No. 21-7882

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: May 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 issuance of its mandate 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 under 28 USC §2101 (c) and this Court's Rule 13.3?)

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, No. 21-55251. 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, 2:21-00096 SVW (ADS). Order denying request to proceed in forma pauperis issued February 17, 2021; order denying motion for leave to appeal in forma pauperis issued March 30, 2021. This proceeding is related to proceeding *Ouyang v. Manella*, et al, in the same district court, C.D. Cal. No. 2:20-05707 SVW (ADS). In proceeding C.D. Cal. No. 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; order denying second motion to vacate judgment issued February 16, 2021. Appeals from orders in case No. 2:20-05707 SVW

(ADS) were docketed in Court of Appeals for the Ninth Circuit as Nos. 20-56071 and 21-55252. In appeals Nos. 20-56071 and 21-55252, a dismissal order issued August 20, 2021, and an order striking timely motion for reconsideration issued March 9, 2022. Petition for a writ of mandamus from the striking order in appeals Nos. 20-56071 and 21-55252 was filed with this Court on April 9, 2022 and placed on this Court's docket on April 15, 2022 as No. 21-7634.

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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, appellant's correspondence regarding the court of appeals' Feb. 9, 2022 amendment to docket text of Sep. 3, 2021 motion for reconsideration filing and appellant's correspondence: status of motion for reconsideration (the Appendix to this Petition ("Pet. App.") 1a) is reported as *Ouyang v. Manella*, No. 21-55251; 2022 U.S. App. LEXIS 6103 (9th Cir. Mar. 9, 2022).

The Ninth Circuit's order of dismissal (Pet. App. 3a) is reported as *Lin Ouyang v. Manella*, No. No. 21-55251; 2021 U.S. App. LEXIS 25066 (9th Cir. Aug. 20, 2021).

The order of district court denying motion for leave to appeal IFP (Pet. App. 4a) is reported as *Ouyang v. Manella*, No. 2:20-00096 SVW (ADS); 2021 U.S. Dist. LEXIS 257165 (C.D. Cal. Mar. 30, 2021).

The opinion of district court denying request to proceed IFP (Pet. App. 5a-6a) is reported as *Ouyang v. Manella*, No. 2:20-00096 SVW (ADS); 2021 U.S. Dist. LEXIS LEXIS 257167 (C.D. Cal. Feb. 17, 2021).

JURISDICTION

The court of appeals dismissed the appeal on August 20, 2021, (Pet. App. 3a), and issued mandate on February 9, 2022 (Pet. App. 2a). Timely filed motion for reconsideration and motion to recall mandate were stricken on March 9, 2022 (Pet. App. 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, representing herself, appealed in California Courts of Appeal a civil judgment against her. Petitioner moved the court to vacate the judgement because her opponent obtained the judgment by deceit upon court. California Courts of Appeal denied the request holding that deceit upon court does not constitute misconducts if a party bears a burden of proof. Petitioner also moved the court to vacate the judgment on other grounds. California Courts of Appeal denied petitioner's request either by replacing petitioner's arguments

with meritless arguments developed by the court itself or by dismissing petitioner's arguments on the ground of waiver or other similar grounds basing on significantly misrepresented records. At the same time, California Courts of Appeal falsely accused petitioner of making false statements of the records, upon information and belief, to make its false statements creditable.

In contrast, in an extraordinary writ proceeding filed by a corporation represented by an attorney, California Courts of Appeal granted the corporation's request and reversed trial court's order denying motion for summary adjudication that was in petitioner's favor by proposing undisputed facts itself, identifying evidence to support its proposed undisputed facts, reviewing its own evidence, and finding that its proposed undisputed facts were undisputed without giving petitioner an opportunity to produce contradict evidence.

Petitioner also appealed in California Courts of Appeal her misdemeanor conviction entered by a civil court with unlimited jurisdiction. California Courts of Appeal denied petitioner's request of a court appointed appellate counsel and dismissed petitioner's misdemeanor appeal with a written opinion basing on a false statement that petitioner was not convicted 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 statements of records, while appeals with representations are treated differently. Petitioner requested in the complaint to disqualify the judges involved from adjudicating her subsequent appeals. Clerk/Executive officer of the court took no action, and his decision was adopted by Judicial Council of California. California Courts of Appeal continued to make false statements of the record in disposing petitioner's subsequent appeals.

D. Ct. No. 2:21-cv-00096, Dkt. 1 at 7-25; 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

Petitioner filed two civil right lawsuits in in the United States District Court for the Central District of California. The first lawsuit, the leading case, is based on the claim of constitutional violations in

petitioner's appeal of her misdemeanor conviction in the state courts and was filed on June 26, 2020 and docketed as D. Ct. No. 2:20-cv-05707 on June 30, 2020. The second one, the subject of this petition, is based on the claim of constitutional violations in petitioner's appeal of her civil lawsuit judgments in the state courts and was filed on January 5, 2021 and docketed as D. Ct. No. 2:21-cv-00096 on January 7, 2021. The second suit was filed in the district court before the judgment of petitioner's last civil appeal became final in state courts.

Petitioner filed a request to proceed to in forma pauperis and a declaration in support of the request in each case. D. Ct. No. 2:20-cv-05707, Dkt. 3; D. Ct. No. 2:21-cv-00096, Dkt. 3.

Petitioner supported her claims with citations to court records and the truth of facts in the complaints can be verified by taking judicial notice of those records. D. Ct. No. 2:21-cv-00096, Dkt. 1; D. Ct. No. 2:20-cv-05707, Dkt. 8.

Petitioner seeks equitable relief against state court officers in their official capacities in both cases. In the leading case, petitioner claims that 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 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. In this case, petitioner claims that 1. California appellate court officers violated her constitutional rights under the Due Process Clause and Equal Protection Clause by refusing to disqualify the judges who treat appeals filed by self-represented appellants, who are generally poor, differently; 2. California appellate court officers violated her constitutional rights under the Due Process Clause in that the court denied petitioner an opportunity to produce evidence in a summary judgment proceeding. Petitioner alleged in the complaint that the pendency of the action concerning the same matter in the state court was no bar to the proceedings in the district court relying on *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 US 280, 292. D. Ct. No. 2:21-cv-00096, Dkt. 1 at 9-25, 35-37.

Petitioner seeks damages against state appellate court judges in their personal capacities in both cases. In the leading case, petitioner claims that the judges are liable pursuant to the Civil Rights Act of 42 U.S.C. §1983 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. In this case, petitioner claims that the judges are liable pursuant to the Civil Rights Act of 42 U.S.C. §1983 for their acts of accepting the practice of deceit upon court, fabricating facts not on the record, replacing parties' arguments with their own arguments, taking evidence, and deciding the matter of facts that were not determined by the trial court in adjudicating appeals, and petitioner alleged in the complaint that judicial immunity does not bar the claims because state appellate court officers clearly have no jurisdiction to take those acts. D. Ct. No. 2:21-cv-00096, Dkt. 1 at 9-33.

Petitioner also seeks damages against Clerk/Executive Officer of California Court of Appeal in his personal capacities in both cases. Petitioner claims in both cases that the Clerk/Executive Officer is liable pursuant to the Civil Rights Act of 42 U.S.C. §1983 for his act of taking no action on complaint of constitutional violations. D. Ct.

No. 2:20-cv-05707, Dkt. 8 at 20-26; D. Ct. No. 2:21-cv-00096, Dkt. 1 at 9-25, 33-35.

In this case, petitioner seeks a declaratory relief that is unrelated to the leading case. Petitioner claims that state courts violate judgment debtors' right under the Due Process Clause by permitting setoff against exempt causes of action without hearing of claims of exemption. D. Ct. No. 2:21-cv-00096, Dkt. 1 at 25, 37-38.

B. District Court's order denying request to proceed IFP

On February 17, 2021, District Court denied petitioner's request to proceed IFP and dismissed the complaint finding that "This Complaint is in essence the same as the complaint filed in related case Lin Ouyang v. Nora M. Manella, et al., 2:20-05707 SVW (ADS) ... as such, dismissal on the same bases is appropriate here and warrants no further discussion." Pet. App. 5a-6a.

In the leading case, the "related case" referred to by the District Court, 1. District Court dismissed the claims for equitable relief finding 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; 2. District Court dismissed the claims for damages against Clerk/Executive Officer of California Court of

Appeal-Second District finding that the allegations are not adequate to state a claim for liability and the officer is entitled to quasi-judicial immunity for his duties "taken in support of the judicial process", Pet. App. 16-18a; 3. District Court dismissed the claims for damages against judges of California Court of Appeal 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.

With regards to the claim for equitable relief that is unrelated to claims in the leading case, District Court held that the claim was dismissed also on the ground of "absolute judicial immunity". Pet. App. 6a.

District Court did not make any findings that the facts in the complaints are untrue in both cases, Pet. App. 5a-38a, and the truth of the facts in the complaints can be verified by taking judicial notice of court records, D. Ct. No. 2:20-cv-05707, Dkt. 8; D. Ct. No. 2:21-cv-00096, Dkt. 1.

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

On March 15, 2021, petitioner filed with District Court a timely notice of appeal and a request for leave to appeal in forma pauperis

including a list of issues to be raised on appeal. D. Ct. No. 2:21-cv-00096, Dkt. 6, 7.

District Court denied the 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. 4a.

III. Proceedings in the Court of Appeals

A. Statement that appeal should go forward.

Petitioner's appeal was docketed in Court of Appeals for the Ninth Circuit under case number 21-55251. Petitioner filed a request for leave to appeal in forma pauperis with Court of Appeals with a statement of issues to be raised on appeal. Ct. A. No. 21-55251, Dkt. 5,6. Petitioner also filed a statement that the appeal is not frivolous and should go forward arguing that the dismissal order should be reversed because none of District Court 's grounds of dismissal is correct. Ct. A. No. 21-55251, Dkt. 7.

With regards to dismissal of the claims for equitable relief, petitioner, relying on *Pulliam v. Allen*, 466 U.S. 522 and *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996) ("state officials enjoy judicial or quasi-judicial immunity from damages only"), raised the issue that District Court erred in finding that judicial immunity

barred equitable relief against state judicial officers. Ct. A. No. 21-55251, Dkt. 7-1 at 16-18.

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 judges' acts stated in the complaint of this case: accepting the practice of deceit upon court, fabricating facts not on the record, replacing parties' arguments with their own arguments, taking evidence, and deciding the matter of facts that were not determined by the trial court, 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, petitioner argued that as judges of a court of justice, the judges absolutely have no jurisdiction to side with evil accepting the practice of deceit upon court to obtain unjust judgment, *Stump v. Sparkman*, 435 U.S. 349 (1978), the judges of appellate court clearly have no jurisdiction to decide the matter of facts even though the judges have the jurisdiction to decide whether trial court erred in finding the matter of facts, *Marbury* v. *Madison*, 1 Cranch, 137, 175, and the judges of appellate court clearly have no jurisdiction to fabricate facts not on the record,

replace parties' arguments with their own arguments and submit their own arguments and records to themselves for an opinion, *In Re Murchison*, 349 U. S. 133, and it is the duty of trial court to submit transcripts to appellate court stating what happened at trial court and it is the duty of parties to submit arguments to an appellate court for adjudication, California Rules of Court Rule 8.122 d (1) & 8.200. Ct. A. No. 21-55251, Dkt. 7-1 at 24-29.

For dismissal of claims for damages against defendant Clerk/Executive Officer of California Court of Appeal, petitioner stated that the current case and leading case shared a common fact, Ct. A. No. 21-55251, Dkt. 7-1 at 15, and raised the issue in her statement in the leading case 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.

In response to District Court's finding that "Plaintiff is attempting to use the federal court to overturn decisions by state courts", Pet. App. 6a, petitioner argued, relying on *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 US 280, 292, that the state court action concerning the same matter had not reached its finality when this case was filed in the district court, thus it was no bar to the parallel proceedings in the district court. In addition, petitioner argued that state court did not adjudicate her constitutional claim of denial of impartial tribunal, as a result there is no state court decision to bar the proceedings in the federal court. Ct. A. No. 21-55251, Dkt. 7-1 at 18-22.

B. Court of appeals' dismissal order.

On August 20, 2021, Ninth Circuit dismissed petitioner's appeal as frivolous. Pet. App. 3a.

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. 3a. District Court did not find the action was frivolous under § 1915. Pet. App. 5a-19a. District Court's grounds of dismissal of the 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. 5a-19a, 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)); *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.)

Failure to state a claim and seeking monetary relief from a defendant immune from such relief, the grounds found by the district court in its dismissal, 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. 3a, 5a-19a.; 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 appeal was frivolous when it did not adopt District Court's grounds of dismissal of the action. Pet. App. 3a, 5a-19a.

The court of appeal did not make any findings that the facts in the complaint are untrue, Pet. App. 3a, and the truth of the facts in the complaint can be verified by taking judicial notice of court records, D. Ct. No. 2:21-cv-00096, Dkt. 1.

Court of Appeal stated in its dismissal order, "No further filing will be entertained in this closed case", however the court did not order issuance of its mandate forthwith. Pet. App. 3a. If the court intends to suspend rehearing proceedings and to make its judgment final, Ninth Circuit General Orders 4.6.b requires the court to issue its mandate forthwith. Ninth Circuit General Orders 4.6.b ("... to effectuate a just result, the action of the Court should become final, and mandate issue, at once...")

C. Motion for reconsideration.

On September 3, 2021, petitioner filed a timely motion for reconsideration. Pet. App. 39a-58a.

Petitioner requested a reversal of dismissal of the appeal relying on *Boag v. MacDougall*, 454 U. S. 364 (1982). Petitioner raised the issue 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. 39a-58a.

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. 3a-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, 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. Pet. App. 53a-56a.

Petitioner requested reconsideration en banc together with motion for reconsideration. Pet. App. 55a-56a.

D. First 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. 60a-61a.

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. 60a-61a.

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. 60a-61a.

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. 59a-61a. 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.

E. Mandate and motion to recall mandate.

On February 9, 2022, Court of Appeals issued its mandate while the motion for reconsideration was pending. Pet. App. 2a.

On February 9, 2022, the court of appeals added statement "NO ACTION will be taken on this filing per order at [8] which directed that no further filing will be entertained" to the docket text of September 3, 2021 motion for reconsideration filing. Pet. App. 83a-84a.

On February 23, 2022, petitioner filed motion to recall mandate raising the issue that the record does not show that the court of appeals suspended the rehearing proceedings, and the court has a duty to rule the timely motion for reconsideration which stays the issuance of mandate until its disposition pursuant to FRAP 41(b). Pet. App. 62a-81a.

On February 23, 2022, petitioner also filed a letter informing the court of appeals that its failure to mark the date of the February 9, 2022 amendment to docket text is confusing as to the date the notice of amendment was sent and the amendment "NO ACTION will be taken on this filing" is inconsistent with the fact that the court of appeals retained its jurisdiction after dismissal and accepted petitioner's filing of motion for reconsideration. Pet. App. 82a-84a.

F. Second correspondence to the court of appeals regarding the status of motion for reconsideration and finality of the court of appeals' judgment.

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. 85a-87a.

G. Order striking motion for reconsideration

On March 9, 2022, the court of appeals ordered that the filings of motion for reconsideration, appellant's correspondence: status of motion for reconsideration, motion to recall mandate, appellant's correspondence regarding the court of appeals' Feb. 9, 2022 amendment to the docket text of Sep. 3, 2021 motion for

reconsideration filing, 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 Orders 4.6.b to justify suspension of rehearing proceedings nor did the court order issuance of its mandate forthwith to suspend rehearing proceedings as required by the 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) remain 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 issuance of its mandate forthwith, Pet. App. 3a, and Ninth Circuit General Orders 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 Orders 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 Orders 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, 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."") Thus, the court of appeals must be presumed to have permitted rehearing filing when it did not issue its mandate forthwith. *Missouri* v. *Jenkins*, 495 US 33, 48-49 (1990).

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, and the court of appeals did not adopt district court's grounds of dismissal of the action and did not state its own findings to support its conclusion that the appeal is frivolous, Pet. App. 3a, 5a-19a; *Jones* v. *Bock*, 549 US 199, 127 S.Ct. 910, 920

[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"

(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 record contains no findings of other exceptional circumstances listed in Ninth Circuit General Orders 4.6.b as well. Pet. App. 1a-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 Orders 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 District Court for the Central District of California, 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, 329 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-56a.

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 determine 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 the court of appeals made no findings that a petition for rehearing or petition for writ of certiorari would be legally frivolous, it accepted petitioner's filing of motion for reconsideration and later struck it. Pet. App. 1a, 3a. By striking the motion, the court manually removed the

motion from the record, however the questions raised in the motion whether the court should reverse its order of dismissal because its decision conflicts with this Court's ruling in *Boag* v. *MacDougall*, 454 U. S. 364 (1982) and *Neitzke* v. *Williams*, 490 US 319 (1989) remain unadjudicated. Pet. App. 1a, 3a, 5a-19a, 39a-58a.

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, a writ of mandamus is warranted given the exceptional circumstances that the court of appeals refused to adjudicate a motion for reconsideration that is properly presented to it. Pet. App. 1a.

No published court rules discharge the court of appeals of its duty to adjudicate a rehearing proceeding. Even though Ninth Circuit's General Orders 4.6.b authorizes that a panel of court of appeals could suspend rehearing proceedings under exceptional circumstances, the rule does not release the court from the duty of adjudicating the matter of rehearing. Specifically, the rule requires court of appeals to adjudicate whether a petition for rehearing or petition for writ of certiorari would be legally frivolous before suspending rehearing proceedings unless other exceptional circumstances, such as emergency situations, exist. Here, to suspend rehearing proceedings, the court of appeals has a duty to adjudicate

whether a petition for rehearing or petition for writ of certiorari from the court of appeals' dismissal order would be legally frivolous. The record shows that the court of appeals did not make such adjudication and made no findings of other exceptional circumstances. Pet. App. 3a.

By refusing to adjudicate the matter of rehearing, the court of appeals evaded from answering the questions whether its decision is erroneous and if so, whether it will modify the judgment and alter the parties' rights. As a result, the court of appeals left petitioner no final judgment to bring to this Court for a review. Moreover, when the court of appeals struck the motion six months later, 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; Pet. App. 1a, 59a-61a.

Accordingly, 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, 278 (1910).

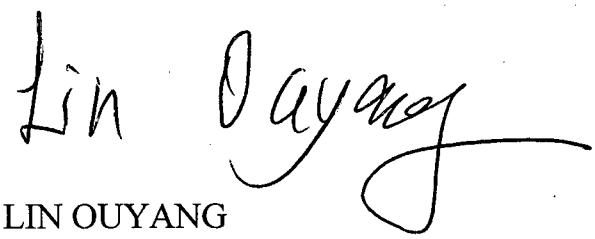
CONCLUSION

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 May 9, 2022.

Respectively submitted,



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