No. 22-5391

IN THE

Supreme Court of the United States

LIN OUYANG,

Petitioner,

v.

MARK A. BORENSTEIN et al.,

Respondents.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Dated: August 15, 2022

QUESTION PRESENTED

District Court dismissed petitioner's 42 U.S.C. §1983 claim finding no violations of judgment debtors' procedural Due Process right under the Fourteenth Amendment in California's examination proceedings that do not require a notice to inform debtors of their right to claim exemptions prior to issuance of a turnover order. In making such a decision, District Court did not follow the well settled principle that a temporary, nonfinal deprivation of property is a "deprivation" in the terms of the Fourteenth Amendment, see *Fuentes* v. *Shevin*, 407 U.S. 67, 85 (1972), instead District Court relied on California state appellate courts' decisions that upheld the statutes finding no impairment because debtors are able to file claims and recover exempt property after compliance with the turnover order. In addition, District Court found that petitioner's claim was frivolous under 28 U.S.C. §1915 because petitioner was aware of those state courts' decisions.

Court of Appeals for the Ninth Circuit dismissed petitioner's appeal as frivolous and stated that "No further filing will be entertained in this closed case", but the Court of Appeals didn't make any findings of good cause to suspend rehearing proceedings and didn't order its mandate to be issued forthwith. Petitioner timely filed a motion for reconsideration seeking reversal of the Court of Appeals' dismissal and the Court of Appeals struck the motion refusing to rule it.

The question presented is: Whether the Court of Appeals has reached a genuinely final judgment under 28 U.S.C. §2101 (c) and this Court's Rule 13.3?

If the answer is No, whether a writ of mandamus should issue directing the Court of Appeals to rule the motion for reconsideration? (What remedy is available?)

If the answer is Yes, the Court of Appeals has reached a genuinely final judgment under 28 U.S.C. §2101 (c) and this Court's Rule 13.3,

1. When did the Court of Appeals' judgment become final?
2. What remedy could this Court issue?

PARTIES TO THE PROCEEDINGS BELOW

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

Respondents in this Court (defendants-respondents in the Court of Appeals) are Mark A. Borenstein, et al.

RELATED PROCEEDINGS

Ouyang v. *Borenstein*, et al, No. 21A804 (U.S.).

Ouyang v. *Borenstein*, et al, No. 21-55647 (9th Cir.).

Ouyang v. *Borenstein*, et al, No. 2:21-cv-03773 (C.D. Cal.).

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PETITION

Petitioner Lin Ouyang respectfully petitions for a writ of mandamus to the United States Court of Appeals for the Ninth Circuit, requesting that the Ninth Circuit be directed to rule petitioner's motion for reconsideration. Or, in the alternative, petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's order striking filings of motion for reconsideration and motion to recall mandate (the Appendix to this Petition ("Pet. App.") 1a) is reported as *Ouyang v. Borenstein*, No. 21-55647; 2022 U.S. App. LEXIS 11389 (9th Cir. Apr. 27, 2022).

The Ninth Circuit's order of dismissal (Pet. App. 3a) is reported as *Ouyang v. Borenstein*, No. 21-55647; 2021 U.S. App. LEXIS 7248 (9th Cir. Mar. 18, 2022).

The order of District Court denying motion for leave to appeal IFP (Pet. App. 4a) is reported as *Ouyang v. Borenstein*, No. 2:21-03773 SVW (ADS); 2021 U.S. Dist. LEXIS 258935 (C.D. Cal. Jun. 30, 2021).

The opinion of District Court denying request to proceed IFP (Pet. App. 5a-6a) is reported as *Ouyang v. Borenstein*, No. 2:21-03773 SVW (ADS); 2021 U.S. Dist. LEXIS 258937 (C.D. Cal. May 20, 2021).

JURISDICTION

The Court of Appeals dismissed the appeal on March 18, 2022, (Pet. App. 3a), and issued mandate on April 11, 2022 (Pet. App. 2a). Timely filed motion for reconsideration and motion to recall mandate were stricken on April 27, 2022 (Pet. App. 1a). On June 8, 2022, Justice Kagan extended the time within which to file a petition to and including Monday, August 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) or, in the alternative, 28 U.S.C. §1651.

COURT RULES AND STATUTARY PROVISIONS INVOLVED

Rules of Supreme Court, Rule 13.3 provides that "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment."

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

STATEMENT OF THE CASE

I. Background facts

California's examination proceedings permit judgment creditors to examine judgment debtors to discover property and apply it toward satisfaction of money judgments. California Code of Civil Procedure ("Cal. CCP") §§ 708.110-708.205. Although California designates certain types of property which every person domiciled in California may hold exempt from satisfaction of money judgments, Cal. CCP §§ 703.140(b) & 704.010 et seq, California's examination procedures do not require a notice to inform debtors of their right to claim exemptions prior to issuance of a turnover order, Cal. CCP §708.110.

Absence of a notice, a judgment debtor may fail to claim exemptions, and where a judgment debtor makes no claim of exemptions, the court or referee may order the judgment debtor to deliver property to a levying officer or directly to the judgment creditor at the conclusion of an examination proceeding, and such an order creates a lien on the property and is enforceable by contempt. Cal. CCP §§708.140, 708.110, 708.205(a); *Imperial Bank v. Pim Electric, Inc.* (Cal. App. 1 Dist. 1995) 33 Cal.App.4th 540, 548 ("By its terms, section 708.205 authorizes the referee to order the debtor to turn over property if it is "not exempt." We read that section as empowering the referee to issue a turnover order unless the judgment debtor raises claims of exemption in the examination procedure or prior to issuance of the turnover order. Alternatively, we may presume the referee determined the

property to be "not exempt" in the absence of any contested claim raised by the judgment debtor.")

After the delivery of property or evidence of title to property to a levy officer, the debtor will be served a notice of levy including information on the debtor's right to claim exemptions for his or her property, Cal. CCP §700.010, and exempt property may be released through the procedures for claiming exemptions, Cal. CCP §§ 703.510 - 703.610.

Under the statutory scheme of permitting issuance of a turnover order without a requirement of a notice and a hearing to determine whether the property covered by the order is exempt, there is a risk of erroneous deprivation of a debtor's possession and use of exempt property. The deprivation may be only temporary but may affect debtors significantly given that exempt properties are generally necessities of life. The appellants in California appellate court case *Imperial Bank v. Pim Electric, Inc.* (Cal. App. 1 Dist. 1995) 33 Cal.App.4th 540 raised the argument that the property must be determined to be not exempt before issuance of the turnover order. *Id.* at p. 548. California state appellate court rejected the argument holding that " no impairment of [debtors]' procedural due process rights in the issuance of the turnover order prior to determination of claims of exemption where [debtors] did not raise any exemption claims in the examination procedure or prior to issuance of the turnover order and where there exists an opportunity for [debtors] and third parties to raise such claims upon the

levying officer's taking custody of the property and serving a notice of levy upon them at that time or immediately thereafter." *Id.* at 555; Pet. App. 6a.

Petitioner, in her appeal from the turnover order issued by California Superior Court after her examination proceeding, again raised the issue that she was not notified of her right to claim exemptions before she was ordered to turn over her property that is exempt, and she was denied her right to a notice and a prior hearing under the Fourteenth Amendment, and California Court of Appeals rejected petitioner's contention relying on *Imperial Bank v. Pim Electric, Inc.* (Cal. App. 1 Dist. 1995) 33 Cal.App.4th 540 finding that "the statutory scheme mandates that after the turnover order issues and the relevant property is presented to the levying officer, a judgment debtor who is a "natural person" must receive a list of the exemptions and be afforded the opportunity to recover exempt property through a specified motion procedure." ... (Id. at p. 554.) In view of those provisions, the court concluded that the statutory scheme adequately "safeguards the judgment debtor's procedural due process rights."" *Ouyang* v. *Achem Indus. Am.*, Nos. B267217, B268195, B269209, B270026, B271357, 2019 Cal. App. Unpub. LEXIS 4427, at 34-35 (June 28, 2019); Pet. App. 6a.

II. **Proceedings in the District Court**

A. Complaint and request to proceed in forma pauperis

On April 4, 2021, petitioner filed the present 42 U.S.C. §1983 suit in the U.S. District Court for the Central District of California, challenging the

constitutionality of California's enforcement of judgment law under the Due Process Clause of the Fourteenth Amendment. D. Ct. No. 2:21-cv-03773, Dkt. 1. Petitioner sought equitable relief against continued enforcement of the procedural provisions of the state statutes that authorize issuance of turnover order without a notice and a prior hearing to determine claim of exemptions. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 7-8. Petitioner did not seek to vacate any state court judgments. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 7-8. In addition, petitioner stated expressly in her complaint that she did not seek any damage nor attorney's fees. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 5. The complaint is against a California state court judge in his official capacity for his role of enforcing the unconstitutional state statutes. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 4-5.

To make a showing that petitioner has standing to sue, petitioner stated in the complaint that there are unsatisfied money judgments against her, and absence of relief requested she will suffer the same injury again in her future examination proceedings. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 3-7. Petitioner stated in the complaint that federal courts have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) over the present section 1983 claims for violations of the United States Constitution. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 2; *Mitchum* v. *Foster*, 407 US 225, 239 (1972) ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation".)

To make a showing that the claim of violations is supported by the existing law, petitioner cited in the complaint this Court's precedence *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) which holds that a temporary, nonfinal deprivation of property is a "deprivation" in the terms of the Fourteenth Amendment " and is required under the mandate of due process to be preceded by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. *Id.* at 82, 88, 90-91; D. Ct. No. 2:21-cv-03773, Dkt. 1 at 6. In addition, petitioner argued in the complaint that applying the three-part balancing test, the *Mathews* v. *Eldridge* test, the current state examination proceedings fail to satisfy the due process requirement. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 5-7.

Petitioner also stated facts that the defendant, a judge of California Superior Court, enforced the unconstitutional statute showing that the defendant is the proper party defendant of the suit. D. Ct. No. 2:21-cv-03773, Dkt. 1 at 4-5.

Petitioner filed a request to proceed to in forma pauperis and a declaration in support of the request. D. Ct. No. 2:21-cv-03773, Dkt. 2.

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

On May 20, 2021, District Court denied petitioner's request to proceed in forma pauperies and dismissed the complaint finding no constitutional violations. Pet. App. 5a-6a. In deciding whether the state statutes violate judgment debtors' Due Process procedural right under the Fourteenth Amendment, District Court did

not apply the balancing test, see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and did not follow the well settled principle that that a temporary, nonfinal deprivation of property is a "deprivation" in the terms of the Fourteenth Amendment, see *Fuentes* v. *Shevin*, 407 U.S. 67, 85 (1972), while both principles were applied in the complaint to support the claim of violations. Pet. App. 5a-6a, D. Ct. No. 2:21-cv-03773, Dkt. 1 at 5-7. Instead, District Court, in reaching the decisions of no violations, relied on state court decisions *Imperial Bank v. Pim Electric, Inc.* (Cal. App. 1 Dist. 1995) 33 Cal.App.4th 540 and *Ouyang* v. *Achem Indus. Am.*, 2019 Cal. App. Unpub. LEXIS 4427, at 34-35 (June 28, 2019), which conflict with this Court's precedent *Fuentes* v. *Shevin*, 407 U.S. 67, 85 (1972). Pet. App. 5a-6a. District Court did not state why it refused to follow the federal laws to decide the question of federal constitutional law, but chose to be submissive to state court decisions, which conflict with this Court's precedents, Pet. App. 5a-6a, while section 1983 was designed "to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."" *Mitchum* v. *Foster*, 407 US 225, 242 (1972).

In addition, District Court found that the complaint was frivolous under 28 U.S.C. §1915 because petitioner was aware of those state courts' decisions. Pet. App. 5a-6a.

District Court also found that state court judges were not the proper party defendants in this case, relying on *In re the Justices of the Supreme Court of*

Puerto Rico, 695 F.2d 17, 22 (1st Cir. 1982), *Wolfe* v. *Strankman*, 392 F.3d 358, 365 (9th Cir. 2004) and *Cunningham* v. *Coombs*, 667 F. App'x 912, 912-13 (9th Cir. 2016). Pet. App. 6a. Moreover, District Court stated that beside the present case, petitioner filed other complaints "challenging decisions made by state court officials in relation to her various legal entanglements". Pet. App. 6a. In those cases, District Court also found that state court judges were not the proper party defendants in § 1983 actions challenging the constitutionality of state statutes, rules, and customs, relying on the same authorities. D. Ct. No. 2:20-cv-05707, Dkt. 22 at 6-7, D. Ct. No. 2:21-cv-00096, Dkt. 5 at 2. And in those cases, petitioner raised objections in post-dismissal motions and appeals that state court judges, who enforced unconstitutional statutes, rules, and customs, were proper party defendants just as other enforcement officers and agencies are and argued that the authorities relied upon by the District Court were distinguishable in that the violations by the defendant judges in petitioner's cases were not the matters in controversy between the parties. Ct. A. No. 20-56071, Dkt. 11-1 at 19; Ct. A. No. 21-55252, Dkt. 5-1 at 28-29; D. Ct. No. 2:20-cv-05707, Dkt. 19 at 15-16. Petitioner relied on the Ninth Circuit's precedence *Ashelman* v. *Pope*, 793 F.2d 1072, 1075 (9th Cir.1986) and this Court's precedence *Supreme Court of Virginia v. Consumers Union of U. S.*, Inc., 446 U.S. 719, 736 (1980) and *Pulliam* v. *Allen*, 466 US 522, 541-542 (1984) in making her arguments. Ct. A. No. 20-56071, Dkt. 11-1 at 19; Ct. A. No. 21-55252, Dkt. 5-1 at 28-29; D. Ct. No. 2:20-cv-05707, Dkt.

19 at 15-16. District Court found that, "Plaintiff has also filed numerous plainly frivolous, post-dismissal actions and has been repeatedly denied leave to appeal in forma pauperis as she continually files appeals that are not taken in good faith, are frivolous, and do not present a substantial question." Pet. App. 6a.

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

On June 16, 2021, petitioner filed in District Court a timely notice of appeal and a request for leave to appeal in forma pauperis including a list of issues to be raised on appeal. D. Ct. No. 2:21-cv-03773, Dkt. 7, 8.

District Court denied the requests and stated, "The Court certifies that the proposed appeal is not taken in good faith under 28 U.S.C. 1915(a) and is frivolous." Pet. App. 4a.

III. Proceedings in the Court of Appeals

A. Statement that appeal should go forward.

Petitioner's appeal was docketed in Court of Appeals for the Ninth Circuit under case number 21-55647. Petitioner filed a request for leave to appeal in forma pauperis in Court of Appeals with a statement of issues to be raised on appeal. Ct. A. No. 21-55647, Dkt. 2. Petitioner also filed a statement that the appeal is not frivolous and should go forward arguing that the dismissal order should be reversed because none of District Court 's grounds of dismissal is correct. Ct. A. No. 21-55647, Dkt. 5.

Petitioner raised the issue that District Court erred in finding that California's enforcement of judgment law did not violate judgment debtors' right under the Due Process Clause of the Fourteenth Amendment. Ct. A. No. 21-55647, Dkt. 5-1, at 21-30. Petitioner argued that applying the balancing test, *Mathews* v. *Eldridge*, 424 U.S. 319, 332-35, (1976), District Court should find that California 's enforcement of judgment law fails to satisfy the requirements of due process notice and hearing under the Due Process Clause of the Fourteenth Amendment. Ct. A. No. 21-55647, Dkt. 5-1, at 26-30. Petitioner also argued that the California state court decisions relied upon by the District Court conflict with this Court's precedence *Fuentes* v. *Shevin*, 407 U.S. 67, 85 (1972). Ct. A. No. 21-55647, Dkt. 5-1, at 22-26. In addition, petitioner argued that no possible applicable principles support District Court 's decision to refuse to follow federal laws, but to be submissive to state court decisions on a question of federal law. Ct. A. No. 21-55647, Dkt. 5-1, at 10-14.

Petitioner also raised the issue that District Court erred in finding that state court judges were not the proper party defendants. Ct. A. No. 21-55647, Dkt. 5-1, at 15-18. Petitioner argued that the judge, who denied a hearing of claim of exemptions, was the proper party defendant just as other enforcement officers and agencies are, *Pulliam* v. *Allen*, 466 US 522, 541-542 (1984), and the authorities relied upon by the District Court were distinguishable in that whether to provide a

hearing was not a dispute between the parties, *Wolfe* v. *Strankman*, 392 F.3d 358, 365 (9th Cir. 2004). Ct. A. No. 21-55647, Dkt. 5-1, at 15-18.

Petitioner raised the issue that District Court erred in finding that the appeal is frivolous. Ct. A. No. 21-55647, Dkt. 5-1, at 19-20. In response to District Court's allegation that "Plaintiff does not have a federal cause of action simply because she disagrees with a decision made in state court", Pet. App. 6a, petitioner raised the argument that District Court had not made a good faith effort to follow the decisions of the courts with jurisdiction to review its judgments citing Moore's Federal Practice, ¶0.402[1], n.14 (1995). Ct. A. No. 21-55647, Dkt. 5-1, at 31-32.

B. Court of appeals' dismissal order.

On March 18, 2022, the Court of Appeals dismissed petitioner's appeal as frivolous pursuant to 28 U.S.C. §1915(e)(2). Pet. App. 3a. The Court of Appeals did not dismiss the appeal on any other grounds under 28 U.S.C. §1915(e)(2) including failure to state a claim on which relief may be granted. Pet. App. 3a. Since District Court's ground of dismissal that the state court judges were not the proper party defendants is failure to state a claim, *Jones v. Bock*, 549 U.S. 199, 215 (2007) (a complaint is subject to dismissal for failure to state a claim if the complaint is subject to an affirmative defense), the Court of Appeals' finding indicates that it did not agree that the state court judges were not the proper party defendants, Pet. App. 3a, 5a-6a; *Jones v. Bock*, 549 US 199, 127 S.Ct. 910, 920

(2007) (failure to state a claim is not frivolous under § 1915(d), renumbered as 28 USC §1915(e)(2)).

The Court of Appeals did not state whether it agreed that District Court should be submissive to state courts' decisions on a question of federal law nor did the Court of Appeals state whether it agreed that the complaint was frivolous because petitioner was aware of the state courts' decisions of no violations. Pet. App. 3a, 5a-6a.

The Court of Appeals stated in its dismissal order, "No further filing will be entertained in this closed case", however the Court of Appeals did not find that a petition for rehearing, or petition for writ of certiorari from its conclusion "this appeal is frivolous" would be legally frivolous and didn't find any other good cause to suspend rehearing proceedings, neither did the Court of Appeal order issuance of its mandate forthwith. Pet. App. 3a.

C. Motion for reconsideration.

On March 30, 2022, petitioner filed a timely motion for reconsideration. Pet. App. 7a-32a.

Petitioner requested a reversal of the dismissal of the appeal relying on *Boag v. MacDougall*, 454 U. S. 364 (1982). Petitioner raised the issue that the Court of Appeals could not exercise its broad discretion to dismiss the appeal as frivolous because District Court's dismissal is based on erroneous legal ground: District

Court refused to strike down the unconstitutional state statute because state courts have upheld it. If the Court of Appeal determined that District Court's ground of dismissal was correct, then the decision of the Court of Appeal would conflict with this Court's precedents, e.g. *Marbury v. Madison*, 5 US 137, 176 (1803) and *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018), which held that federal Constitution is the "fundamental and paramount law of the nation" and "when federal and state law conflict, federal law prevails and state law is preempted". Pet. App. 7a-32a.

D. Mandate and motion to recall mandate.

On April 11, 2022, the Court of Appeals issued its mandate while the motion for reconsideration was pending. Pet. App. 2a.

On April 23, 2022, petitioner filed a motion to recall mandate raising the issue that the record does not show that the Court of Appeals suspended the rehearing proceedings, and the court has a duty to rule the timely motion for reconsideration which stays the issuance of mandate until its disposition pursuant to F.R.A.P. 41(b). Pet. App. 33a-50a.

E. Order striking motion for reconsideration and motion to recall mandate

On April 27, 2022, the Court of Appeals ordered that the filings of motion for reconsideration and motion to recall mandate be stricken. Pet. App. 1a.

REASON FOR GRANTING THE PETITION

I. A writ of mandamus is warranted to compel the Court of Appeals to adjudicate the timely filed motion for reconsideration.

The issuance of a writ of mandamus to a lower court is warranted when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is "clear and indisputable," ' and (3) 'the writ is appropriate under the circumstances.' " *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). Each of those prerequisites for mandamus relief is met here.

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

Second, the Court of Appeals clearly and indisputably erred in striking petitioner's timely motion for reconsideration while the Court of Appeals did not

make any findings of exceptional circumstances listed under Ninth Circuit General Orders 4.6.b to justify suspension of rehearing proceedings nor did the Court of Appeals order issuance of its mandate forthwith to suspend rehearing proceedings as required by the rules. With the motion for reconsideration stricken, the question raised in the motion whether the Court of Appeals should reverse its order of dismissal remains open. As a result, "`there is no "judgment" to be reviewed'" by this Court. *Hibbs* v. *Winn*, 542 U.S. 88, 98, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). Thus, the writ will be in aid of this Court's appellate jurisdiction.

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

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

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

Petitioner's right to a writ of mandamus directing the Ninth Circuit to rule petitioner's timely motion for reconsideration is clear and indisputable. The Court of Appeals clearly and indisputably erred in striking petitioner's timely motion for reconsideration. By striking the motion, the Court of Appeals evaded from answering the question whether its decision of dismissal was erroneous, as a result "there is no `judgment' to be reviewed" by this Court. *Hibbs* v. *Winn*, 542 U.S. 88, 98, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004).

It is clear from the record that the Court of Appeals did not suspend rehearing proceedings and did not make its judgment final when it dismissed the appeal as frivolous because the Court of Appeals did not find that a petition for rehearing, or petition for writ of certiorari from its conclusion "this appeal is frivolous" would be legally frivolous and did not find any other good causes to suspend rehearing proceedings, neither did the Court of Appeals order issuance of its mandate forthwith, Pet. App. 3a, and Ninth Circuit General Orders 4.6.a and 4.6.b provide that to suspend rehearing proceedings and to make its judgment final, the Court of Appeals is required to issue its mandate forthwith with a good cause to justify the suspension. Ninth Circuit General Orders 4.6.a ("... only in exceptional circumstances should a panel order the issuance of mandate forthwith upon the filing of a disposition."); Ninth Circuit General Orders 4.6.b ("Exceptional circumstances may include, but are not limited to, instances where it appears from the record that a petition for rehearing en banc[1], or petition for writ of certiorari would be legally frivolous, where the losing litigant is attempting to defeat a just result by interposing delaying tactics, or where an emergency situation requires that, to effectuate a just result, the action of the Court should become final, and mandate issue, at once. In such a case, the panel may close the disposition with the following language: "No petition for rehearing will be entertained and mandate shall issue forthwith. See Fed. R. App. P. 2."") Thus, under such circumstances,

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

the Court of Appeals must be presumed to have permitted rehearing filing. *Missouri* v. *Jenkins*, 495 US 33, 48-49 (1990).

Accordingly, by stating that "No further filing will be entertained in this closed case" without issuing its mandate forthwith when no findings of any good cause to suspend rehearing proceedings was made, Pet. App. 3a, the Court of Appeals expressed its unwillingness to adjudicate the matter of rehearing while petitioner is permitted to file a motion for reconsideration by the published rules of procedure, and at the same time the Court of Appeals also expressed its willingness to comply with the policy against immediate issuance of mandate by retaining its jurisdiction to accept further filings. Ninth Circuit General Orders 4.6.a ("... only in exceptional circumstances should a panel order the issuance of mandate forthwith upon the filing of a disposition."), *Missouri* v. *Jenkins*, 495 US 33, 48-49 (1990), *Mariscal-Sandoval* v. *Ashcroft*, 370 F. 3d 851, 856 (9th Cir. 2004) ("Although it is true that "Nothing requires the court to wait until the mandate issues [,]" ..., [the aggrieved party] still retains the ability to petition this panel for rehearing, or to petition the court as a whole to review our decision en banc. Until any further petitions to this panel or the entire court are resolved, we cannot say that [the aggrieved party] has no probability of success on the merits.")

Because this Court ordinarily does not consider matters neither raised before nor decided by the courts below, *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970), by striking the timely motion for reconsideration, the Court of Appeals not

only foreclosed petitioner's chance of review by this Court of the issue raised in the motion for reconsideration, *e.g.* the Court of Appeals' decision conflicts with this Court's precedents *Boag* v. *MacDougall*, 454 U. S. 364 (1982), but also effectively diminished this Court's jurisdiction by preventing the issues from being brought to this Court.

Therefore, the writ will be in aid of this Court's appellate jurisdiction and petitioner met the threshold to justify the granting of the writ. *Roche* v. *Evaporated Milk Assn.*, 319 US 21, 25 (1943) ("[Appellate court's] authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.")

B. No other adequate means exist to obtain relief.

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

practically nullified this Court's rules that determine the finality of a judgment to be reviewed by this Court. This Court's Rule 13.3 states,

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

The rule becomes ineffective to determine the time to file a petition for a writ of certiorari in this Court when a timely filed motion for reconsideration is stricken, as the rule only considers the circumstances of granting a petition and denial of a petition. Supreme Court Rule 13.3. As a result, no court rules apply in this case to determine whether the Court of Appeals reached a final judgment for the purpose to seek a review in this Court, if so when the Court of Appeals reached a final judgment.

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

adjudicated rights and that that adjudication is not subject to further review by a [lower] court." Here, the record shows that the Court of Appeals did not find that a petition for rehearing or petition for writ of certiorari would be legally frivolous and did not find that any other good cause existed to suspend rehearing proceedings, it accepted petitioner's filing of motion for reconsideration and later struck it without adjudication. Pet. App. 1a, 3a. And the timely filing of the motion for reconsideration raised the possibility that the Court of Appeals' dismissal order might be reversed because its decision conflicts with this Court's ruling in *Boag* v. *MacDougall*, 454 U. S. 364 (1982) or *Marbury* v. *Madison*, 5 US 137 (1803) and *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) if the Court of Appeals adopted District Court' position of refusing to strike down the unconstitutional state statute because state courts have upheld it. Pet. App. 7a-32a. By striking the motion, the Court of Appeals manually removed the motion from the record, however the questions raised in the motion whether the Court of Appeals should reverse its order of dismissal remain unadjudicated. Pet. App. 1a, 3a, 5a-6a, 7a-32a.

No court decision has addressed the issue how striking a timely motion for reconsideration affects the finality of the judgment of a lower court. The Court of Appeals' striking order raises important questions of law of first impression. By striking the motion from the docket, the Court of Appeals evaded effective resolution of the questions presented to it, its conduct will very likely be followed

by others and the questions presented here will very likely recure. Adjudication by this Court would clarify the matters for judges, litigants, and lawyers.

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

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

Although the writ of mandamus is extraordinary relief, this Court has explained that it is appropriately used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) Here, a writ of mandamus is warranted given the exceptional circumstances that the Court of Appeals refused to adjudicate a motion for reconsideration that is properly presented to it. Pet. App. 1a, 3a, 5a-6a, 7a-32a.

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

unless other exceptional circumstances, such as emergency situations, exist. Here, to suspend rehearing proceedings, the Court of Appeals has a duty to adjudicate whether a petition for rehearing or petition for writ of certiorari from the Court of Appeals' dismissal order concluding "this appeal is frivolous" would be legally frivolous. The record shows that the Court of Appeals did not make such adjudication and made no findings of other exceptional circumstances. Pet. App. 3a. Federal Rules of Appellate Procedure Rule 2 also authorize a court of appeals to suspend a proceeding when a good cause exists. F.R.A.P. 2. Similarly, the Court of Appeals made no findings of any good causes pursuant to F.R.A.P. 2 to suspend a rehearing proceeding. Pet. App. 3a.

If a court of appeals is permitted not to adjudicate a rehearing proceeding, which is its duty to do, it would impose an added and unnecessary burden of adjudication upon this Court. *United States v. Healy*, 376 US 75, 80 (1964). In this case, had the Court of Appeals considered the contentions raised in the motion for reconsideration, a petition for a review in this Court could be avoided if the Court of Appeals corrected its errors, even if the Court of Appeals denied the motion, its decision and reasoning in denying the motion would make the record complete for this Court to review. Pet. App. 7a-32a.

Absence of a ruling of the motion for reconsideration, it is unclear whether the Court of Appeals agreed that its decision of dismissal was erroneous, and the issue raised in petitioner's appeal that District Court erred in dismissing the claim

is not fully adjudicated, Pet. App. 1a, 3a, 5a-6a, 7a-32a, as a result there is no judgment for this Court to review. *Gila Valley, G. & NR Co.* v. *Hall*, 232 US 94, 98 (1914) ("it is [the court of appeals'] judgment which is alone subject to our review"), *Magruder* v. *Drury*, 235 US 106, 112-113 (1914) ("This court ... sits as an appellate court for the purpose of reviewing the decree of the Court of Appeals, and that is the extent of the jurisdiction here.")

Accordingly, the denial of relief here would have the practical effect of diminishing this Court's power to bring the litigation to a natural conclusion and petitioner's right will be irretrievably lost as well. Thus, issuance of writ is justified in this exceptional circumstance. *McClellan* v. *Carland*, 217 US 268, 278 - 280 (1910) ("(w)e think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.")

II. In alternative, a writ of certiorari is warranted to decide when the Court of Appeals' judgment became final and what remedy this Court could issue.

A. Certiorari should be granted to settle the important question regarding the time within which review may be taken from the Court of Appeals' judgment.

The Court of Appeals' unauthorized action of striking a timely motion for reconsideration, if permitted, would invite uncertainty into the current provisions

of federal rules governing the time within which review may be taken from the Court of Appeals' judgments as no rules provides guidance on the time to file when a timely filed rehearing petition is stricken. 28 U.S.C. § 2101(c), this Court's Rule 13.3.

The Court of Appeals' dismissal order couldn't be considered as a judgment to start the clock to seek review in this Court, because solely a statement that "[n]o further filing will be entertained in this closed case", Pet. App. 3a, did not reasonably notify petitioner that the Court of Appeals had suspended the rehearing proceedings and petitioner's only possible judicial redress would be with this Court, as the Court of Appeals is required to find good cause to suspend a proceeding and it did not make such findings, Pet. App. 3a; F.R.A.P. 2, Ninth Circuit General Orders 4.6.a & 4.6.b, 28 U.S.C. §1254 (1). Because this Court's traditional practice precludes a grant of certiorari when "the question presented was not pressed or passed upon below", *United States* v. *Williams*, 504 US 36, 41 (1992), petitioner is required to raise the issue first in the Court of Appeals that its dismissal order is erroneous in that the Court of Appeals could not exercise its broad discretion to dismiss an in forma pauperis appeal as frivolous pursuant to 28 U.S.C. §1915(d) when the District Court's dismissal is based on the erroneous legal ground: the District Court refused to strike down the unconstitutional state statute because state courts have upheld it, see *Boag* v. *MacDougall*, 454 U. S. 364 (1982), and if the Court of Appeals adopted the District Court's ground of

dismissal, there is a federalism concern, *Marbury* v. *Madison*, 5 US 137, 176 (the U.S. Constitution is the "fundamental and paramount law of the nation"). Pet. App. 3a, 5a-6a, 7a-32a. By filing the reconsideration motion, petitioner raised the possibility that the Court of Appeals' dismissal order might be reversed, thus suspended the finality of the Court of Appeals' order. *Hibbs* v. *Winn*, 542 U.S. 88, 98, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)

Only the Court of Appeals' order striking the timely motion for reconsideration, Pet. App. 1a, could possibly be considered as a judgment for the purpose to seek this Court's review if this Court finds that the Court of Appeals reached a judgment, because only when the Court of Appeals issued its order on the reconsideration motion was petitioner notified to seek a review in this Court, before that, petitioner had to wait for a decision on the motion from the Court of Appeals. *Hibbs v. Winn*, 542 U.S. 88, 98 (2004) ("A timely petition for rehearing ... operates to suspend the finality of the ... court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties"). However, this Court's Rule 13.3 does not provide the time to file when a rehearing petition is stricken.

Only this Court can resolve the uncertainties in this Court's Rule 13.3. The petition for a writ of certiorari should be granted. *U.S. v. F. & M. Schaefer Brewing Co.*, 78 S.Ct. 674, 356 U.S. 227, 230-231 (1958) (certiorari was granted because of the public importance of the proper interpretation and uniform application of the

provisions of the Federal Rules governing the time to take appeals.); Supreme Court Rule 10.

B. Certiorari should be granted to settle the important question what remedy this Court could issue.

Because the Court of Appeals did not rule the timely motion for reconsideration, it is unclear whether the Court of Appeals conceded that its dismissal was erroneous, as a result it is uncertain what relief this Court could issue when this Court exercises its appellate jurisdiction under 28 U.S.C. §1254(1). Pet. App. 1a, 3a, 7a-32a.

Specially, a reversal is not available to reverse either the striking order or the dismissal that was not fully adjudicated because there are no meaningful contrary decisions. The relief could have been available had the Court of Appeals denied the motion for reconsideration. *Monroe* v. *Pape*, 365 U.S. 167, 170 (1961) (this Court granted writ of certiorari in action for violation of Federal Civil Rights Act, § 1983 of Title 42, because of a seeming conflict in Court of Appeals ruling affirming dismissal of complaint with Supreme Court's prior cases. Overruled on other grounds by 436 U.S. 658.)

A GVR order (grant, vacate, and remand) that overcomes the issue of uncertainty to exercise this Court's appellate jurisdiction under 28 U.S.C. §1254 (1) is also unavailable because a GVR order is generally issued when a lower court

did not have an opportunity to consider certain significant factors, *Lawrence on Behalf of Lawrence v. Chater*, 116 S.Ct. 604, 516 U.S. 163, 167-168 (1996), while in this case, the lower court had the opportunities to consider petitioner's motion for reconsideration and motion to recall mandate, which should have been granted had the motions been adjudicated, but the lower court refused to adjudicate them. Pet. App. 1a, 7a-50a. No precedent discussed whether a GVR is appropriate in this circumstance.

A remedy should be available to relieve petitioner from the unauthorized action of the Court of Appeals. *Marbury* v. *Madison*, 5 US 137, 163 (1803) ("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded".) And only this Court can determine what remedy this Court could issue in this exceptional circumstance. *Haynes v. U.S.*, 88 S.Ct. 722, 390 U.S. 85, 100-101 (1968) (this Court has plenary authority under 28 U. S. C. § 2106 to make such disposition of the case as may be just.) The petition for a writ of certiorari should be granted. *Sears, Roebuck & Co. v. Mackey*, 76 S.Ct. 895, 351 U.S. 427, 429 (1956) (certiorari was granted to determine an important issue of appellate jurisdiction), Supreme Court Rule 10.

C. This case presents an ideal vehicle to consider the important and recurring questions presented.

Resolving the questions presented are vitally important for courts and litigants. As discussed, the Court of Appeals' action of refusing to adjudicate a rehearing proceeding, if permitted, has the practical consequence of shifting the workload from the first level appellate court-the courts of appeals to this Court, and causing uncertainty in relevant procedural rules including but not limited to this Court Rule 13.3 and 28 U.S.C. § 2101(c) - rules governing the time within which a review may be taken from the judgments of court of appeals, 28 U. S. C. § 2106 – rules determining appellate remedies, and F.R.A.P. 2-rules authorizing suspending proceedings. The uncertainty places harsh jurisdictional consequences on litigants who miss the due dates to seek a review in this Court while waiting for court of appeals to adjudicate rehearing proceedings. The novel action of the Court of Appeals will very likely recur. This Court's clarification and guidance on proper applications of those rules in the circumstances, where a court of appeals refuses to adjudicate a rehearing proceeding, are needed by the lower courts and litigants.

This case also presents an ideal vehicle for this Court to resolve the questions presented. The issue is clearly presented, Pet. 1a, 3a, 7a-32a, and was briefed in petitioner's motion to recall mandate which was struck by the Court of Appeals as well. Pet. 1a, 33a-50a. In addition, there are no factual or procedural obstacles that would detract from the Court's ability to focus on this critical issue of law. Thus, this is the perfect case for resolving the questions presented.

CONCLUSION

The Court should issue a writ of mandamus to the Court of Appeals, ordering it adjudicate the timely filed motion for reconsideration. In the alternative, the Court should grant the petition for a writ of certiorari, vacate the court of appeals' order striking motion for reconsideration, or grant other and further relief as the Court deems proper.

Dated August 15, 2022.

Respectively submitted,

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Petitioner *in pro se*