition the court as a whole to review our decision en banc. Until any further petitions to this panel or the entire court are resolved, we cannot say that [the aggrieved party] has no probability of success on the merits.")

With regards to the court of appeals' statement "No further filing will be entertained in this closed case", a published opinion of the trial court of this case, *Schweitzer* v. *Scott*, 469 F. Supp. 1017, 1019-1020 (C.D. Cal. 1979), suggests that the court of appeals is following a practice to dismiss an in forma pauperis action seeking money damages regardless the action has merit or not. *Ibid.* ("... the willingness of courts to utilize proceedings in forma pauperis should correspond, at least to some degree, to the gravity and impact of the social policy asserted in the underlying cause of action, and the ability of that underlying cause of action to generate fees and attract the private bar. Although the courts do not judge the relative worth of various laws, as a general rule, a court should be more willing to entertain an application of this nature in a criminal proceeding, or a Title VII proceeding, than, say, in a civil action for money damages...") And such a practice apparently conflicts with this Court

's holding in *Neitzke v. Williams*, 490 US 319 that "Congress' overarching goal in enacting the in forma pauperis statute" is ""to assure equality of consideration for all litigants."" *Ibid.* Petitioner raised the issue in her motion for reconsideration that the court of appeals' dismissal order conflicts with *Neitzke.* Pet. App. 53a-55a.

Accordingly, by stating "No further filing will be entertained in this closed case" without issuing its mandate forthwith, the court of appeals is trying to prevent petitioner from filing a rehearing petition without violating the law. In other words, to adhere to the published rules of procedure, the court of appeals had to permit petitioner to file a petition for rehearing, but the court did not want to adjudicate it. Because this Court ordinarily does not consider matters neither raised before nor decided by the courts below, *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970), by striking the timely motion for reconsideration, the court of appeals not only foreclosed petitioner's chance of review by this Court of the issues raised in the motion for reconsideration, but also effectively diminished this Court's jurisdiction by preventing questions from being brought to this Court. *Ibid.*

Therefore, the writ will be in aid of this Court's appellate jurisdiction and petitioner met the threshold to justify the granting of

the writ. *Roche* v. *Evaporated Milk Assn.*, 319 US 21 (1943) ("[Appellate court's] authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.")

B. No other adequate means exist to obtain relief

No other adequate means exist to obtain relief desired. Where subject concerns enforcement of rules which by law it is the duty of this Court to formulate and put in force, mandamus should issue to prevent such action thereunder as is so palpably improper as to place it beyond the scope of the rule invoked. *La Buy* v. *Howes Leather Company*, U.S.1957, 77 S.Ct. 309, 352 U.S. 249, 256. (1957). Here, by striking a timely filed motion for reconsideration, the court of appeals has practically nullified this Court's rules that determines the finality of a judgment to be reviewed by this Court. This Court's Rule 13.3 states,

> "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by

> any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment."

The rule becomes ineffective to determine the time to file a petition for a writ of certiorari with this Court in this case when a timely filed motion for reconsideration is stricken, as the rule only considers the situations of granting a petition and denial of the petition. In addition, when the court of appeals struck the motion for reconsideration six months after it was filed, the time to seek review with this Court from the court of appeals' dismissal order had passed. Supreme Court Rule 13.1 and 13.2. As a result, no court rules apply in this case to determine whether the court of appeals reached a final judgment for the purpose to seek a review from this Court, if so when the court of appeals reached a final judgment.

In addition, only "a genuinely final judgment" will trigger § 2101(c)'s 90-day period for filing a petition for certiorari in this Court. *Hibbs v. Winn*, 542 U.S. 88, 98, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). In *Department of Banking v. Pink*, 1942, 317 U.S. 264, 268, 63 S.Ct. 233, 235, 87 L.Ed. 254, this Court said: "For the purpose of the finality which is prerequisite to a review in this Court, the test is

... whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." Here, the record shows that in its dismissal order, the court of appeals did not adopt district court's grounds of dismissal, it mistook district court 's grounds: failure to state a claim and seeking monetary relief from a defendant immune from such relief as frivolous under § 1915, and did not state its own grounds of dismissal of the appeal as frivolous, the court of appeals did not make any findings that any exceptional circumstances to suspend rehearing proceedings listed in Ninth Circuit General Order 4.6.b existed in this case, and did not order its mandate to be issued forthwith to suspend rehearing proceedings as required by Ninth Circuit General Order 4.6.b, but the court of appeals stated, "No further filing will be entertained in this closed case", Petitioner filed a timely motion for reconsideration seeking reversal the court of appeals' dismissal order, the court of appeal struck the motion six months later without making a ruling. Pet. App. 1a, 4a-5a, 7a-19a, 40a-57a; Ninth Circuit General Order 4.6.a & 4.6.b; *Jones v. Bock*, 549 US 199, 127 S.Ct. 910, 920 (2007) (Failure to state a claim and seeking monetary relief from a defendant immune from such relief are not frivolous under § 1915(d), renumbered as 28 USC §1915(e)(2)).

No court decision has addressed the issue how striking a timely motion for reconsideration affects the finality of the judgment for this Court's review. The court of appeals' striking order raises important questions of law of first impression. By striking the motion from the docket, the court of appeal evaded effective resolution of the questions presented to it, its conduct will very likely be followed by others and the questions presented here will very likely recure. Adjudication by this Court would clarify the matters for judges, litigants, and lawyers.

Therefore, Petitioner met the threshold to justify the granting of the writ. *La Buy* v. *Howes Leather Company*, U.S.1957, 77 S.Ct. 309, 352 U.S. 249, 256. (1957) ("were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him]")

C. A writ of mandamus is warranted given the exceptional circumstances

Although the writ of mandamus is extraordinary relief, this Court has explained that it is appropriately used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) Here, the court of

appeal refused to adjudicate a motion for reconsideration that is properly presented to it and only struck the motion after the time to seek a review from the dismissal order expired. Pet. App. 1a, 58a-60a. The denial of relief here would have the practical effect of diminishing this Court's power to bring the litigation to a natural conclusion and petitioner's right will be irretrievably lost as well. Thus, issuance of writ is justified in this exceptional circumstance. *McClellan v. Carland*, 217 US 268 (1910).

CONCLUSION

The Court should issue a writ of mandamus to the court of appeal, ordering it adjudicate the timely filed motion for reconsideration. In the alternative, the Court should treat this petition as a petition for a writ of certiorari, grant the petition, and vacate the court of appeals' order striking motion for reconsideration.

Dated April 9, 2022.

Respectively submitted,

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