No. 24-645

IN THE
Supreme Court of the United States

KELSEY CASCADIA ROSE JULIANA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

PHILIP L. GREGORY
GREGORY LAW GROUP
1250 Godetia Drive
Redwood City, CA 94062

JULIA A. OLSON
Counsel of Record
ANDREA K. RODGERS
LAURA MEBERT
OUR CHILDREN'S TRUST
1216 Lincoln St.
Eugene, OR 97401
(415) 786-4825
julia@ourchildrenstrust.org

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other Authorities

SUMMARY OF THE ARGUMENT

The court of appeals denied Plaintiffs' standing on redressability grounds only. Thereafter, Plaintiffs filed an amended complaint in 2023 for declaratory relief that section 201b(c) of the Energy Policy Act and executive agency energy policies and practices are unconstitutional because they infringe Plaintiffs' individual Fifth Amendment rights to life and liberty, and Plaintiffs' access to, and enjoyment of, federally protected public trust resources. There is no final judgment on the merits because this case has been tangled up for ten years by the Government's numerous interlocutory appeal and mandamus petitions, which ultimately led to a mandamus dismissal. Plaintiffs' first question asks whether a declaratory judgment regarding the constitutionality of federal policies—without proof of specific actions relevant actors will subsequently take in response to declaratory judgment—satisfies the redressability element of standing.

A hold followed by a grant, vacate, and remand ("GVR") would be a traditional and equitable course of action where this Court has now granted certiorari on all other cases on the Ninth Circuit's side of the redressability circuit split, including *Gutierrez v. Saenz*, No. 23-7809 (Fifth), and *Diamond Alternative Energy v. EPA*, No. 24-7 (D.C.). Fossil fuel companies, a man on death row, and youth have all petitioned this Court to clarify the redressability rule that denied them access to federal courts. They all seek a straightforward redressability rule like the ones this Court articulated in *Uzuegbunam v. Preczewski* and *Reed v. Goertz*. This Court's forthcoming opinions in *Diamond* and *Gutierrez* will undoubtedly affect the

Ninth Circuit's treatment of Plaintiffs' standing. However, unlike the complicated interplay between federal law, state law, and prosecutorial discretion in *Gutierrez*, this case involves only federal law and federal defendants. It is even more straightforward than the potentially sunsetting regulation challenged in *Diamond* because Plaintiffs here already offered sufficient pre-trial proof of injury and traceability and there is no possibility that the challenged statute and policies will cease without judicial intervention.

To answer a central question posed during the *Gutierrez* argument and the Government's opposition here, a declaratory judgment in Plaintiffs' favor would accomplish at least three things: it would preclusively (1) determine the statute and other policies and practices relied on by the Government are unconstitutional, coercing a change in policies and practices causing Plaintiffs harm; (2) resolve the ongoing controversy between the parties over the factual contours of Plaintiffs' rights to life and liberty, delineating the point of constitutional infringement in the context of the challenged energy policies that harm Plaintiffs' survival resources and their persons; and (3) resolve the controversy over the Government's public trustee obligation to avoid substantially impairing national public trust resources and the line for substantial impairment. It is a fair assumption that government statutes and policies will advance their intended effect—here fossil fuel production and pollution—and an equally fair assumption that a declaratory judgment of unconstitutionality will at least frustrate those activities and partially redress the injury to those who are harmed by the policies' intended effects. By demanding more in a redressability showing, the Ninth Circuit, like the

Fifth and D.C. Circuits, defies this Court's precedents, diverges from other circuits, and strays from Article III's original meaning.

The Government opposes certiorari with obfuscations about Plaintiffs' inoperative 2015 complaint, obsolete injunctive relief requests, and an already-dismissed Ninth Amendment claim. Despite the Government's arguments, the only operative complaint here is the 2023 amended complaint, which the Ninth Circuit never reviewed. The case for *declaratory* relief before the Court today is different from the case for declaratory and *injunctive* relief this Court briefly considered in 2018, which the Government tries to re-litigate now. Importantly, the Ninth Circuit, via its 2024 mandamus order, circumvented review of the district court's 2023 motion to dismiss order, which held that Plaintiffs have standing to proceed to trial on the 2023 amended complaint. The court of appeals blindly repeated its 2020 ruling that declaratory judgment was insufficient for redressability in this constitutional case. Because the court of appeals has not analyzed Plaintiffs' standing to bring their 2023 complaint, the equities favor a GVR order.

On the second question presented, the Government ignores that the Ninth Circuit awarded mandamus applying simple de novo review, spiting *Cheney v. U.S. District Court for District of Columbia*. Unlike other circuits, which hold that the three *Cheney* conditions must be satisfied before mandamus may issue, including in mandate-enforcing situations, the Ninth Circuit *Vizcaino* split holds that mandate-enforcing situations give courts a get-out-of-*Cheney*-free card. At a time when mandamus petitions are

trending, Pet. 31, the use of different mandamus standards than the one set by this Court, for such an extraordinary remedy, warrants correction. If this Court holds this petition and issues a GVR after *Gutierrez* and *Diamond* clarify redressability, the Court should additionally instruct the Ninth Circuit to adhere to all three *Cheney* conditions on remand.

ARGUMENT

I. A GVR on Redressability Regarding *Gutierrez* and *Diamond* is Warranted.

When Plaintiffs filed their petition, this Court had already granted certiorari in *Gutierrez* on a question nearly identical to Plaintiffs' first question. Accordingly, Plaintiffs requested a hold and GVR. Pet. 37. Subsequently, this Court granted certiorari in *Diamond* on a substantially similar redressability question. No. 24-7. A GVR will ensure the Ninth Circuit is not the sole outlier and will conform its Article III redressability doctrine to this Court's precedents.

The Court flexibly and liberally considers whether "the overall probabilities and equities support the GVR order." *Lawrence v. Chater*, 516 U.S. 163, 168, 173 (1996). The Court's "power to GVR" is "broad," and "all Members of this Court . . . are agreed that a wide range of intervening developments . . . may justify a GVR order." *Id.* at 166, 173. "[A] reasonable probability that the lower court relied on the point at issue . . . suffice[s]." *Id.* at 171. Here, the Ninth Circuit relied on the same type of redressability analysis this Court will resolve in *Gutierrez* and *Diamond*, regarding whether the judgment alone—absent

evidentiary proof of what specific actions relevant actors will subsequently take in response to the judgment—satisfies the redressability element of standing. App. 116a.[1]

The redressability question is arguably easier to resolve here than in *Gutierrez* for lack of federal-state issues. The probability of a different outcome on remand is stronger here, where redressability was the Ninth Circuit's sole basis for dismissal, Pet. 11, 14; App. 2a-4a, compared with *Diamond* where the lower court did not examine injury or traceability and may still find a lack of standing on those grounds, or find the case moot. *Ohio v. EPA*, 98 F.4th 288, 301 (D.C. Cir. 2024). Because certiorari was appropriate in *Gutierrez* and *Diamond*, a GVR is appropriate here.

The equities also support a GVR because "[g]iving [plaintiffs] a chance to benefit from" the intervening legal development "furthers fairness by treating [plaintiffs] like other future" plaintiffs who are similarly situated. *Lawrence*, 516 U.S. at 174-75. The Government's countervailing concerns are only the time and resources attorneys spend doing their jobs. Opp'n 16. Such concerns are universal to all defendants and are especially unpersuasive coming from the well-resourced DOJ whose extraordinary mandamus efforts escalated the time and costs of this case. App. 171a n.1; Br. of Amici Curiae Public Justice at 9. If that concern factors into the equities, then so must the democratic good of giving Plaintiffs full opportunity to make their case vindicating a violation

[1] *See, e.g.*, Br. for Amicus Curiae American Petroleum Institute and Br. for Amici Curiae Our Children's Trust and Public Justice, No. 24-7 (Feb. 3, 2025).

of fundamental constitutional rights to life and liberty, and giving due respect to Congressional enactment of the Declaratory Judgment Act. Moreover, the Government's concern here is far less serious than the Court's concern about the "unfair" litigation strategies present in *Lawrence*, which did not "require that we deprive [the plaintiff] of the benefit of a favorable" change in the law. 516 U.S. at 175. Nor does it here.

II. Plaintiffs' Challenge to a Statute, an Order, and Other Specified Policies and Practices is No Barrier to Standing.

1. While standing is not defeated by the size of a plaintiff's claims, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 484 (1982), the Government overstates this case's breadth. The specific government conduct challenged in the second amended complaint includes 15 U.S.C. § 717b(c); DOE/FE Order No. 3041; and specific patterns of related agency conduct, like authorizing extraction of five trillion cubic feet of natural gas annually from federal lands. Pet. 6-7; App. 237a. The district court narrowed Plaintiffs' constitutional claims to the Fifth Amendment Due Process Clause's protections of life and liberty and the federal public trust doctrine. Pet. 12; App. 25a-78a. The only requested relief at issue are Plaintiffs' 2023 requests for declaratory relief. Although the Ninth Circuit previously held that the 2015 complaint's requested remedial plan was beyond the power of the court, App. 116a-19a, that holding is not at issue here.

At bottom, this case, alongside *Gutierrez* and *Diamond*, concerns the federal courts' power to

declare a plaintiff's rights relative to the defendant without exercising coercive force. That power lies at the center, not periphery, of the courts' role in our tripartite system of government. THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (Colonial Press, 1901) (The federal courts' role is to exercise "merely judgment," not "force," and a court "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933).

Federal courts are no strangers to judgments declaring statutes, regulations, and even large-scale government conduct unconstitutional. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), *supplemented sub nom.* 349 U.S. 294, 298 (1955); *cf. Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 190 (2023); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984); *see also Ziglar v. Abbasi*, 582 U.S. 120, 144 (2017). This case is squarely within American courts' power to judge.

2. All five federal judges to have evaluated Plaintiffs' Article III standing unanimously concluded that Plaintiffs' evidence established concrete, particularized injuries fairly traceable to the named defendants' challenged conduct. Pet. 11, 7-9. The Government does not dispute the "copious expert evidence" and damning findings of fact that supported the lower courts' pre-trial conclusions on injury and traceability. Pet. 6, 7-9, 11.

"The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely

shared, [] but each individual suffers a particularized harm." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016). In generalized grievances, "the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998). Here, by contrast, Plaintiffs' particularized injuries are far from abstract and include individual harm to a child's bodily health, repeated flooding of a child's home, and forced abandonment of a Native child's home on the Navajo Reservation. Pet. 8. The Government's admissions establish traceability. Pet. 7-8. A declaratory judgment on the constitutionality of section 201b(c), for instance, which is effective and contributes to Plaintiffs' personal injuries, cannot be considered "[a]n abstract declaration of rights," Opp'n 12, without undermining the very purpose of Article III.

3. Plaintiffs agree that "[r]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023); Opp'n 12. Unlike the *Brackeen* plaintiffs, the Plaintiffs here sued the correct defendants, whom a declaratory judgment would bind, "preclud[ing] the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). This "preclusive effect" of the unconstitutionality of government acts "saves" declaratory judgments "from a redressability problem." *Cf. Brackeen*, 599 U.S. at 293. The "practical consequence" of a court-ordered "change in legal status" is that a reasonable person would be likelier

than before to conform their conduct to it. *See* Pet. 23; *Utah v. Evans*, 536 U.S. 452, 464 (2002).

Contrary to the Government's contention, *Uzuegbunam* does have "bearing on this suit," Opp'n 12, because the "'irreducible constitutional minimum' of Article III standing" should not be higher for prospective relief than for purely retrospective nominal relief for non-economic injury. *Uzuegbunam*, 592 U.S. at 285, 292; Pet. 20.

III. The Mandamus Question Also Warrants a GVR or Alternatively Certiorari.

Plaintiffs' second question concerns whether the three *Cheney* conditions "must" always be satisfied before mandamus may issue, or whether there are exceptions, as the Ninth Circuit, in creating the circuit split from this Court's precedent, posits. 542 U.S. at 380-81; Pet. 26-30.

An accurate account of the proceedings below is critical to this question. In 2020, the Ninth Circuit dismissed Plaintiffs' 2015 complaint without prejudice for lack of redressability. Pet. 11. There was no judgment on the merits. In 2023, the district court accepted Plaintiffs' timely amended complaint. Pet. 12. The 2015 complaint, over which the Ninth Circuit's 2021 mandate issued, is no longer operative. The Ninth Circuit did not review for redressability the 2023 second amended complaint for declaratory relief. Pet. 14. Instead, ignoring *Cheney,* it relied on *Vizcaino* to take de novo review *on mandamus* of the district court's order allowing leave to amend. *Id.*; *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999). Doing so leap-frogged the Final Judgment Rule to apply the earlier mandate

regarding the 2015 complaint, *de novo,* to Plaintiffs' 2023 amended complaint—without considering how the 2023 complaint differed from 2015. Had the Ninth Circuit applied the mandatory *Cheney* conditions, it would have had no choice but to deny the Government's mandamus petition. Pet. 35-37.

A. A GVR to Apply *Cheney* is Warranted.

The Government opposes certiorari by arguing that *Cheney*'s treatment of the most potent weapon in the judicial arsenal is flexible, not mandatory. Opp'n 17 ("a party generally must show…"). The Government asks the Court to give the Ninth Circuit a pass for defying this Court's test for when mandamus may issue, "[r]egardless of whether the court of appeals' opinion articulated the correct test," Opp'n 21-22, or applied it to the correct complaint. In their view, "the government had no alternative means of preventing an unlawful, time-consuming, wasteful, and intrusive trial." Opp'n 17. That argument defies this Court's precedent. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943). The equities favor a GVR to the Ninth Circuit to comply with *Cheney* because it would limit DOJ's future misuse of mandamus petitions without supporting evidence and clarify that *Cheney*'s conditions are required always, not "generally." A GVR after *Gutierrez* and *Diamond* that also reiterates *Cheney*'s requirements is warranted here.

B. This Case is an Effective Vehicle to Resolve the *Vizcaino* Circuit Split.

Defendants misconstrue the *Vizcaino* circuit split. Opp'n 20-21. In that split, the Ninth Circuit treats

mandate-enforcing situations as a get-out-of-*Cheney*-conditions-free card. *See* Pet. 26-29.

This case is a good vehicle for resolving the *Vizcaino* split because it illustrates why applying *Vizcaino* instead of *Cheney* leads to very different mandamus outcomes. Even if the Ninth, Eleventh, and Federal Circuits' failure to apply *Cheney* is harmless in cases where the conditions are nonetheless met, the Government cannot satisfy *Cheney*'s conditions here, Opp'n 17-18, for three reasons in addition to those explained in Plaintiffs' Petition, 35-37.

First, this Court has emphatically rejected the Government's arguments for satisfying the first *Cheney* condition. Because the orders the Government challenged through mandamus were appealable after final judgment, the Government failed the first *Cheney* condition. Pet. 36; *Roche*, 319 U.S. at 27-28; Opp'n 17. A desire to avoid litigation expenses or trial cannot satisfy that condition. Br. for Amici Curiae Public Justice at 6-17. Trial cannot possibly be "intrusive" because discovery has not been intrusive. *In re United States*, 895 F.3d 1101, 1105 (9th Cir. 2018) ("[T]he government has not challenged a single specific discovery request, and the district court has not issued a single order compelling discovery."); *see* Pet. 7-8, 13.

Second, the Government's right to relief was not clear and indisputable, as *Cheney* requires. Pet. 36. A court of appeals can dismiss a case with leave to amend, without leave to amend, or silent on leave to amend. The 2020 Opinion's dismissal was silent on leave to amend. App. 101a-64a. Two circuit precedents—*Nguyen* and *S.F. Herring*—

unambiguously *required* the district court to interpret a Ninth Circuit dismissal order that is silent on leave to amend as *mandating* the district court to allow amendment, which the district court obeyed. *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986); *S.F. Herring Ass'n v. Dep't of Interior*, 946 F.3d 564, 574 (9th Cir. 2019); App. 12a, 14a, 45a, 89a, 92a; *see also* Fed. R. Civ. P. 15(a)(2). Those cases are fatal to the Government's theory that the 2020 dismissal foreclosed leave to amend. *Compare* Pet. 36 *with* Opp'n 17.

Third, contrary to the Government's assertion, Opp'n 17, Plaintiffs' 2023 amended complaint added factual allegations that demonstrated a basis for Article III jurisdiction. App. 47a (finding injury and traceability), 88a-100a & 55a-58a (finding the second amended complaint "fit[]" redressability "like a glove"). It simply cannot be said that the district court gave the Government's arguments anything less than full consideration, Pet. 37, whereas the Ninth Circuit's mandamus order gave Plaintiffs' standing *none*.

CONCLUSION

This Court should hold this petition pending the Court's opinions in *Gutierrez* and *Diamond*, and then grant, vacate, and remand to the Ninth Circuit for further proceedings consistent therewith and consistent with the standard articulated in *Cheney*. Alternatively, this Court should grant certiorari.

Respectfully submitted,

PHILIP L. GREGORY
GREGORY LAW GROUP
1250 Godetia Drive
Redwood City, CA 94062

JULIA A. OLSON
Counsel of Record
ANDREA K. RODGERS
LAURA MEBERT
OUR CHILDREN'S TRUST
1216 Lincoln St.
Eugene, OR 97401
(415) 786-4825
julia@ourchildrenstrust.org

Counsel for Petitioners

February 26, 2025