

Appendix A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 12 2023

FOR THE NINTH CIRCUIT

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

MAI-TRANG THI NGUYEN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 22-16074

D.C. No. 5:22-cv-00948-NC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Nathanael M. Cousins, Magistrate Judge, Presiding**

Submitted June 26, 2023**

Before: CANBY, S.R. THOMAS, and CHRISTEN, Circuit Judges.

Mai-Trang Thi Nguyen appeals pro se from the district court's judgment dismissing her Federal Torts Claims Act action arising from voting procedures in the 2020 presidential election. We have jurisdiction under 28 U.S.C. § 1291. We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The parties consented to proceed before a magistrate judge. See 28 U.S.C. § 636(c).

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

APPENDIX A

review de novo a dismissal for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). We affirm.

The district court properly dismissed Nguyen's action because Nguyen failed to allege facts sufficient to establish Article III standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (explaining that constitutional standing requires an "injury in fact," causation, and redressability; "injury in fact" refers to "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent" (citation and internal quotation marks omitted)); *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003) (recognizing that a "generalized grievance against allegedly illegal government conduct" is insufficient to confer standing).

We do not consider Nguyen's contentions concerning the dismissal of her prior action because it is outside the scope of this appeal.

AFFIRMED.

APPENDIX B

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAI-TRANG THI NGUYEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Case No. 22-cv-00948-NC

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS**

Re: ECF 16

Plaintiff Mai-Trang Thi Nguyen sued Defendant the United States under the Federal Torts Claims Act (FTCA) for negligence in introducing its “new” vote by mail system in 2020 and subsequently failing to recount 2020 Presidential Election votes in battleground votes. This Court dismissed Nguyen’s previous case against the United States in January 2022. Now, the United States moves to dismiss the current lawsuit, arguing that it is not only barred by res judicata and is moot, but also that Nguyen lacks standing. Because the Court finds that: (1) this case arises from the same facts as the previous lawsuit that was dismissed with prejudice, and (2) Nguyen lacks standing, the Court GRANTS the United States’ motion and DISMISSES the complaint without leave to amend.

I. BACKGROUND

A. Prior Lawsuit, Case No. 20-cv-08755-NC (*Nguyen I*)

Nguyen sued Speaker Nancy Pelosi and Senator Mitch McConnell on December 9, 2020, under the FTCA for negligence in failing to conduct a recount of the 2020

APPENDIX B

United States District Court
Northern District of California

1 Presidential Election votes. *Nguyen I*, ECF 1 at 1. After several amendments, Nguyen
 2 submitted a third amended complaint with substantially the same claim, but with the
 3 United States as the sole defendant. *Nguyen I*, ECF 23. Nguyen claimed that the United
 4 States' negligence "became the seed of [her] mental-illness injury," alleging damages of
 5 "\$1 trillion" for failing its duties "to vindicate the results of this coronavirus-infected
 6 Presidential Election of 2020." *Id.* at 4, 6. The Court found that Nguyen lacked standing
 7 to sue—her mental illness injury was not particularized, and her requested relief of a
 8 "recount-recheck" was "beyond this court's ability to redress absent the mythical time
 9 machine." *Nguyen I*, ECF 33 at 3 (citing *Feehan v. Wis. Elections Comm'n*, 506 F. Supp.
 10 3d 596, 615 (E.D. Wis. 2020)). Because Nguyen was unable to establish standing after
 11 three amendments, the Court dismissed the case with prejudice and entered judgment on
 12 January 11, 2022.¹ *Id.*

13 **B. Current Lawsuit, Case No. 22-cv-00948-NC**

14 On February 16, 2022, Nguyen brought a second suit against the United States
 15 under the FTCA for negligence in conducting the 2020 Presidential Election during the
 16 coronavirus pandemic. ECF 1. First, Nguyen alleges that the United States negligently
 17 launched and "forced" Nguyen to accept a vote by mail system, a "brand new product" that
 18 had "cracks and holes." *Id.* at 7–9. Second, Nguyen alleges that because the government
 19 was negligent in administering the vote by mail system, this warrants an "automatic
 20 recount-recheck in battleground states" to "vindicate the results" of the 2020 Presidential
 21 Election. *Id.* at 15, 17. Nguyen further alleges that the United States' negligence caused
 22 her "mental illness injury" and "cost [her] a lot of money." *Id.* at 11–12. Nguyen seeks
 23 "\$1 trillion for her mental injury" or the "cost of writing the suit" and a "letter of apology."
 24 *Id.* at 19. The United States moves to dismiss the lawsuit arguing res judicata and lack of
 25 standing. ECF 16.

26 All parties have consented to magistrate judge jurisdiction. ECF 3; ECF 12.

27
 28 ¹ The full extent of the Court's reasoning for dismissing the case can be found at Case No. 20-cv-08755, ECF 48.

APPENDIX B**II. LEGAL STANDARD**

Federal courts are courts of limited jurisdiction and are presumptively without jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “Article III of the Constitution limits federal court jurisdiction to cases and controversies.” *Flint v. Dennison*, 488 F.3d 816, 823 (9th Cir. 2007) (cleaned up). Rule 12(b)(1) allows a defendant to move for dismissal for lack of subject-matter jurisdiction. It is the plaintiff’s burden to establish the existence of subject matter jurisdiction in response to a 12(b)(1) motion. *See Kingman Reef Atoll Inv., LLC v. U.S.*, 541 F.3d 1189, 1197 (9th Cir. 2008).

III. DISCUSSION**A. The Current Lawsuit is Barred by Res Judicata**

The United States first challenges the complaint on the grounds of res judicata. ECF 16 at 4. Res judicata, or claim preclusion, bars litigation of any claims that were raised or could have been raised in a prior action. *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). “Claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated.” *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020). Res judicata “has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party. . . and of promoting judicial economy by preventing needless litigation.” *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). For res judicata to apply there must be: (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties. *W. Radio Servs. Co.*, 123 F.3d at 1192. Under these criteria, the Court dismisses Nguyen’s Complaint under res judicata.

First, there is an identity of claims between this case and Nguyen’s prior case. To satisfy this factor, the two suits need only to arise out of the same transactional nucleus of facts. *Lenk v. Monolithic Power Sys., Inc.*, Case No. 16-cv-02625-BLF (NC), 2017 WL 2491597, at *2 (N.D. Cal. Apr. 20, 2017). Here, both lawsuits arise from nearly identical facts concerning the 2020 Presidential Election—Nguyen bases her claims on the government’s negligence in the 2020 Presidential Election for failing to conduct a

APPENDIX B

United States District Court
Northern District of California

1 “recount-recheck” in response to the use of vote by mail. *Compare* ECF 1 at 17 (alleging
2 that there should be “recount-recheck” due to the government’s negligence in “launching
3 its . . . vote by mail system[] for the 2020 President Election”) *with Nguyen I*, ECF 23 at 4,
4 6 (alleging during the Presidential Election of 2020, the government should have
5 conducted a “recount-recheck” due to the “first launch” of nationwide mail-in ballots).

6 Nguyen argues that the current case is “not EXACTLY the same” because it
7 “contains one more tort claim. . . and contains [new] real-life evidence of duplicate-voting
8 ballots.” ECF 18 at 1–2. These changes are not sufficient to defeat the identity of claims.
9 An additional claim does not preclude cases from having the same transactional nucleus of
10 facts. *See Lenk*, Case No. 16-cv-02625-BLF (NC), 2017 WL 2491597, at *2 (stating that
11 “two cases can have the same transactional nucleus of facts even if the second lawsuit
12 identifies new claims”). Further, Nguyen’s inclusion of new evidence of the same
13 negligence does not create a different claim. Thus, the Court finds that there is an identity
14 of claims.

15 Second, there was a final judgment on the merits in the previous case. “The
16 dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a
17 judgment on the merits.” *Federated Dep’t Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981).
18 The Court ruled twice on motions to dismiss and entered final judgment in Nguyen’s prior
19 case. *Nguyen I*, ECF 22; *Nguyen I*, ECF 48, *Nguyen I*, ECF 49. Therefore, there was
20 already a judgment on the merits.

21 Third, there is an identity or privity of parties in the two actions. Privity exists
22 when a party is “so identified in interest with a party to former litigation that he represents
23 precisely the same right in respect to the subject matter involved.” *Stratosphere Litig. LLC*
24 *v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002). Nguyen was the plaintiff
25 in both suits against the defendant, the United States. Accordingly, the Court finds that
26 there is privity.

27 Because there is an identity of claims, a final judgment on the merits, and identity
28 or privity between the parties, the Court concludes that this case is barred by *res judicata*.

APPENDIX B**B. No Leave to Amend due to Uncurable Deficiencies**

Generally, a court must grant leave to amend freely. Fed. R. Civ. P. 15(a).

However, in doing so, the Court considers futility of the proposed amendment. *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th Cir. 1984). Here, the Court finds that granting leave to amend would be futile.

The current lawsuit, like the three complaints Nguyen filed in the prior lawsuit, lacks standing for not alleging a cognizable injury or redressability. Nguyen's alleged harm is shared by other "Trump[] voter[s]" and "[United States'] citizens" and is therefore not a particular, concrete injury. ECF 1 at 7-10. Nguyen's requested relief of a "recount-recheck" is also not redressable.² There is no provision in the U.S. Constitution or federal law for an audit or re-do of a presidential election two years later.³

Thus, because Nguyen has not been able to cure her lack of standing in three prior complaints and because this complaint is barred by res judicata, the Court finds granting leave to amend would be futile. *See Lopez v. Smith*, 2003 F.3d 1122, 1127 (9th Cir. 2000).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the United States' motion to dismiss and DISMISSES the complaint with prejudice and without leave to amend.

IT IS SO ORDERED.

Dated: July 18, 2022


NATHANAEL M. COUSINS
United States Magistrate Judge

² If there was a mistake with Nguyen's ballot, she should contact the Santa Clara County Registrar of Voters (<https://sccvote.sccgov.org/search-results-0#1849274314-2996967254>). If Nguyen does not like the results of an election, she is encouraged to vote again in the next one. If Nguyen seeks to change the rules for nationwide elections, she should contact her representative (<https://www.congress.gov/members/find-your-member>).
³ Nguyen's complaint is also moot because the Courts cannot turn back the clock and order a recount of results that are already final and certified.

APPENDIX C

UNITED STATES COURT OF APPEALS

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

MAI-TRANG THI NGUYEN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 22-16074

D.C. No. 5:22-cv-00948-NC
Northern District of California,
San Jose

ORDER

Before: CANBY, S.R. THOMAS, and CHRISTEN, Circuit Judges.

Nguyen's petition for panel rehearing (Docket Entry No. 13) is denied.

No further filings will be entertained in this closed case.