APPENDIX A

Case: 21-55251, 03/09/2022, ID: 12390133, DktEntry: 16, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 9 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LIN OUYANG, Plaintiff-Appellant, v. NORA M. MANELLA; et al., Defendants-Appellees.	No. 21-55251 D.C. No. 21-cv-00096-SVW-ADS Central District of California, Los Angeles ORDER

Before: SILVERMAN, CHRISTEN, and LEE, Circuit Judges.

Because the court's August 20, 2021 order dismissing this appeal as frivolous stated that no further filings will be entertained, the Clerk is directed to strike the filings submitted at Docket Entry Nos. 10, 11, 13, 14, and 15.

APPENDIX B

Case: 21-55251, 02/09/2022, ID: 12365699, DktEntry: 12, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 09 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LIN OUYANG,

Plaintiff - Appellant,

v.

NORA M. MANELLA; et al.,

Defendants - Appellees.

No. 21-55251

D.C. No. 2:21-cv-00096-SVW-ADS
U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered August 20, 2021, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rebecca Lopez
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 20 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LIN OUYANG, Plaintiff-Appellant, v. NORA M. MANELLA; et al., Defendants-Appellees.	No. 21-55251 D.C. No. 2:21-cv-00096-SVW-ADS Central District of California, Los Angeles ORDER

Before: SILVERMAN, CHRISTEN, and LEE, Circuit Judges.

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). On March 25, 2021, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and the responses to the court's March 25, 2021 order, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 2 and 5) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

No further filings will be entertained in this closed case.

DISMISSED.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LIN OUYANG, PLAINTIFF(S), v. NORA M. MANELLA, ET AL., DEFENDANT(S).	CASE NUMBER: 2:21-00096 SVW (ADS) **ORDER ON MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS:** ☐ **28 U.S.C. 753(f)** ☑ **28 U.S.C. 1915**

The Court, having reviewed the Motion for Leave to Appeal In Forma Pauperis and Affidavit thereto, hereby ORDERS: *(The check mark in the appropriate box indicates the Order made.)*

☑ **The court has considered the motion and the motion is DENIED.** The Court certifies that the proposed appeal is not taken in good faith under 28 U.S.C. 1915(a) and is frivolous, without merit and does not present a substantial question within the meaning of 28 U.S.C. 753(f).

The Clerk is directed to serve copies of this Order, by United States mail, upon the parties appearing in this cause.

March 30, 2021
Date

United States District Judge

☐ **The Court has considered the motion and the motion is GRANTED.** It appears to the Court that the proposed appeal is taken in good faith within the meaning of 28 U.S.C. 1915(a). The Court certifies that the proposed appeal is not frivolous, that it presents a substantial question. The within moving party is authorized to prosecute an appeal in forma pauperis to the United States Court of Appeals for the Ninth Circuit without pre-payment of any fees or costs and without giving security therefor.

☐ A transcript is needed to decide the issue presented by the proposed appeal, all within the meaning of 28 U.S.C. 753 (f). The Court Reporter is directed to prepare and file with the Clerk of this Court an original and one copy of a transcript of all proceedings had in this Court in this cause; the attorney for the appellant is advised that a copy of the transcript will be made available. The expense of such transcript shall be paid by the United States pursuant to 28 U.S.C. 1915(c) and 753(f).

The Clerk is directed to serve copies of this Order upon the parties appearing in this cause.

Date

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

LIN OUYANG, PLAINTIFF(S) v. NORA M. MANELLA, et al., DEFENDANT(S)	CASE NUMBER 2:21-00096 SVW(ADS) **ORDER RE REQUEST TO PROCEED *IN FORMA PAUPERIS***

IT IS ORDERED that the Request to Proceed *In Forma Pauperis* is hereby GRANTED.

Date — United States Magistrate Judge

IT IS RECOMMENDED that the Request to Proceed *In Forma Pauperis* be **DENIED** for the following reason(s):

- ☐ Inadequate showing of indigency
- ☐ District Court lacks jurisdiction
- ☒ Legally and/or factually patently frivolous
- ☒ Immunity as to judicial defendants
- ☐ Other: _____

Comments:
Please see attached.

February 17, 2021
Date

/s/ Autumn D. Spaeth
United States Magistrate Judge

IT IS ORDERED that the Request to Proceed *In Forma Pauperis* is hereby:

- ☐ GRANTED
- ☒ DENIED (see comments above). IT IS FURTHER ORDERED that:
  - ☐ Plaintiff SHALL PAY THE FILING FEES IN FULL within 30 days or this case will be dismissed.
  - ☒ This case is hereby DISMISSED immediately.
  - ☐ This case is hereby REMANDED to state court.

February 17, 2021
Date

United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:21-00096 SVW (ADS) Date: February 17, 2021

Title: *Lin Ouyang v. Nora M. Manella, et al.*

ATTACHMENT TO CV-73

On January 5, 2021, pro se Plaintiff Lin Ouyang filed a Complaint against Justices Nora M. Manella, Audrey B. Collins, Kim G. Dunning, Norman L. Epstein, Brian S. Currey, and the Clerk/Executive Officer of the Court of Appeal, Daniel P. Potter. Plaintiff also filed a Request to Proceed Without Prepayment of Fees ("IFP Request"). [Dkt. Nos. 1, 3]. 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). It involves the same defendants, asserts the same claims, and is based on the same underlying set of facts. The only difference is the inclusion of new defendant Justice Brian S. Currey.

The Court dismissed Plaintiff's previous case for immune judicial defendants and for legally and patently frivolous claims. The Court has determined twice more that dismissal was appropriate in denying two Motions to Vacate Judgment by Plaintiff. See Case No. 2:20-05707 SVW (ADS) [Dkt. Nos. 9, 16, 22]. Plaintiff asserts the same claims, against the same defendants, based on the same underlying set of facts, and as such, dismissal on the same bases is appropriate here and warrants no further discussion.

In addition, all claims against Justice Brian S. Currey must similarly be dismissed. The only actions attributed to Justice Currey are "refusing to reconsider its [three judge panel including Justice Currey] decision reversing trial court's order" and "den[ying] Plaintiff's petition for rehearing." [Dkt. No. 1, ¶¶ 31-32]. These are judicial decisions made in Justice Currey's judicial capacity. As such, Justice Currey is entitled to absolute judicial immunity and all claims against him must be dismissed. See Mireles v. Waco, 502 U.S. 9, 11 (1991) (per curiam) (superseded by statute on other grounds).

It is clear the deficiencies with this Complaint cannot be cured. Plaintiff is attempting to use the federal court to overturn decisions by state courts, and now files a second case asserting the same claims, against the same defendants, based on the same underlying set of facts in an attempt to circumvent this Court's decisions in her other case.

The Court accordingly recommends that the IFP application be denied and the case dismissed without leave to amend.

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LIN OUYANG, Plaintiff, v. NORA M. MANELLA, et al., Defendants.	Case No. 2:20-05707 SVW (ADS) **ORDER DENYING MOTION TO VACATE JUDGMENT**

I. INTRODUCTION

Before the Court is Plaintiff Lin Ouyang's ("Plaintiff") Motion to Alter Order Denying Motion to Vacate. [Dkt. No. 19]. The Court construes this as a motion to amend, alter, or vacate judgment ("Motion") pursuant to Federal Rule of Civil Procedure 59(e). This is the second such request by Plaintiff. Also, before the Court is Plaintiff's Motion for Leave to Appeal *In Forma Pauperis* ("IFP") with supporting affidavit. [Dkt. No. 20]. This is the second such request to proceed IFP on appeal by Plaintiff. The Motions are denied for the reasons set forth in more detail below.

II. RELEVANT PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The Court has already detailed Plaintiff's extensive history of litigation stemming from a 2014 employment action initially filed in Los Angeles Superior Court, which Plaintiff continues to contest. As this Court has explained, based on the complaints and previous Motion to Alter, Amend, or Vacate Judgment [Dkt. No. 10], it is clear Plaintiff is attempting to use the federal courts to overturn decisions made by the state courts. This second Motion to Alter, Amend, or Vacate Judgment [Dkt. No. 19] seeks to vacate this Court's previous Order denying the first such Motion, which objected to the Court's dismissal of this case [Dkt. No. 16]. The Court has already considered Plaintiff's objections to dismissal and has made clear that there are many reasons why this case was dismissed. No further objections need be considered, but, in the interest of judicial efficiency, the Court will consider each of Plaintiff's ten new objections in turn.

III. ANALYSIS

A. Standard of Review Under Rule 59(e)

The Motion relies on Rule 59(e) and specifically moves to prevent manifest injustice. Under Rule 59(e), a party may move to alter or amend a judgment "no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(e). In general, there are four grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law. Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). District courts have considerable discretion in granting or denying such motions, and relief under Rule 59(e) is "extraordinary" and

"should be used sparingly." McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999); Weeks v. Bayer, 246 F.3d 1231, 1236 (9th Cir. 2001) ("[j]udgment is not properly reopened 'absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'") (citing 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)).

As relevant here, clear error occurs where the court "is left with the definite and firm conviction that a mistake has been committed." Smith v. Clark Cty. Sch. Dist., 727 F.3d 950, 955 (9th Cir. 2013). To find "clear error," the error must be "manifestly unjust." Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). More specifically, "[a] manifest injustice is defined as an error in the trial court that is direct, obvious, and observable." Brooks v. Tarsadia Hotels, No. 3:18-cv-2290-GPC-KSC, 2020 U.S. Dist. LEXIS 22035, 2020 WL 601643, at *5 (S.D. Cal. Feb. 7, 2020) (internal quotations marks omitted). To prevail on a theory that the court manifestly erred, a moving party "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Arteaga v. Asset Acceptance, LLC, 733 F. Supp. 2d 1218, 1236 (E.D. Cal. 2010).

B. Discussion

1. Ground One

Plaintiff argues the Court "omitted factual allegations that plaintiff will suffer present and future harm absence [sic] of relief requested and erroneously found prospective relief retroactive." [Dkt. No. 19, p. 12[1]]. The Court may assume Plaintiff

[1] All page references shall refer to CM/ECF pagination.

refers to the finding in the last Order [Dkt. No. 16, p. 8] regarding Ground Six where the Court found Plaintiff's almost verbatim objection meritless. The Court has already explained the retroactive relief sought is only one of many reasons for dismissal. As such, this ground remains meritless.

2. Ground Two

Plaintiff's second objection is her currently pending appeal in state court "indicates that a prospective relief can be granted, even though a retroactive relief was sought." [Dkt. No. 19, p. 16]. Not only does Plaintiff acknowledge she seeks retroactive relief, but by informing the Court this issue is still on appeal in the state courts and that "plaintiff is expecting more appeals in the future," these claims may be even further barred by the Younger abstention doctrine. Under Younger and its progeny, equity, comity, and federalism preclude the federal courts from interfering in state judicial proceedings absent extraordinary circumstances. Younger v. Harris, 401 U.S. 37, 54 (1971); Steffel v. Thompson, 415 U.S. 452, 454 (1974); Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-35 (1982). Since there are many deficiencies with the complaints that cannot be remedied and provide numerous grounds for dismissal, it is unnecessary to conduct a full analysis of whether Younger abstention applies in this case. However, if Younger abstention is applicable, that is yet another reason why all claims in this case must be dismissed. Plaintiff does not present clear error by the Court.

3. Ground Three

Plaintiff, somewhat obliquely, asserts the Court "failed to take inference in favor of plaintiff, term 'the conviction' in injunction refers to a second contempt conviction to be entered against plaintiff, not the one plaintiff had appealed." [Dkt. No. 19, p. 17].

Plaintiff asserts the complaint refers to a "second misdemeanor conviction to be entered," therefore, she seeks prospective relief. [Id. at p. 18]. Plaintiff's clarification that she is actively seeking a federal court to interfere with state court proceedings only further reinforces that claims in this case are barred. Further, this provides additional support to the possibility that this case is likely barred by the Younger abstention doctrine. Additionally, it is immaterial whether Plaintiff meant to refer to one conviction or two. As this Court has already explained twice, Plaintiff's claims are barred primarily based on judicial immunity. The fact that there is a second conviction does not change that.

4. Ground Four

Plaintiff next asserts the Court "omitted" Plaintiff's request to remove the retroactive relief and "erroneously found all requests for prospective relief retroactive, also erroneously found that the suit is barred by the Rooker-Feldman doctrine." [Dkt. No. 19, p. 2]. As an initial matter, the Court did not "omit" Plaintiff's request to remove one of the requests for relief, as the entire case had already been dismissed at that time. and Plaintiff was not granted leave to amend. Furthermore, removing one request for relief would not have cured the deficiencies with the complaints.

Moreover, as the Court explained in its last Order, the issue of whether Plaintiff seeks prospective or retroactive relief is not dispositive. It is just one of many deficiencies. As already explained, the main problem is "that Plaintiff does not seek injunctive relief against ordinary state employee defendants, but against California state judges who are entitled to judicial immunity. . 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)." [Dkt. No. 16, p. 9]. The California Court of Appeals judges remain immune. The Court did not err.

Plaintiff's contention that the Rooker-Feldman doctrine was erroneously applied because "plaintiff has requested to remove the retroactive relief request" is meritless. Plaintiff does not dispute that she is seeking a "de facto appeal" of a state court decision. Further, this case was not dismissed based on the Rooker-Feldman doctrine, but the Court acknowledged that could be just one more of the many grounds for dismissal. The Court did not err.

5. Ground Five

Ground Five asserts "Court [sic] II states a separate claim asserting unconstitutionality of statute." [Dkt. No. 19, p. 5]. This is incorrect. The FAC clearly states "[t]his is an action brought under 42 U.S.C. § 1983" and Count II specifically states "[v]iolations of rights secured by the Equal Protection Clause of the Fourteenth Amendment." [Dkt. No. 8, p. 9, 22]. This is reinforced by the fact that there is no indication by Plaintiff that she complied with Federal Rule of Civil Procedure 5.1 to properly file a notice of constitutional question. This is clearly a Section 1983 claim for violations of Plaintiff's Fourteenth Amendment rights.

However, even assuming Plaintiff meant to state a claim asserting a California state statute is unconstitutional, this claim must still be dismissed. Judges are "not proper party defendants in § 1983 actions challenging the constitutionality of state statutes." In re the Justices of the Supreme Court of Puerto Rico, 695 F.2d 17, 22 (1st Cir. 1982); see also id. at 21 (noting that "ordinarily, no 'case or controversy' exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute," because judges acting as neutral adjudicators do not

have legal interests adverse to the interests of litigants). The Ninth Circuit has made clear when a judge acts as an "adjudicator" and applies a state statute, the judge is not a proper defendant in a Section 1983 action challenging the constitutionality of a state law. Wolfe v. Strankman, 392 F.3d 358, 365 (9th Cir. 2004) (citing Grant v. Johnson, 15 F.3d 146, 148 (9th Cir. 1994)); Cunningham v. Coombs, 667 F. App'x 912, 912-13 (9th Cir. 2016) (affirming dismissal of claims against judges because they were not proper parties in a Section 1983 action). Here, Plaintiff is suing the California Court of Appeals judges solely as a result of those judges' application of California state law. As such, they are not proper defendants in such an action where Plaintiff intends to challenge the constitutionality of California state law. See Rupert v. Jones, No. C 10-00721 SI, 2010 U.S. Dist. LEXIS 103108, at *15 (N.D. Cal. Sep. 29, 2010).

Additionally, to the extent Plaintiff intends to bring this action asserting unconstitutionality of California state law against the only remaining defendant, clerk Potter, this must also be dismissed. To assert a state official was upholding an unconstitutional statute, the state official "must have some connection with the enforcement of the act," and that connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1134 (9th Cir. 2012) (internal citations omitted). There is no connection between clerk Potter and the allegedly unconstitutional statute which "provides no right to appointed attorney to indigent misdemeanor appellant." [Dkt. No. 19, p. 20]. Plaintiff has not, and cannot, provide facts showing that Potter, a clerk of the court, has the authority or ability to determine when appointed counsel to an appellant is appropriate. At best, Potter's involvement, as

clerk of the court, may be liberally construed to be a "generalized duty to enforce state law." Coal. To Defend Affirmative Action, 674 F.3d at 1134; see also L.A. Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992). As such, there is no direct connection between clerk Potter and the allegedly unconstitutional state statute that does not provide a right to appointed counsel when appealing misdemeanors. See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 943 (9th Cir. 2013) (state official's only connection to allegedly unconstitutional statute was his general duty to enforce California law).

Even assuming Plaintiff did assert a claim to argue a California state statute is unconstitutional, she fails to state a claim against any of the named defendants, and it is clear she cannot. The Court did not err.

6. Ground Five

Plaintiff asserts claims against the unknown officers of the Judicial Council of California were improperly omitted. The Court has already addressed this objection in its previous Order [Dkt. No. 16, p. 7]. The Court did not err.

7. Ground Six

Plaintiff asserts the Court "failed to order leave to amend while the Court did not find the complaint is incurable." [Dkt. No. 19, p. 2]. Although the Court construes the Complaint liberally when the plaintiff is proceeding pro se, see Barrett v. Belleque, 544 F.3d 1060, 1061 62 (9th Cir. 2008) (per curiam), the Court must "dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief..." 28 U.S.C. § 1915(e)(2). In the Order denying Plaintiff's request to proceed in forma pauperis, the Court clearly determined

the complaint was legally and/or patently frivolous and involved defendants who were immune from requested relief, and as such must be dismissed. [Dkt. No. 9]. The Court denied Plaintiff's previous request to vacate judgment, finding the dismissal was warranted. [Dkt. No. 16]. As the Court is required to dismiss an action that is frivolous or involves immune defendants, leave to amend was not required. As such, the Court did not err.

8. Ground Seven

The seventh ground asserted by Plaintiff argues that it was error to find that judicial officers are immune from suit because Moore "does not apply to judicial officers in state court." [Dkt. No. 19, p. 3]. This argument is simply incorrect. Although Moore v. Brewster, 96 F.3d 1240 (9th Cir. 1996) involved a federal judge, there was no indication in Moore that the doctrine of judicial immunity should not apply to state court judges. To the contrary, there is a plethora of legal authority applying judicial immunity to state court judges. See, e.g., Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286 (1991) (judicial immunity applied to California Superior Court judge); Stump v. Sparkman, 435 U.S. 349, 359 (1978) (judicial immunity applied to state circuit court judge); Ashelman v. Pope, 793 F.2d 1072, 1079 (9th Cir. 1986) (judicial immunity for state court judge). As such, the Court did not err.

9. Ground Eight

Plaintiff argues that her allegation that the Judicial Defendants "fabricated a lower court order" is a factual allegation that can be "reasonably inferred" and not a conclusion, so the Court must accept it as true and judicial immunity should not apply. [Dkt. No. 19, p. 3]. Although Plaintiff phrases this objection slightly differently, this is in essence the same Objection Eight as in the previous Request. See [Dkt. No. 10, p. 15].

The crux of this argument is Plaintiff believes the Judicial Defendants making a judicial determination that a lower court was nonappealable is necessarily a "fabrication." The Court has already addressed this objection in its previous order. [Dkt. No. 16, p. 10]. This Court did not err.

10. Ground Nine

The ninth ground raised by Plaintiff asserts the claim against defendant Potter is based on supervisory liability, not vicarious liability. [Dkt. No. 19, p. 3]. Plaintiff asserts defendant Potter is liable "because of his actions in adopting and maintaining a practice, custom or policy of deliberate indifference to known or suspected denial of due process hearing to self-represented appellant by court members." [Id. at p. 30]. Even assuming Potter, a clerk of the court, had decision making authority regarding judicial decisions, which he does not, and even if Plaintiff had asserted this claim in the complaint, rather than raising it here for the first time, this claim would still fail.

Government officials are not liable under Section 1983 simply because their subordinates engaged in unconstitutional conduct. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). To hold a supervisor liable for a civil rights violation, Plaintiff must allege facts showing the supervisor defendants either: (1) personally participated in the alleged deprivation of constitutional rights; (2) knew of the violations and failed to act to prevent them; or (3) promulgated or "implement[ed] a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff must allege facts that meet this standard in order to hold a supervisor personally liable for the civil rights violations of an employee.

Plaintiff's objections fall into the third category, so she must plead that defendant Potter implemented "a policy so deficient that the policy itself is a repudiation of constitutional rights." Hansen, 885 F.2d at 646. The policy Plaintiff specifies is that Potter, a clerk, "could have requested court members to provide a hearing for plaintiff's appeal, or could have established or suggested to establish quality control to secure a due process hearing for appeals filed by self-represented appellant, however he failed to take any action." [Dkt. No. 19, p. 30]. Plaintiff fails to provide a theory of liability through detailed factual allegations that a clerk's inability to direct judges on the case management of their own dockets is a policy "so deficient that [it] itself is a repudiation of constitutional rights." See Hansen, 885 F.2d at 646. Further, Plaintiff's allegation is not adequate to state a claim for supervisory liability. See Victoria v. City of San Diego, No. 17-CV-1837-AJB-NLS, 2019 U.S. Dist. LEXIS 163531, 2019 WL 4643713, at *5 (S.D. Cal. Sept. 23, 2019) (holding that allegations that the defendant supervisor knew of the violations of constitutional rights and failed to act to prevent them were insufficient); Rosales v. Cty. of San Diego, No. 19-CV-2303 JLS (LL), 2021 U.S. Dist. LEXIS 1306, at *16 (S.D. Cal. Jan. 5, 2021) (holding that plaintiff's allegations that supervisor defendant "did nothing to stop his Deputies from engaging in the wrongful conduct" was not adequate to state a supervisory liability claim). Moreover, Plaintiff has not pled a constitutional violation by any supposed subordinate. The Court did not err.

11. Ground Ten

Plaintiff next argues that defendant Potter is not entitled to quasi-judicial immunity because that is not supported by material in the complaint. [Dkt. No. 19, p. 3]. As described by Plaintiff in the complaint and subsequent filings, actions taken by defendant Potter were actions taken in support of the judicial process, so Potter is

entitled to quasi-judicial immunity for such actions. See Mireles v. Waco, 502 U.S. 9, 9 (1991); Mullis v. United States Bankr. Court, 828 F.2d 1385, 1390 (9th Cir. 1987) (superseded by statute that extended judicial immunity beyond holding) (finding actions of court clerks who refused to accept an amended petition were integral parts of judicial process and qualify for quasi-judicial immunity); Demoran v. Witt, 781 F.2d 155, 156-57 (9th Cir. 1985) (finding that probation officers preparing presentencing reports act as "an arm of the sentencing judge" and serve an integral function to the independent judicial process). As such, the Court did not err.

12. Leave to Amend is Not Appropriate and Would be Futile

Plaintiff further requests leave to amend the complaint. This case has been dismissed because it lists immune defendants and is patently factually and legally frivolous. The Court has now twice more addressed each of Plaintiff's allegations in turn to reach the same conclusion. The Court must "dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief..." 28 U.S.C. § 1915(e)(2). Leave to amend is not required when it is clear the complaint cannot be cured. Cato v. United States, 70 F.3d 1103, 1105-06 (9th Cir. 1995). As Plaintiff has shown across her numerous filings in this and state court, she is intent on relitigating claims stemming from her 2014 employment action, and now seeks to use the federal courts to overturn decisions related to that case by the state courts. This is not a cognizable federal action. Moreover, the Court has now explained three times why the complaint cannot be cured.

Plaintiff fails to set forth any facts or law of a strongly convincing nature to show the Court manifestly erred. As such, there is no cause to alter, amend, or vacate the Court's previous Order.

IV. MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Plaintiff's second Motion for Leave to Appeal In Forma Pauperis presents the same grounds as the basis for appeal as were presented in this Motion to Alter Order Denying Motion to Vacate Judgment [Dkt. No. 19]. Each of those grounds, discussed above, have been addressed and found to be meritless. As such, this motion must be denied as not taken in good faith, frivolous and does not present a substantial question.

V. CONCLUSION

Plaintiff's second Motion to Alter Order Denying Motion to Vacate [Dkt. No. 19] and second Motion for Leave to Appeal In Forma Pauperis [Dkt. No. 20] are denied. Because Plaintiff has repeatedly filed plainly meritless, post-dismissal motions, no further filings are permitted in this case without judicial approval.

IT IS SO ORDERED.

Dated: February 16, 2021

THE HONORABLE STEPHEN V. WILSON
United States District Judge

Presented by:

/s/ Autumn D. Spaeth
THE HONORABLE AUTUMN D. SPAETH
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LIN OUYANG, Plaintiff, v. NORA M. MANELLA, et al., Defendants.	Case No. 2:20-05707 SVW (ADS) **ORDER DENYING MOTION TO VACATE JUDGMENT**

I. INTRODUCTION

Before the Court is Plaintiff Lin Ouyang's ("Plaintiff") Motion to Vacate Order of Dismissal pursuant to Federal Rule of Civil Procedure 59(e) ("Rule 59(e)"). [Dkt. No. 10]. The Court construes this as a motion to amend, alter, or vacate judgment ("Motion"). The Motion is denied for the reasons set forth in more detail below.

II. RELEVANT PROCEDURAL HISTORY

On June 26, 2020, pro se Plaintiff Lin Ouyang filed a Complaint against Justices Nora M. Manella, Audrey B. Collins, Kim G. Dunning, and Norman L. Epstein, and the

Clerk/Executive Officer of the Court of Appeal, Daniel P. Potter. Plaintiff also filed a Request to Proceed Without Prepayment of Fees ("IFP Request"). [Dkt. Nos. 1, 3]. Plaintiff asserted claims for due process and equal protection violations pursuant to the Fourteenth Amendment, challenging the dismissal of her appeal from a Superior Court misdemeanor conviction for contempt and an order denying rehearing. [Dkt. No. 1, p. 7]. Plaintiff also challenged a decision denying Plaintiff's request for appointment of appellate counsel to assist in appealing the misdemeanor conviction. [Id. at p. 6]. The Judicial Defendants dismissed the appeal and denied Plaintiff's requests. Plaintiff asserts Clerk/Executive Officer, Mr. Potter, "ratified the acts, omissions, and misconduct of the court's agents and employees" and did not provide a "formal response" to Plaintiff when she filed another claim with the Court of Appeal challenging the panel's decision. [Id. at pp. 7, 16]. All defendants were listed in both their individual and official capacities. On August 24, 2020, Plaintiff filed a First Amended Complaint. [Dkt. No. 8]. The First Amended Complaint was largely the same as the original Complaint, except it removed Norman L. Epstein as a defendant. The Court denied Plaintiff's IFP request and dismissed the action on the basis that the action was brought against immune defendants and for legally and/or factually patently frivolous claims.

A. Plaintiff's Litigation History

Plaintiff has an extensive history of litigation. This case stems from a 2014 employment action initially filed in Los Angeles Superior Court where Plaintiff sued her employer, Achem Industry, for fraud, breach of contract, and wrongful termination. See Ouyang v. Achem Industry America Inc., Los Angeles Superior Court Case No. BC468795. Over the next six years, Plaintiff would go on to file copious appeals.

A review of the Second Circuit Court of Appeals' records shows Plaintiff has been involved in at least fifteen appeals, with numerous appeals of individual orders filed in each action. See Ouyang v. Achem Industry America, Inc., B290915; Ouyang v. Achem Industry America, Inc., B282945; Achem Industry America, Inc. v. Superior Court of Los Angeles County, B282801; Ouyang v. Achem Industry America Inc., B280724; Ouyang v. Achem Industry America, Inc., B279172; Ouyang v. Achem Industry America Inc., B271357; Ouyang v. Achem Industry America, Inc., B270026; Ouyang v. S.C.L.A. et al., B269775; Ouyang v. S.C.L.A. et al., B269372; Ouyang v. Achem Industry America Inc., B269209, Ouyang v. Superior Court of Los Angeles County, B268985; Ouyang v. Achem Industry America, Inc., B268195; Ouyang v. Superior Court of Los Angeles County et al., B267576; Ouyang v. Achem Industry America, Inc., B267617; Ouyang v. Superior Court of Los Angeles County et al., B263444; Ouyang v. Achem Industry America, Inc., B261929; Ouyang v. Workers Compensation Appeals Board et al., B256947. Plaintiff has appealed to the Supreme Court of California no less than six times. See Achem Industry America v. S.C. (Ouyang), S244548; Ouyang v. Achem Industry America, S241991; Ouyang v. Achem Industry America, S241977; Ouyang v. Achem Industry America, S257338; Ouyang v. Achem Industry America, S257341; Ouyang v. W.C.A.B. (Achem Industry America), S221187. A review of these dockets reflects that in each appeal to the Supreme Court of California, the petition for review was denied.

B. Present Motion

Plaintiff requests the judgment in this case be vacated to "prevent manifest injustice." [Dkt. No. 10, p. 3]. Although Plaintiff does not explain how vacating the judgment in this case is needed to prevent manifest injustice, she provides eleven

grounds to alter, amend, or vacate the judgment. The Court will consider each objection in turn.

III. ANALYSIS

A. Standard of Review Under Rule 59(e)

The Motion relies on Rule 59(e) and specifically moves to prevent manifest injustice. Under Rule 59(e), a party may move to alter or amend a judgment "no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(e). In general, there are four grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law. Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). District courts have considerable discretion in granting or denying such motions, and relief under Rule 59(e) is "extraordinary" and "should be used sparingly." McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999); Weeks v. Bayer, 246 F.3d 1231, 1236 (9th Cir. 2001) ("[j]udgment is not properly reopened 'absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'") (citing 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)).

As relevant here, clear error occurs where the court "is left with the definite and firm conviction that a mistake has been committed." Smith v. Clark Cty. Sch. Dist., 727 F.3d 950, 955 (9th Cir. 2013). To find "clear error," the error must be "manifestly unjust." Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). More

specifically, "[a] manifest injustice is defined as an error in the trial court that is direct, obvious, and observable." Brooks v. Tarsadia Hotels, No. 3:18-cv-2290-GPC-KSC, 2020 U.S. Dist. LEXIS 22035, 2020 WL 601643, at *5 (S.D. Cal. Feb. 7, 2020) (internal quotations marks omitted). To prevail on a theory that the court manifestly erred, a moving party "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Arteaga v. Asset Acceptance, LLC, 733 F. Supp. 2d 1218, 1236 (E.D. Cal. 2010).

B. Discussion

1. Ground One

Plaintiff argues the Court manifestly erred because "the Court omitted the claim challenging the constitutionality of California Penal Code § 1466 upon which relief can be granted." [Dkt. No. 10, p. 8]. A review of the First Amended Complaint reflects that Plaintiff asserts two claims for violations of the Equal Protection Clause of the Fourteenth Amendment against all defendants (Count I and II) and two counts for violation of the Due Process Clause of the Fourteenth Amendment by all defendants (Count III and IV). Plaintiff does not assert a separate claim asserting the California Penal Code is unconstitutional. Instead, Plaintiff asserts that by failing to "provide a right to court appointed counsel for indigent misdemeanor appellant" the Judicial Defendants, in applying the California Penal Code, are acting as "inconsistent with the Equal Protection Clause of the Fourteenth Amendment." [Dkt. No. 8, ¶ 46]. It is not necessary to assess the merits of Plaintiff's contention that the California Penal Code is unconstitutional. Plaintiff asserts this claim against all defendants, who are sued in both individual and official capacity. The three named judicial defendants are entitled to judicial immunity, to be discussed in greater detail below. Regarding the fourth

defendant, defendant Potter, Eleventh Amendment immunity bars claims against him in his official capacity, to be discussed in greater detail below, and there are no facts to suggest that defendant Potter personally participated in a due process or equal protection violation to support an individual capacity claim. Plaintiff's new assertion that Potter was "in charge" and "took no action" in response to the Judicial Defendants' conduct instead suggests that Plaintiff intends to assert vicarious liability. [Dkt. No. 10, p. 10]. If these allegations were contained in the complaint, and even if they were sufficient to state a civil rights violation, state officials are not vicariously liable for the violations of constitutional rights by employees. See generally Monell v. Dep't of Soc. Serv. of the City of New York, 436 U.S. 658 (1978). As such, the Court did not manifestly err.

2. Grounds Two and Three

Similar to Ground One, Plaintiff argues in Grounds Two and Three that the Court "omitted" additional claims, specifically those asserting that California Rules of the Court 8.240-8.278 are unconstitutional and that the state appellate court's "custom" of not providing appointed counsel to misdemeanor appeals is unconstitutional. [Dkt. No. 10, pp. 8-13]. Again, the four causes of action applicable to these allegations are asserted against defendants who have judicial immunity, or, in the case of defendant Potter, are barred by the Eleventh Amendment and there are no facts suggesting personal participation in a constitutional violation. As such, the Court did not manifestly err.

3. Ground Four

Plaintiff asserts Norman L. Epstein was erroneously removed and Plaintiff did not "abate" her claim against him. [Dkt. No. 10, p. 12]. The First Amended Complaint

explicitly removed Norman L. Epstein from both the caption of the complaint and the list of defendants under "parties to this complaint." Plaintiff explicitly noted "Hon. Norman L. Epstein is substituted by his successor Defendant No. 1 Hon. Nora M. Manella." [Dkt. No. 8, p. 4]. Regardless, the Honorable Norman L. Epstein is also entitled to judicial immunity, as noted in the Attachment to the CV-73 ("[a]ny claims against the Honorable Norman L. Epstein, who was removed as a defendant in the FAC, must similarly be dismissed."). [Dkt. No. 9, p. 2]. The First Amended Complaint clearly expresses Plaintiff intended to remove The Honorable Norman L. Epstein as a defendant. Even if she did not, he is similarly entitled to judicial immunity for the acts taken in his judicial capacity. The Court did not erroneously "remove" defendant Epstein.

4. Ground Five

Plaintiff asserts claims against the unknown officers of the Judicial Council of California were improperly omitted. The Judicial Council of California is not described anywhere in the four causes of action. [Dkt. No. 8]. To the extent Plaintiff is referring to the Doe defendants, although plaintiffs may allege Doe defendant liability, that liability must be properly alleged. This means a plaintiff must be able to identify how each defendant is liable for a constitutional violation. Dempsey v. Schwarzenegger, No. C 09-2921 JSW (PR), 2010 U.S. Dist. LEXIS 144416, 2010 WL 1445460, *2 (N.D. Cal. Apr. 9, 2010). Plaintiff has not done this as she has not identified specifically what each of the over 100 Doe defendants did that constitutes a constitutional violation. The Court did not err.

5. Ground Six

Plaintiff asserts the Court erroneously applied Eleventh Amendment immunity and absolute immunity. Plaintiff also asserts that qualified immunity does not apply. Qualified immunity was never discussed by the Court and is not at issue. Plaintiff contends that Eleventh Amendment immunity and absolute immunity do not apply because a suit for injunctive relief against state employees in their official capacities is appropriate. Such suit may be appropriate against state employees when it involves prospective injunctive or declaratory relief. See Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1036 (9th Cir. 1999) (recognizing a "narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers in their official capacities"). Prospective injunctive and declaratory relief serves the purpose of preventing present and future harm to the plaintiff. Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 840 (9th Cir. 1997) ("the Eleventh Amendment allows only prospective injunctive relief to prevent an ongoing violation of federal law"). In contrast, although retroactive relief may include monetary damages, injunctive or declaratory relief may also be retroactive when sought solely to remedy past violations. Here, it is abundantly clear that Plaintiff only seeks to remedy past alleged constitutional violations. For instance, Plaintiff explicitly asks this federal Court to "direct defendants to vacate its judgment ... and rehear plaintiff's appeal." [Dkt. No. 8, p. 26]. Other remedies sought by Plaintiff are also meant to rectify what she perceives as incorrect decisions by the California Court of Appeals panel, including that Plaintiff be provided "appointed appellate counsel to assistant [sic] indigent misdemeanant to appeal the conviction." [Id.]. Plaintiff provides no information how forcing a California state court to rehear her appeal and declaring

California state law invalid will prevent present or future harm to Plaintiff. The alleged harm has already occurred. Plaintiff does not allege she is at risk of similar harm in the future or how the requested injunctive relief is needed to prevent an ongoing or future constitutional violation. Even assuming Plaintiff had sufficiently stated a constitutional violation, it has already occurred and there is no suggestion of it occurring again in the present or future. The Eleventh Amendment bars suits for retroactive injunctive or declaratory relief against state employees in their official capacities. See Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007) (injunctions sought were not merely limited to past violations and could not be characterized as "solely retroactive" injunctive relief barred by the Eleventh Amendment).

Further, the main issue is that Plaintiff does not seek injunctive relief against ordinary state employee defendants, but against California state judges who are entitled to judicial immunity. A judicial defendant is absolutely immune from federal civil rights suits for acts performed in his or her judicial capacity. 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) (superseded by statute on other grounds). Accordingly, Plaintiff's contention that suit against the Judicial Defendants is appropriate because she seeks declaratory and injunctive relief is incorrect. As such, the Court did not err.

6. Ground Seven

The seventh ground asserted by Plaintiff is that it was erroneous to "ignore the reliefs that this Court can grant and dismiss the entire complaint because of a remedy that plaintiff is not entitled to." [Dkt. No. 10, p. 2]. The case was dismissed because Plaintiff sought to sue immune defendants and presented patently frivolous claims.

7. **Ground Eight**

Plaintiff argues that judicial immunity should not apply because the Judicial Defendants were not acting in their judicial capacities when they "fabricated a lower court conviction and presented it to themselves for an opinion." [Dkt. No. 10, p. 15]. Plaintiff expands that Plaintiff's appeal before the judicial defendants was dismissed based on "a false statement that plaintiff's conviction was civil contempt ... a nonappealable order." [Id.]. Plaintiff further asserts that the Court must accept all allegations as true.

Judicial immunity applies "however erroneous the act may have been and however injurious in its consequences it may have proved to the plaintiff." Moore, 96 F.3d at 1244. Judicial immunity is not lost even if a plaintiff alleges that an action was erroneous, malicious, in bad faith, or in excess of jurisdiction. Mireles v. Waco, 502 U.S. 9, 11-12 (1991); Stump v. Sparkman, 435 U.S. 349, 356 (1978) ("[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority"). Judicial immunity is only lost if an action was taken in the "clear absence" of jurisdiction, such as when judicial officers "rule on matters belonging to categories which the law has expressly placed beyond their purview." O'Neil v. City of Lake Oswego, 642 F.2d 367, 369-70 (9th Cir. 1981) (finding the judge defendant's action of convicting the plaintiff of contempt, "an offense within his court's jurisdiction, although without the requisite papers to confer jurisdiction over this particular commission of the offense" was acting in excess of jurisdiction rather than a clear absence).

Plaintiff asserts the judicial defendants acted without jurisdiction when they "made up a lower court's order, a nonappealable civil contempt conviction." [Dkt. No.

10, p. 17]. This appears to be a disagreement with the California Court of Appeals judges over whether an order was appealable or not. At best, this may be read as the Judicial Defendants making a mistake as to the appealability of the order, as Plaintiff asserts it was a "false statement that the charge convicted was a non-appealable civil contempt." [Id. at p. 7]. Or perhaps it might even be argued the Court of Appeals judges acted in excess of their jurisdiction with regards to the contempt conviction. See, e.g., O'Neil, 642 F.2d at 369-70; Williams v. Sepe, 487 F.2d 913, 913 (5th Cir. 1973) (per curiam) (judge who failed to comply with procedure for prosecuting an indirect contempt did not act in clear absence of jurisdiction); McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972) (taking into consideration that the judge was not in his judge's robes, not in the courtroom, and "may well have violated state and/or federal procedural requirements regarding contempt citations," but was still acting within his jurisdiction and entitled to immunity). Even assuming the Judicial Defendants were incorrect in their decision or acted in excess of their jurisdiction, a judge is not deprived of judicial immunity if "the action he took was in error" or in excess of jurisdiction. Stump, 435 U.S. at 356-57. Plaintiff presents no facts to suggest the determination made by the Judicial Defendants, even if in error or in excess or jurisdiction, was taken in the "clear absence" of jurisdiction.

Plaintiff is correct that in determining whether Plaintiff has stated a claim, the Court accepts as true the factual allegations contained in the Complaint and views all inferences in the light most favorable to Plaintiff. See Hamilton v. Brown, 630 F.3d 889, 892-93 (9th Cir. 2011). However, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Nor does the Court need to accept "unwarranted deductions of fact, or

unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). Plaintiff's assertion that the judicial defendants making an incorrect determination means they "fabricated" an order is a legal conclusion that the Court need not accept as true. See Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) (the "conclusory nature" of the allegations "disentitles them to the presumption of truth"); see also Dettamanti v. Staffel, No. 19-1230-CBM-PLAx, 2019 U.S. Dist. LEXIS 65375 (C.D. Cal. Feb. 28, 2019) (civil rights complaint against superior court judge for "illegal act" was barred by Eleventh Amendment and judicial immunity); Ezor v. Duffy-Lewis, No. CV 19-9804-JVS (AGR), 2020 U.S. Dist. LEXIS 95596, at *9 (C.D. Cal. Apr. 21, 2020) (allegations of "fraud" by superior court judge were conclusory and barred by judicial immunity). Even if the Judicial Defendants made an error in determining that an order was not appealable, that does not abrogate judicial immunity. This Court did not err.

8. Ground Nine

The ninth ground raised by Plaintiff is largely the same as ground eight. Plaintiff's conclusion that by making an error the judicial defendants "fabricated" a lower court order does not contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. These allegations do not abrogate judicial immunity.

9. Ground Ten

Plaintiff next argues that claims for "failure to act" were omitted against defendant Potter. [Dkt. No. 10, p. 18]. Plaintiff also asserts deliberate indifference by defendant Potter. Claims against defendant Potter were dismissed as legally and/or factually patently frivolous, based on Eleventh Amendment immunity for claims in official capacity, and, in individual capacity, for failure to state any facts suggesting

personal participation in a cognizable Section 1983 claim. As has been discussed above, it was proper to find the Eleventh Amendment bars Plaintiff's claims against Potter in his official capacity. As to the individual capacity claims, Plaintiff's contention seems to argue that Potter, a clerk of the court, should have realized the judicial defendants were applying unconstitutional provisions and intervened. In the present Motion, Plaintiff clarifies this claim is based on Potter's failure to act as a supervisor to "stop the violations" of the judicial defendants. [Id. at pp. 21-22].

Plaintiff cannot assert a claim against defendant Potter in his individual capacity merely for his failure to act to correct judicial mistakes. Plaintiff has not alleged any facts that, if taken as true, would establish Potter, as the Clerk of Court, has the authority or the obligation to correct judicial mistakes. The Court did not err in finding the claims against defendant Potter legally and/or factually patently frivolous.

10. Ground Eleven

Plaintiff's final argument is that absolute immunity cannot be extended to defendant Potter. However, as the Clerk of Court, Potter's actions are performed as quasi-judicial functions, as to which he is entitled to absolute immunity. Moore, 96 F.3d at 1244.

11. Additional Grounds

Although Plaintiff attempts to frame this case as one about civil rights, it is clear this is an attempt to appeal the judgment of a state court, and as such, is likely additionally barred by the Rooker-Feldman doctrine. "A suit brought in federal district court is a 'de facto appeal' forbidden by Rooker-Feldman when 'a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision.'" Carmona v. Carmona, 603 F.3d 1041,

1050 (9th Cir. 2010) (quoting Noel v. Hall, 341 F.3d 1148, 1164 (9th Cir. 2003)). That is precisely what Plaintiff seeks to do here, where Plaintiff asserts the judges of the California Court of Appeals wrongfully applied California law when they did not find in her favor. [Dkt. No. 8, pp. 7, 14-18].

Plaintiff asks this Court to order the California Court of Appeals to vacate its judgment and rehear Plaintiff's case. As such, although Plaintiff might try to frame this as a civil rights complaint, it is clear she is seeking relief from a state court decision, and this is barred by the Rooker-Feldman doctrine. Carmona, 603 F.3d at 1050. See also Doe v. Mann, 415 F.3d 1038, 1041 (9th Cir. 2005) (stating that the Rooker-Feldman doctrine bars federal courts "from exercising subject-matter jurisdiction over a proceeding in 'which a party losing in state court' seeks 'what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.'"); Exxon Mobil Corp. v. Saudi Basic Indust. Corp., 544 U.S. 280, 286 n.1 (2005) (noting that "a district court [cannot] entertain constitutional claims attacking a state-court judgment"). Accordingly, this case could also have been dismissed based on the Rooker-Feldman doctrine.

Each of Plaintiff's eleven grounds hold no merit. Furthermore, it is likely this action is barred by the Rooker-Feldman doctrine as Plaintiff seeks to use the federal court to overturn a state court decision. Plaintiff fails to provide facts or law of a strongly convincing nature to induce the Court to alter, amend, or vacate its judgment.

IV. CONCLUSION

Plaintiff's Motion to Vacate Order of Dismissal [Dkt. No. 10] is denied.

IT IS SO ORDERED.

Dated: November 6, 2020

THE HONORABLE STEPHEN V. WILSON
United States District Judge

Presented by:

/s/ Autumn D. Spaeth
THE HONORABLE AUTUMN D. SPAETH
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LIN OUYANG, PLAINTIFF(S) v. NORA M. MANELLA, et al., DEFENDANT(S)	CASE NUMBER 2:20-05707 SVW(ADS) **ORDER RE REQUEST TO PROCEED *IN FORMA PAUPERIS***

IT IS ORDERED that the Request to Proceed *In Forma Pauperis* is hereby GRANTED.

Date United States Magistrate Judge

IT IS RECOMMENDED that the Request to Proceed *In Forma Pauperis* be **DENIED** for the following reason(s):

- ☐ Inadequate showing of indigency
- ☐ District Court lacks jurisdiction
- ☒ Legally and/or factually patently frivolous
- ☒ Immunity as to judicial defendants
- ☐ Other:

Comments:
Please see attachment.

September 4, 2020
Date

/s/ Autumn D. Spaeth
United States Magistrate Judge

IT IS ORDERED that the Request to Proceed *In Forma Pauperis* is hereby:

- ☐ GRANTED
- ☒ DENIED (see comments above). IT IS FURTHER ORDERED that:
  - ☐ Plaintiff SHALL PAY THE FILING FEES IN FULL within 30 days or this case will be dismissed.
  - ☒ This case is hereby DISMISSED immediately.
  - ☐ This case is hereby REMANDED to state court.

September 15, 2020
Date

United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:20-05707 SVW (ADS) Date: September 4, 2020

Title: *Lin Ouyang v. Nora M. Manella, et al.*

ATTACHMENT TO CV-73

On June 26, 2020, pro se Plaintiff Lin Ouyang filed a Complaint against Justices Nora M. Manella, Audrey B. Collins, Kim G. Dunning, and Norman L. Epstein, and the Clerk/Executive Officer of the Court of Appeal, Daniel P. Potter. Plaintiff also filed a Request to Proceed Without Prepayment of Fees ("IFP Request"). [Dkt. Nos. 1, 3]. Plaintiff asserts claims for due process and equal protection violations pursuant to the Fourteenth Amendment, and challenges the dismissal of her appeal from a Superior Court misdemeanor conviction for contempt and an order denying rehearing. [Dkt. No. 1, p. 7]. Plaintiff also challenges a decision denying Plaintiff's request for appointment of appellate counsel to assist in appealing the misdemeanor conviction. [Id. at p. 6]. Plaintiff asserts Clerk/Executive Officer, Mr. Potter, "ratified the acts, omissions, and misconduct of the court's agents and employees" and did not provide a "formal response" to Plaintiff when she filed another claim with the Court of Appeal challenging the panel's decision. [Id. at pp. 7, 16]. All defendants are sued in both their individual and official capacities. Plaintiff seeks attorney's fees and costs of suit, and declaratory and injunctive relief including "an order directing defendants to vacate its judgment." [Id. at p. 22]. On August 24, 2020, Plaintiff filed a First Amended Complaint. [Dkt. No. 8]. The FAC is largely the same as the original Complaint, except removes Norman L. Epstein as a defendant. The FAC does not cure any of the identified deficiencies, discussed below.

The Court recommends that the IFP application be denied and the case dismissed without leave to amend for the following reasons:

(1) The three named judicial defendants have absolute immunity. This Complaint is solely based on decisions made by judicial officers in their judicial capacity. Judges are entitled to absolute immunity for acts within their judicial capacity. Mireles v. Waco, 502 U.S. 9, 11 (1991) (per curiam) (superseded by statute on other grounds) ("judicial immunity is an immunity from suit, not just from ultimate assessment of damages"); Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir. 1999) ("It is well settled that judges are generally immune from civil liability under section 1983."); Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir. 1988). There are only two circumstances where a judge is not immune from liability: (1) for nonjudicial actions; and (2) for actions, though judicial in nature,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:20-05707 SVW (ADS) Date: September 4, 2020

Title: *Lin Ouyang v. Nora M. Manella, et al.*

taken in complete absence of all jurisdiction. Mireles, 502 U.S. at 11-12; Shucker, 846 F.2d at 1204. Here, the conduct in question by the three California Court of Appeals justices concern actions taken in their official capacity during judicial proceedings. There are no facts or evidence presented to suggest that the three justices engaged in any nonjudicial conduct or took any action in complete absence of all jurisdiction. To the contrary, the only conduct attributed to these defendants involves issuing legal decisions. The justices are entitled to absolute judicial immunity. See Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986) ("Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacity."). All claims against the three justices must be dismissed. Any claims against the Honorable Norman L. Epstein, who was removed as a defendant in the FAC, must similarly be dismissed. Clerk/executive officer Potter may also be entitled to quasi-judicial immunity. Adams v. Comm. on Judicial Conduct & Disability, 165 F. Supp. 3d 911, 923 (N.D. Cal. 2016) (citing Mullis v. United States Bankr. Court, 828 F.2d 1385 (9th Cir. 1987) (superseded by statute)) ("Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process."). However, there are too few facts alleged to determine whether Defendant Potter was engaged in tasks necessary to the judicial process, for which he would be entitled to quasi-judicial immunity, or purely administrative tasks.

(2) The allegations related to the only possible remaining defendant, clerk/executive officer Potter, are legally and patently frivolous. The complaint does not state a cognizable Section 1983 claim against Defendant Potter. Defendant Potter is sued in both his individual and official capacity for alleged violations of Plaintiff's due process and equal protection rights under the Fourteenth Amendment for the "authorization of, and acquiescence in, the unlawful conducts of [judicial defendants]." [Dkt. No. 1, p. 18]. Pursuant to the Eleventh Amendment, state agencies and officials are generally immune from liability under Section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989) (Section 1983 does not permit suits against a state unless the state has waived its immunity); Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007) (state officials sued in their official capacities are not "persons" within the meaning of Section 1983 and are generally entitled to Eleventh Amendment immunity). Plaintiff does not assert, and there

is nothing to suggest, that California has waived its immunity in this case. The official capacity claim against Defendant Potter is barred. Also, here it clear that Plaintiff is seeking to use the federal courts to overturn a state court decision and force the state court to rehear her case. That does not present a cognizable Section 1983 claim against Defendant Potter in his individual capacity. Moreover, Plaintiff does not provide any facts to show personal participation by Defendant Potter in a due process violation. As such, this claim is frivolous and must also be dismissed.

APPENDIX G

No. 21-55251

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIN OUYANG,

Plaintiff and Appellant,

v.

NORA M. MANELLA, in her individual capacity; et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:21-cv-00096-SVW-ADS
Hon. Stephen Victor Wilson, District Judge

PETITION FOR REHEARING EN BANC

LIN OUYANG
1124 WEST ADAMS BLVD.
LOS ANGELES, CA 90007
TEL: (213) 747-5296
APPELLANT IN PRO SE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

RULE 35(b) STATEMENT

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 35(a)(1), Plaintiff and Appellant Lin Ouyang ("Ouyang") petitions for rehearing because the panel's decision to dismiss Ouyang's appeal as frivolous conflicts with the United States Supreme Court decision in *Boag v. MacDougall*, 454 U. S. 364 (1982) (per curiam) ("*Boag*"). *Boag* holds that when a dismissal is based on erroneous legal conclusions, it should be reversed, even though the court also has broad discretion to dismiss an in *forma pauperis* appeal as frivolous pursuant to 28 USC §1915(d), renumbered as 28 USC §1915(e)(2). *Id.* at 365. Here, the panel's decision directly conflicts with *Boag,* instead of reversing District Court's dismissal that is based on erroneous legal conclusions: judicial immunity barred claims for equitable relief against state judicial officers, the panel dismissed the appeals as frivolous under 28 USC §1915(e)(2). The Court should grant rehearing en banc to resolve the conflict. FRAP 35(a)(1).

Moreover, this Petition should be granted because, under FRAP 35(a)(2) the proceeding involves an issue of exceptional importance – protection of indigent litigants' right to access to courts. Permitting discretionary dismissals of appeals as frivolous under §1915(e)(2) where appeals raise arguable claims denies indigent appellants the practical protections against unwarranted dismissal generally accorded paying appellants and is inconstant with Congress' overarching goal in

enacting the in forma pauperis statute: "to assure equality of consideration for all litigants". *Neitzke v. Williams*, 490 US 319, 329 (1989).

BACKGROUND

I. Complaint.

Ouyang appealed in California state appellate court a civil judgment against her. Ouyang moved the court to vacate the judgement because her opponent obtained the judgment by deceit upon court. State appellate denied the request holding that deceit upon court does not constitute misconducts if a party bears a burden to prove. Ouyang argued also on other grounds that the judgment should be reversed. State appellate court either replaced Ouyang's arguments with meritless arguments developed by the court itself and found their own arguments meritless or dismissed Ouyang's arguments as waived or on other similar grounds basing on significantly misrepresented trial court' records. Add. 52a – 57a.

Corporation defendant represented by an attorney filed an extraordinary writ proceeding in state appellate court against Ouyang to review a denial of motion for summary adjudication that was in Ouyang's favor. State appellate court proposed undisputed facts against Ouyang, identified potions of pleadings to support their position, reviewed their own evidence, and found their proposed undisputed facts were undisputed without giving Ouyang an opportunity to produce contradict evidence, and the court ruled against Ouyang. Add. 45a-52a.

Ouyang filed a complaint with state appellate court complaining that her appeals were disposed without a hearing, while appeals filed by parties with attorneys are treated differently. Clerk/Executive officer of the court took no action, and his decision was adopted by Judicial Council of California. State appellate court again misstated records in Ouyang's subsequent appeal. Add. 57a-58a.

Ouyang filed this civil right suit in District Court of Central California before the judgment of her last appeal became final in state court. Ouyang seeks declaratory relief against state judicial officers in their official capacities that state appellate court violated her constitutional rights. Add. 71a-74a. Ouyang also seeks damages against certain state appellate court officers in their individual capacities 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 and Ouyang argued that judicial immunity does not bar the claims because state appellate court officers clearly have no jurisdiction to take those acts. Add. 61a- 71a. Ouyang provided in the complaints citations to the court records that her factual allegations are based on and the truth of the facts in the complaint can be verified by taking judicial notice of those court records. Add. 45a-60a.

This suit is related to another civil right suit District Court case No. 20-5707. Suit case No. 20-5707 is based on the facts of constitutional violations in Ouyang's criminal appeal in state appellate court: state appellate court denied Ouyang's request of a court appointed appellate counsel, dismissed her misdemeanor appeal with a written opinion basing on a false statement that the charge convicted was a civil contempt that is non-appealable, at the same time the court dismissed all other appeals that could collaterally attack the misdemeanor conviction also basing on misrepresentations of the record, in addition the court fabricated arguments for two appeals that Ouyang did not contend in her briefs. Add. 117a-119a. In suit case No. 20-5707, Ouyang challenges the constitutionality of relevant state statute, state court rules and customs and seeks equitable reliefs against state judicial officers and Ouyang also seeks damages against state judicial officers in their individual capacities for their act of fabricating a trial court conviction and taking no action to Ouyang's complaint of constitutional violations. Add. 136a-138a.

II. Dismissal order of District Court.

District Court 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) ... The Court dismissed Plaintiff's previous case for immune judicial defendants and for legally and patently frivolous claims. The Court has determined twice more that dismissal was appropriate in

denying two Motions to Vacate Judgment by Plaintiff. See Case No. 2:20-05707 SVW (ADS) [Dkt. Nos. 9, 16, 22] … as such, dismissal on the same bases is appropriate here and warrants no further discussion." Add. 3a-4a. District Court dismissed the previous case finding that "the main problem" is that judicial immunity barred equitable relief against state judicial officers relying on *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996). Add. 9a-10a. District Court replying on *Mireles v. Waco*, 502 U.S. 9 (1991) similarly held that judicial immunity barred claims against a new defendant Justice Currey in this case. Add. 4a.

District Court's decision is erroneous as a matter of law. Judicial immunity does not bar declaratory and injunctive relief against state court judges. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984); *Lebbos v. Judges of Superior Court, Santa Clara Cty.*, 883 F.2d 810, 813 & n.5 (9th Cir. 1989) *Moore v. Brewster*, 96 F. 3d 1240, 1243-1244, relied upon by District Court similarly held that "state officials enjoy judicial or quasi-judicial immunity from damages only". *Mireles v. Waco*, 502 US 9 (1991), relied upon by District Court, is distinguishable. In *Mireles v. Waco,* the judge was sued for damage, *Id.* at 10, however in this case defendant Justice Currey is sued in his official capacity for declaratory relief, Add. 37a, 73a-74a, and declaratory relief against him is not

barred by judicial immunity. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984).

In 1996, Congress amended §1983 to prohibit the grant of injunctive relief against any judicial officer acting in her or his official capacity "unless a declaratory decree was violated, or declaratory relief was unavailable." 42 U.S.C. §1983. This Court in *Moore v. Urguhart*, 899 F.3d 1094 (9th Cir. 2018) distinguished statuary immunity from common law immunity finding that "Section 1983 (as amended by the FCIA) . . . provides judicial officers immunity from injunctive relief even when the common law would not" indicating that *Pulliam* was not overruled. *Id.*at 1104. The Eleventh Circuit held that *Pulliam* decision has been partially abrogated by statute. *Bolin v. Story*, 225 F. 3d 1234, 1242 (11th Cir.2000). The Second and Third Circuits held that Congress intends to overrule *Pulliam* by amending the statute, and at the same time they held that the amended Section 1983 now implicitly recognizes that declaratory relief is available against judicial officers. *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 197-98 (3d Cir. 2000), *Mentero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999).

Providing that injunctive relief against judicial officers is only available when certain conditions are met, not absolutely unavailable, Congress still upholds *Pulliam* ruling that judicial immunity does not bar injunctive relief against judicial officers. Interpreting the amendment otherwise would conflict with the maxim that

a statute in derogation of the common law "must be strictly construed, for no statute is to be construed as altering the common law, farther than its words import." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 304, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959) (internal quotation marks omitted).

In other words, the amendment intends to say that both injunctive relief and declaratory relief are available, but declarative relief is more favorable than injunctive relief and judicial officers are to be given opportunities to decide what actions to take to correct violations before a rival court tells them what to do. 42 U.S.C. §1983. Since *Pulliam* conclusion that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer" is based on analysis "whether the common law recognized judicial immunity from prospective collateral relief", *Pulliam v. Allen*, 466 U.S. 522, 542, 529, the conclusion of *Pulliam* similarly applies to other collateral relief, such as declaratory relief. Thus, the amendment requesting issuing declaratory relief prior to issuing injunctive relief provides guidance on how to apply *Pulliam* and is not necessarily relevant to the conclusion of *Pulliam* that is on the issue of judicial immunity. This Court and the Second Circuit held *Pulliam* a good law without discussing FCIA, *Buckwalter v. Nevada Bd. of Medical Examiners*, 678 F. 3d 737, 747 (9th Cir. 2012) ("Absolute immunity is not a bar to injunctive or declaratory relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984)."); *Shmueli v.*

City of New York, 424 F. 3d 231, 239 (2nd Cir. 2005) ("[A]n official's entitlement to absolute immunity from a claim for damages," however, "does not bar the granting of injunctive relief," ...; see, e.g., *Pulliam v. Allen*, 466 U.S. 522, 536-37, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), *Hili v. Sciarrotta*, 140 F.3d 210, 215 (2d Cir.1998); ..., or of other equitable relief.")

Therefore, *Pulliam* is a good law, and District Court's conclusion is erroneous as a matter of law.

Because District Court mistook the facts alleged in this case as the facts alleged in the previous case, Add. 4a ("It involves the same defendants, asserts the same claims, and is based on the same underlying set of facts"), no immunity is proposed to bar claims in this case for damages against judicial officers in their individual capacities 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. Add. 4a, 61a- 71a. Therefore, there is no justification for dismissal of the damage claims in this case. *Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 843 (9th Cir. 2016).

III. Appeal and statements why appeal should go forward.

Ouyang filed with District Court timely notices of appeal and requested leave to appeal in *forma pauperis*. Trial court denied the request finding that proposed

appeal is not taken in good faith and is frivolous. Add. 2a. Ouyang filed request for leave to appeal in *forma pauperis* with Court of Appeal. Court of Appeal ordered Ouyang to either dismiss the appeal or file a statement explaining why the appeal is not frivolous and should go forward. Add. 1a.

Ouyang filed a timely statement why the appeal is not frivolous and should go forward. Ouyang argued that dismissal order should be reversed because District Court did not meet its burden to establish the justification for judicial immunity proposed by the District Court. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993); *Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 843 (9th Cir. 2016). Ouyang also argued that assuming the court is correct that the complaint fails to state a claim, leave to amend should be granted to cure the alleged deficiencies. *Lopez v. Smith*, 203 F.3d 1122, 1127-28 (9th Cir.2000) (en banc); *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Each of other grounds raised by District Court are also erroneous and are argued in the statement. Add. 78a-111a.

IV. Dismissal order of the panel.

The panel affirmed the dismissal of District Court finding that "this appeal is frivolous" pursuant to 28 U.S.C. §1915(e)(2). Add. 1a. The panel did not dismiss the appeal on other grounds listed under 28 U.S.C. §1915(e)(2): the allegation of poverty is untrue, the appeal is malicious, the action fails to state a claim on which

relief may be granted, or the action seeks monetary relief against a defendant who is immune from such relief. Add. 1a. The panel did not explain why the appeals are frivolous. Add. 1a.

The dismissal should be reversed even though the court has broad discretion to dismiss an in forma pauperis petition as frivolous, because District Court's dismissal is erroneous as a matter of law on its face: District Court's claim that judicial immunity barred equitable relief against state judicial officers conflicts with *Pulliam*. *Boag v. MacDougall*, 454 U. S. 364, 365 (1982) (per curiam) However, the panel failed to follow to *Boag,* and dismissed the appeals as frivolous. Add. 1a.

REASONS FOR GRANTING REHEARING

I. The panel's decision conflicts with *Boag*.

In *Boag*, the Court holds that when a dismissal is based on erroneous legal conclusions, it should be reversed, even though the court also has broad discretion to dismiss an in *forma pauperis* appeal as frivolous pursuant to 28 USC §1915(d), renumbered as 28 USC §1915(e)(2). *Boag v. MacDougall*, 454 U. S. 364, 365 (1982) (per curiam).

§1915(e)(2) permits court to dismiss an appeal if court determines it is frivolous and §1915 (a)(3) provides that an appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

Unlike criminal appeals, in which, the good faith standard is an objective one and the test under 28 U.S.C. §1915(a) for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous, *Coppedge v. United States*, 369 U.S. 438, 445 (1962), in civil suits lower federal courts has held that, "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 court has discretion to find an appeal not taken in good faith if a trial judge finds that "it is a case proceeding capriciously, or viciously, or with prejudice, or from any other improper motive". *Schweitzer v. Scott*, 469 F. Supp. 1017, 1020.

Generally, it would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the defendants, but has sufficient merit to support an appeal in forma pauperis. *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). And due to the weakness of human nature, a judge, as a human being, tends to confuse the state of mind of unwillingness to have its own decision challenged with the state of mind of finding an appeal filed from improper motive. In other words, a district court generally does not certificate that an appeal is taken in good faith even if the appeal has merit.

Supreme Court in *Boag,* a case involving civil appeals, stated, "We need not address the permissible contours of the Court of Appeals' first conclusion [that

district courts have "especially broad" discretion to dismiss frivolous actions against prison officials under 28 U. S. C. § 1915(d)], for its second conclusion [that petitioner's action is frivolous because it does not state a claim upon which relief can be granted] is erroneous as a matter of law." *Boag v. MacDougall*, 454 U. S. 364, 365 (1982) (per curiam). However, in practice, lower court ignores Supreme Court's ruling, such as this case.[1] According to a study by U.S. Department of Justice, the percentage of civil rights cases dismissed from U.S. district courts increased from 66% in 1990 to 75% in 2003 and decreased slightly to 72% in 2006. Add. 160a-171a. This case indicates that those dismissed cases very likely have merit, and the amount of such cases may be significant. It is necessary to grant rehearing en banc to solve the conflict. FRAP 35(a)(1).

II. This case presents a question of exceptional importance.

This case also presents a question of exceptional importance. "[T]o assure equality of consideration for all litigants" is Congress' overarching goal in enacting the in forma pauperis statute. *Neitzke v. Williams*, 490 US 319, 329. However,

[1] The complaint provides citations to court records that the facts in the complaint are based on, no question of the truth of the factual allegations was raised, Add. 3a-4a, 5a-17a, 18a-32a, 33a-36a, 37a-75a, 112a-157a, thus *Denton v. Hernandez*, 504 US 25 (1992) and its offspring are not discussed in this case. *Nietzke v. Williams*, 490 U.S. 319 (1989) is not discussed in this argument because the panel did not dismiss the appeal on the grounds that the action fails to state a claim on which relief may be granted or the action seeks monetary relief against a defendant who is immune from such relief. Add. 1a.

permitting dismissals of appeals as frivolous under §1915(e)(2) where an appeal raises arguable claims denies indigent appellants the practical protections against unwarranted dismissal generally accorded paying appellants. If Ouyang were a paying appellant, dismissal of her appeal as frivolous under § 1915(e) (2) will be avoided and her appeal will very likely benefit from adversary proceedings that are designed to minimize decisional error.

The courts should strive to treat paying and non-paying litigants alike. *Neitzke v. Williams*, 490 U.S. 319, 329, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989). The Court should grant rehearing en banc to protect indigents' right to access to courts. FRAP 35(a)(2).

CONCLUSION

The petition for rehearing should be granted.

Dated: September 3, 2021

Respectfully submitted,

/s/Lin Ouyang

Appellant in Pro Se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 21-55251

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,026.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Lin Ouyang **Date** 9/3/2021

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 3, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Lin Ouyang

Lin Ouyang

Lin Ouyang
1124 West Adams Blvd., Los Angeles, CA 90007-2317
T (213) 747 – 5296 • linouyang@gmail.com

November 2, 2021

VIA E-FILING

United States Court of Appeals for the Ninth Circuit

Re: 20-56071, 21-55251 & 21-55252, Lin Ouyang v. Nora Manella, et al, "Motion for Reconsideration from Dispositive Order"

TO HONORABLE CIRCUIT JUDGES SILVERMAN, CHRISTEN, LEE AND/OR OTHER MEMBERS OF THE PANEL:

This Court ordered Aug. 20, 2021 in cases 20-56071, 21-55251 & 21-55252 that "[n]o further filings will be entertained in these closed cases". Will this Court issue an order on the motion for reconsideration from dispositive order filed Sep. 3, 2021 in these cases?

If this Court does not issue an order on the motion for reconsideration, no court rules would apply to decide when this Court's Aug. 20, 2021 order becomes final, as the timely filed motion for reconsideration in these cases stays the finality of the court's final judgment pursuant to Supreme Court Rule 13.3 ("if a petition for rehearing is timely filed in the lower court by any party, ..., 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 ...")

I would really appreciate it if the Court could update the status of the motion. Please see a discussion between the Clerk's office and me attached hereto.

Respectively submitted,

/s/ Lin Ouyang

Appellant in *pro se*

Gmail

Lin Ouyang <lin.ouyang@gmail.com>

Re: 20-56071, 21-55251 & 21-55252, Lin Ouyang v. Nora Manella, et al, "Motion for Reconsideration from Dispositive Order"

6 messages

Lin Ouyang <lin.ouyang@gmail.com> Mon, Nov 1, 2021 at 3:28 AM
To: questions@ca9.uscourts.gov

Dear Clerk of United States Courts for the Ninth Circuit:

Because the court ordered Aug. 20, 2021 in cases 20-56071, 21-55251 & 21-55252 that "No further filings will be entertained in these closed cases", I am wondering whether my motion for reconsideration from dispositive order filed Sep. 3, 2021 in these cases will be ruled by the court.
If the court won't consider the motion, will the court issue an order?

Respectfully Submitted,
Lin Ouyang
Appellant in pro se

Questions CA09Operation <questions@ca9.uscourts.gov> Mon, Nov 1, 2021 at 8:32 AM
To: Lin Ouyang <lin.ouyang@gmail.com>

I do not think the issue a decision or order on the motion because no further filings will be entertained in the closed cases.

From: Lin Ouyang <lin.ouyang@gmail.com>
Sent: Monday, November 1, 2021 3:28 AM
To: Questions CA09Operation <questions@ca9.uscourts.gov>
Subject: Re: 20-56071, 21-55251 & 21-55252, Lin Ouyang v. Nora Manella, et al, "Motion for Reconsideration from Dispositive Order"

CAUTION - EXTERNAL:

[Quoted text hidden]

CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

Lin Ouyang <lin.ouyang@gmail.com> Mon, Nov 1, 2021 at 11:07 AM
To: Questions CA09Operation <questions@ca9.uscourts.gov>

Dear Clerk of United States Courts for the Ninth Circuit:

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 writ of certiorari with the Supreme Court.
Could you please bring this matter to the court's attention?

Respectfully Submitted,

Lin Ouyang
Appellant in pro se
[Quoted text hidden]

Questions CA09Operation <questions@ca9.uscourts.gov> Mon, Nov 1, 2021 at 11:43 AM
To: Lin Ouyang <lin.ouyang@gmail.com>, Questions CA09Operation <questions@ca9.uscourts.gov>

Hello,

Per this Court's previous orders, no further filings will be entertained in these closed cases.

[Quoted text hidden]

Lin Ouyang <lin.ouyang@gmail.com> Tue, Nov 2, 2021 at 11:18 AM
To: Questions CA09Operation <questions@ca9.uscourts.gov>

Dear Clerk of United States Courts for the Ninth Circuit:
Pursuant to Supreme Court Rule 13.3, "if a petition for rehearing is timely filed in the lower court by any party, ..., 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 ...", the timely filed motion for reconsideration in these cases stays the finality of the court's final judgment.
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.
Respectfully submitted,
Lin Ouyang
Appellant in pro se

[Quoted text hidden]

Questions CA09Operation <questions@ca9.uscourts.gov> Tue, Nov 2, 2021 at 11:38 AM
To: Lin Ouyang <lin.ouyang@gmail.com>, Questions CA09Operation <questions@ca9.uscourts.gov>

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.

[Quoted text hidden]

No. 21-55251

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIN OUYANG,

Plaintiff and Appellant,

v.

NORA M. MANELLA, in her individual capacity; et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:21-cv-00096-SVW-ADS

PLAINTIFFS-APPELLANTS' MOTION TO RECALL MANDATE THAT WAS ISSUED WHILE A TIMELY MOTION FOR RECONSIDERATION WAS PENDING

LIN OUYANG
1124 WEST ADAMS BLVD.
LOS ANGELES, CA 90007
TEL: (213) 747-5296
APPELLANT IN PRO SE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

Pursuant to FRAP 41 and Ninth Circuit Rule 27-7 ("Orders issued pursuant to [section 27-7] are subject to reconsideration pursuant to Circuit Rule 27-10"), Plaintiff-Appellant Lin Ouyang respectfully requests an order recalling the mandate issued by this Court on February 9, 2022.

This Court issued a mandate before the judgment of this case reaches its finality. Specifically, the timely motion for reconsideration in this case is pending for this Court's decision and the motion stays the issuance of mandate until its disposition. FRAP 41 (b); *Bell v. Thompson*, 545 US 794, 802 (2005).

Even though this Court stated "No further filing will be entertained in this closed case" in its dismissal order, the fact that this Court did not order its mandate to be issued forthwith indicates that this Court intended to retain jurisdiction to rule subsequent filings. In addition, the findings and entire record suggest that this Court did not determine to make its dismissal order final and did not suspend rehearing proceedings. If this Court intended to use statement "No further filing will be entertained in this closed case" to replace the requirement of issuance of its mandate forthwith to make its dismissal order final, appellant's due process right would be violated.

Recall of the mandate is appropriate to protect the integrity of the court's processes and to prevent injustice.

FACTUAL AND PROCEDURAL BACKGROUND

I. A timely motion for reconsideration is pending for this Court's decision.

On Sep. 3, 2021, Appellant filed a timely motion to reconsider this Court's dismissal order and the motion is pending for this Court's decision. Dkt. 10.

II. The timely filing of motion for reconsideration automatically stays the issuance of mandate. FRAP 41 (b).

The timely filing of motion for reconsideration in this appeal automatically postpones the issuance of mandate until disposition of the motion. FRAP 41 (b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order."); *Bell v. Thompson*, 545 US 794, 802 (2005) (applying former version of FRAP); Committee Notes - 2018 Amendment to FRAP 41 ("...Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing— has been deleted and the rest of subdivision (d) has been renumbered and renamed accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision

(d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the rule; no substantive change is intended...")

III. This Court did not order to suspend the rehearing proceedings.

A. Mandate is required to be issued forthwith to suspend rehearing proceedings.

Upon filing of a dispositive order, a Ninth Circuit panel has authority to bar the parties from petition for rehearing and order immediate issuance of its mandate only in exceptional circumstances, General order 4.6.b, and the aggrieved party's only possible judicial redress is with the Supreme Court unless a circuit judge calls for a vote to rehear the case en banc which is not applicable here. 28 USC 1254 (1). In such cases, Ninth Circuit's General order 4.6.b suggests a notice be given to the parties using the following language: "No petition for rehearing will be entertained and mandate shall issue forthwith. See Fed. R. App. P. 2."" General order 4.6.b. Absence of issuance of mandate forthwith as required by General order 4.6.a & 4.6.b, a timely filing of petition for rehearing or motion for reconsideration will stay the mandate until disposition of the petition or motion, FRAP 41 (b); *Bell v. Thompson*, 545 US 794, 802 (2005); Committee Notes - 2018 Amendment to FRAP 41.

B. The fact that this Court did not order its mandate to be issued forthwith indicates that this Court intended to retain jurisdiction to rule subsequent filings.

In this case, this Court's dismissal order states "No further filing will be entertained in this closed case", however this Court did not follow General Order 4.6.b 's recommendations to order its mandate to be issued forthwith. Dkt. 8. Since jurisdiction is relinquished upon issuance of the court's mandate, *Mariscal-Sandoval v. Ashcroft*, 370 F. 3d 851, 856 (9th Cir. 2004), this Court's act of retaining jurisdiction indicates its intent to rule subsequent filings, as the court in *Mariscal-Sandoval v. Ashcroft* explained "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." *Ibid.*

Here, appellant's reconsideration motion shows the probability of success on the merits. Dkt. 10. Specifically, when a dismissal is based on erroneous legal conclusions, it should be reversed on appeal, even though the court also has broad discretion to dismiss an in *forma pauperis* appeal as frivolous pursuant to 28 USC §1915(e)(2), *Boag v. MacDougall*, 454 U. S. 364, 365 (1982), and in this case district court, basing on an erroneous legal conclusion that judicial immunity

barred equitable relief against state court judges, bared claims for request of equitable relief against state court judges for their acts of enforcing an unconstitutional custom that discriminates against self-represented appellants who are generally poor, *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); Dkt. 10, 5-8, also district court bared claims for damages against judicial officers in their individual capacities without proposing any immunity for the officers' acts of accepting deceit upon court, fabricating facts, and replacing parties' arguments with their own arguments in making their decisions, *Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 843 (9th Cir. 2016); Dkt. 10, 8, in addition, the facts in the complains can be verified by taking judicial notice of the court records, Dkt. 10, 3, 12 n1.

C. The findings and entire record suggest that this Court did not determine to make its dismissal order final and did not suspend rehearing proceedings.

If this Court intended to make its dismissal order final by stating "No further filing will be entertained in this closed case", the Court's statement would be conflicted with the Court's act of not issuing a forthwith mandate as "[a] court of appeals' judgment or order is not final until issuance of the mandate." FRAP 41 (c), Adv. Comm. Note; *Natural Resources Defense Council, Inc. v. Los Angeles*, 725 F. 3d 1194, 1203 (9th Cir. 2013).

To determine whether there is any ambiguity or obscurity in this Court's order, reference can properly be made to the findings and entire record for determining what was decided. *Security Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062, 1066 (10th Cir.1980). Barring petition for rehearing which may affect substantial rights of the litigant is limited to exceptional circumstances. General order 4.6.a. "Exceptional circumstances may include, ..., instances where it appears from the record that a petition for rehearing en banc, or petition for writ of certiorari would be legally frivolous..." General order 4.6.b. Here, this Court made no finding that a petition for rehearing, or petition for writ of certiorari would be legally frivolous. Dkt. 8. Also this Court made no findings to support its conclusion "Upon a review of the record and the responses to the court's March 25, 2021 order, we conclude that this appeal is frivolous." Dkt. 8. Specifically, this Court did not dismiss the appeal on the grounds erroneously based on by the district court: the action fails to state a claim on which relief may be granted and the action seeks monetary relief against a defendant who is immune from such relief, Dkt. 10, 5-10; Neither did district court nor this Court find untrue the facts in the complains that can be verified by taking judicial notice of the court records, Dkt. 10, 3, 12 n1. In other words, this Court did not adopt the erroneous grounds relied upon by the district court to dismiss the appeal, and at the same time this Court did not explain any deficiency why the complaint or the appeal is frivolous,

while only a legal conclusion that "this appeal is frivolous" is insufficient to satisfy the procedure protection set forth in the decision of *Noll v. Carlson*, 809 F.2d 1446 (9th Cir.1987). *Id.* at 1448.

In addition, when dismissing the appeal without ordering mandate to be issued forthwith, this Court knew or should know that to suspend the proceedings of FRAP 40, petition for rehearing, a mandate is required to be issued forthwith, General order 4.6.b & General order 4.6.a, otherwise a timely filing of petition for rehearing or motion for reconsideration will stay the mandate until disposition of the petition or motion, FRAP 41 (b); *Bell v. Thompson*, 545 US 794, 802 (2005); Committee Notes - 2018 Amendment to FRAP 41. Thus, in this circumstance, the fact that this Court retained jurisdiction also indicates that that this Court did not decide to make its dismissal order final.

In sum, the finding of this Court and entire record show that this Court did not determine to make its dismissal order final, accordingly the timely motion for reconsideration will be ruled. *In re Tomlin*, 105 F. 3d 933 (4th Cir. 1997).

D. If this Court intended to use statement "No further filing will be entertained in this closed case" to replace the requirement of issuance of its mandate forthwith to make its dismissal order final, appellant's due process right would be violated.

Federal statute 28 USC 1254 (1) provides a right for a party to file a petition for a writ of certiorari with the Supreme Court to review an appellate court's

judgement, 28 USC 1254 (1), thus due process protects appellant who seeks review in the Supreme Court. *Wright v. Beck*, 981 F. 3d 719, 733 (9th Cir. 2020), *Logan v. Zimmerman Brush Co.*, 455 US 422, 429 (1982) ("Due Process Clauses protect civil litigants who seek recourse in the courts").

Due process mandates a notice before "any proceeding which is to be accorded finality." *Wright v. Beck*, 981 F. 3d 719, 733 (9th Cir. 2020). Notice of the finality of this Court's dismissal is critical because a petition for a writ of certiorari with the Supreme Court needs to be filed within 90 days of the finality of a judgment-entry of a judgment or denial of a timely petition for rehearing, and the notice is necessary to apprise appellant the time to present her petition. Supreme Court Rule 13.1 & Supreme Court Rule 13.3. Thus, the notice must be "reasonably calculated, under all the circumstances" to notify appellant whether this Court intended to make its dismissal order final and "[t]he notice must be of such nature as reasonably to convey the required information". *Wright v. Beck*, 981 F. 3d 719, 727 (9th Cir. 2020); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, the required information is whether the mandate is issued forthwith to suspend the rehearing proceedings. General order 4.6.b & General order 4.6.a; *Mariscal-Sandoval v. Ashcroft*, 370 F. 3d 851, 856 (9th Cir. 2004) (jurisdiction is relinquished upon issuance of the court's mandate). If this Court interpreted statement "No further filing will be entertained in this closed case" as a

substitute of an order of issuance of its mandate forthwith to make its dismissal order final, this Court's notice that provides no explanation why mandate is not issued forthwith fails to satisfy the due process requirement, as such a notice is subject to a different constriction of the finality of the dismissal order: this Court intended to comply with the policy against immediate issuance of mandate to retain jurisdiction to rule subsequent filings. *Ibid.* ("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."); General order 4.6.a, accordingly such a notice violates appellant's right to due process. *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir. 1970).

Due process also requires notice of remedial procedures be given if the procedures are not publicly available. *Memphis Light, Gas & Water Div. v. Craft*, 436 US 1, 13-15 (1978). Here, there is no procedure public available to determine whether this Court's dismissal order is final if this Court intended to suspend rehearing proceedings without ordering its mandate be issued forthwith, General order 4.6.b & General order 4.6.a, thus the notice that made no mention of a procedure to file a petition with the Supreme Court in such an unordinary situation

fails to satisfy the due process notice requirement, Dkt. 8; *Memphis Light, Gas & Water Div. v. Craft*, 436 US 1, 13-15 (1978). If no procedure exists to determine the finality of this Court's dismissal order in this situation, appellant 's right to file a petition with the Supreme Court to review this Court's dismissal order would be cutoff, as while the petition for rehearing is pending, there is no "judgment" to be reviewed by the Supreme Court. *Department of Banking of Nebraska v. Pink*, 317 U. S. 264, 266 (1942). As a result, appellant's right to petition in the Supreme Court would be deprived in a random manner by this Court, accordingly due process procedure would be violated. *Wright v. Beck*, 981 F. 3d 719, 733 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982))

Appellant contacted the clerk offices of both this Court and the Supreme Court: The clerk office of this Court 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"; Appellant forwarded the position of this Court's clerk office to the clerk office of the Supreme Court and asked whether appellant was permitted to file a petition for a writ of certiorari in this unordinary situation, and the clerk of the Supreme Court told appellant that she needed to wait for an order on her motion for reconsideration to file the petition; appellant then forwarded the position of clerk of the Supreme Court to the clerk office of this

Court and raised the issue of the finality of this Court's dismissal order and the clerk office of this Court 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"; appellant then sent a letter querying the status of motion for reconsideration to this Court raising the issue that if this Court does not rule the motion for reconsideration, there will be no court rule to apply to determine the finality of the judgment. Dkt. 11. No response is made to the letter.

The clerk office 's Feb. 9, 2022 amendment to the Sep 3, 2021 notice of docket entry of motion for reconsideration adding statement "NO ACTION will be taken on this filing per order at [8] which directed that no further filings will be entertained" provides no guidance as to what procedure to follow in this unordinary situation.

In sum, if this Court intended to use statement "No further filing will be entertained in this closed case" to replace the requirement of issuance of its mandate forthwith to make its dismissal order final, appellant's due process right would be violated.

IV. This Court issued mandate prior to entry of an order on the timely motion for reconsideration.

On Feb. 9, 2022, this Court issued a mandate while the motion for reconsideration was pending. Dkt. 12.

V. As a result, this Court lost the power to enter an order on the motion for reconsideration, a substantive decision in this case.

Upon issuance of the mandate, this case has been returned to the district court's jurisdiction, and this Court lost the power to enter an order on the motion for reconsideration, a substantive decision in this case. *Sgaraglino v. State Farm Fire and Cas. Co.*, 896 F. 2d 420, 421 (1990).

ARGUMENTS

I. This court has clear authority to recall a mandate to protect the integrity of its own processes.

This Court has recognized that it has inherent authority to recall its mandate and thereby assume jurisdiction over an appeal to protect the integrity of its own processes. *Abreu-Reyes v. INS*, 350 F. 3d 966, 967 (2003); see also *Calderon v. Thompson*, 523 U.S. 538, 549-550 (1998) (recognizing that courts of appeals "have the inherent power to recall their mandates").

In this case, this Court's judgment is not final when no ruling has been made on the motion for reconsideration. FRAP 41 (b); see also Supreme Court Rule 13.3

("if a petition for rehearing is timely filed in the lower court by any party, ..., the time to file the petition for a writ of certiorari ... runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.")

In such circumstance, recall of the mandate is necessary for this Court to assume the jurisdiction over this appeal to enter its final disposition order. 350 F. 3d 966, 967; 523 U.S. 538, 549-550.

II. Recalling this Court's mandate is necessary to prevent injustice.

Recall of mandate is not to be done except in extraordinary circumstances. *Zipfel v. Halliburton Co.*, 861 F. 2d 565, 567 (1988); *Calderon v. Thompson*, 523 U.S. 538, 549, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). The rule is meant to protect interests in repose. *Id.* at 550. Here, those interests are minimal. This Court is to issue an order on the motion for reconsideration and so the judgment is not actually final. In other words, the judgment of this case is not in the state of repose. The defendants, who have not appeared, can have little interest, based on reliance or other grounds, in preserving a mandate not in accordance with the actual final decision rendered by the court. Appellant, the only party appeared in this, has a compelling interest to obtain this Court's order on her motion for reconsideration. Supreme Court Rule 13.3. Therefore, exercise of the court's authority to recall mandate is needed to prevent injustice in this case. *Zipfel v. Halliburton Co.*, 861 F. 2d 565, 567 (1988).

CONCLUSION

The motion to recall mandate should be granted.

Dated: Feb. 23, 2022 Respectfully submitted,

/s/Lin Ouyang

Appellant in Pro Se

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27 (d), I certify that the attached additional statement is proportionately spaced, has a typeface of 14 points or more, and contains 3,240 words.

Dated: Feb. 23, 2022

/s/Lin Ouyang

Lin Ouyang

Appellant in Pro Se

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Feb. 23, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Lin Ouyang

Lin Ouyang

Lin Ouyang
1124 West Adams Blvd., Los Angeles, CA 90007-2317
T (213) 747 – 5296 • linouyang@gmail.com

February 23, 2022

VIA E-FILING
Ms. Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Lin Ouyang v. Nora Manella, et al,* No. 21-55251

Dear Ms. Dwyer:

This letter is to inform your office that the amendment made by your office on Feb. 9, 2022 to a Sep 3, 2021 notice of docket entry in the above entitled case is inconsistent with the court's Aug. 20, 2021 order. Specifically, the court did not order its mandate to be issued forthwith indicating that the court intended to retain jurisdiction to rule subsequently filings, even though the court stated in the dismissal order "No further filing will be entertained in this closed case", Dkt. 8; General Order 4.6.b & 4.6.a; *Mariscal-Sandoval v. Ashcroft*, 370 F. 3d 851, 856 (9th Cir. 2004). Accordingly, the statement added by your office on Feb. 9, 2022 that "NO ACTION will be taken on this filing per order at [8] which directed that no further filings will be entertained" is inconsistent with the court's order.

In addition, your office failed to mark the date the amendment was made, as result, the amended notice appears to be sent on September 3, 2021 on the docket report. Correction is necessary as it affects the timeliness the deficiency is brought to your attention. Notices of docket activity sent on Feb. 9, 2022 and Sep. 3, 2021 are attached.

Respectively submitted,
/s/ Lin Ouyang
Appellant in *pro se*

Gmail

Lin Ouyang <lin.ouyang@gmail.com>

Re-send: 21-55251 Lin Ouyang v. Nora Manella, et al "Motion for Reconsideration from Dispositive Order"

1 message

ca9_ecfnoticing@ca9.uscourts.gov <ca9_ecfnoticing@ca9.uscourts.gov> Wed, Feb 9, 2022 at 3:02 PM
To: linouyang@gmail.com

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

United States Court of Appeals for the Ninth Circuit

Amended 02/09/2022 15:02:30: Notice of Docket Activity

The following transaction was entered on 09/03/2021 at 3:45:10 PM PDT and filed on 09/03/2021

Case Name:	Lin Ouyang v. Nora Manella, et al
Case Number:	21-55251
Document(s):	Document(s)

Docket Text:
Filed (ECF) Appellant Lin Ouyang motion for reconsideration of dispositive Judge Order of 08/20/2021. Date of service: 09/03/2021. NO ACTION will be taken on this filing per order at [8] which directed that no further filings will be entertained [12220440] --[COURT ENTERED FILING to correct entry [9] .] (TYL)

Notice will be electronically mailed to:

Lin Ouyang: linouyang@gmail.com

The following document(s) are associated with this transaction:
Document Description: Main Document
Original Filename: 21-55251 m10.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1106763461 [Date=09/03/2021] [FileNumber=12220440-0] [
02651228acf56adad04c38e2319d810ff409745f685267d89ff82883e60b73d90c53741714ff301f0eb43166a8
c4a279cac7f446fda05100de47ee38fbe24529]]

Gmail

Lin Ouyang <lin.ouyang@gmail.com>

21-55251 Lin Ouyang v. Nora Manella, et al "Motion for Reconsideration from Dispositive Order"

1 message

ca9_ecfnoticing@ca9.uscourts.gov <ca9_ecfnoticing@ca9.uscourts.gov> Fri, Sep 3, 2021 at 3:45 PM
To: linouyang@gmail.com

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United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 09/03/2021 at 3:45:10 PM PDT and filed on 09/03/2021

Case Name:	Lin Ouyang v. Nora Manella, et al
Case Number:	21-55251
Document(s):	Document(s)

Docket Text:
Filed (ECF) Appellant Lin Ouyang motion for reconsideration of dispositive Judge Order of 08/20/2021. Date of service: 09/03/2021. [12220440] --[COURT ENTERED FILING to correct entry [9] .] (TYL)

Notice will be electronically mailed to:

Lin Ouyang: linouyang@gmail.com

The following document(s) are associated with this transaction:
Document Description: Main Document
Original Filename: 21-55251 m10.pdf
Electronic Document Stamp:
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c4a279cac7f446fda05100de47ee38fbe24529]]

Lin Ouyang
1124 West Adams Blvd., Los Angeles, CA 90007-2317
T (213) 747 – 5296 • linouyang@gmail.com

March 4, 2022

VIA E-FILING
Ms. Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Lin Ouyang v. Nora Manella, et al,* No. 21-55251

Dear Ms. Dwyer:

I am really concerned about the status of the pending motion for reconsideration due to the issuance of mandate prior to a ruling of the motion and the length of time (over six months) the motion has been pending.

Please be kindly reminded that the court did not order its mandate to be issued forthwith and the court retained jurisdiction to rule subsequent filings, even though the court stated "No further filing will be entertained in this closed case" in its dismissal order. Ninth Circuit General Order 4.6.b & 4.6.a; *Mariscal-Sandoval v. Ashcroft*, 370 F. 3d 851, 856 (9th Cir. 2004). Thus, the timely motion for reconsideration in this case automatically postpones the issuance of mandate until disposition of the motion. FRAP 41 (b); *Bell v. Thompson*, 545 US 794, 802 (2005); Committee Notes - 2018 Amendment to FRAP 41.

If the court intends to deny the motion for reconsideration without considering its merit, an order on the motion still needs to be issued to make the court's judgment final, and to allow me to seek review with the Supreme Court. *Department of Banking of Nebraska v. Pink*, 317 U. S. 264, 266 (1942) (While the petition for rehearing is pending,

there is no "judgment" to be reviewed by the Supreme Court); also see the letter regarding the status of the motion filed with the court on November 2, 2021.

If the court has determined that the usual appellate procedure will not be followed, the court is required to prescribe method of submission and disposition. *Groendyke Transport, Inc. v. Davis*, C.A.5 (5th Cir. 1969) 406 F.2d 1158, 1161. The Court has not made such prescription.

On February 9, 2022, your office added statement "NO ACTION will be taken on this filing per order at [8] which directed that no further filings will be entertained" to the original docket entry of the September 3, 2021 motion for reconsideration filing. The date of the amendment was omitted and was not corrected despite a request to correct filed February 23, 2022. *See* Dkt. 14. Did your office intend to say that your office intended to notify me that the motion would not be ruled when the motion was filed on September 3, 2021, but your office did not make the notification until February 9, 2022?

In sum, I would really appreciate it if the court can let me know the status of the case.

Respectively submitted,
/s/ Lin Ouyang
Appellant in *pro se*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 26. Notice of Delay

Instructions for this form: http://www.ca9.uscourts.gov/forms/form26instructions.pdf

9th Cir. Case Number(s) 21-55251

Case Name Lin Ouyang v. Nora Manella, et al.

Name(s) of party or parties filing this notice:

Lin Ouyang

I am notifying the court that this appeal or petition has been pending before the court for a period in excess of that set forth below:

☐ A motion has been pending for longer than 4 months.

☐ The parties have not received notice of oral argument or submission on the briefs within 15 months after the completion of briefing.

☐ A decision on the merits has not been issued within 9 months after submission.

☐ The mandate has not issued within 28 days after the time to file a petition for rehearing has expired.

☒ A petition for rehearing has been pending for longer than 6 months.

☐ Other *(describe the nature of the delay)*:

Signature s/Lin Ouyang **Date** Mar 4, 2022

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov