No. 16-16325

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DUARTE NURSERY, INC., a California Corporation;
and JOHN DUARTE,

Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and
THE UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable, Kimberly J. Mueller District Judge

OPPOSITION TO UNITED STATES MOTION TO DISMISS APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Duarte Nursery, Inc., a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

INTRODUCTION

This Court has jurisdiction over this appeal, because it is taken from an immediately appealable collateral order. The Court should deny the government's motion to dismiss.

The order below meets all three factors to be considered a collateral order. The district court's dismissal of Appellants' First Amendment retaliation claim conclusively determines the applicable dispute, after multiple rounds of motion practice in the trial court on the question. The dismissal on sovereign immunity grounds is completely separate from the merits of Appellants' First Amendment retaliation claim. The retaliation claim is a sufficiently important issue, because its purpose is to vindicate important First Amendment freedoms and protect citizens from retaliatory government action. The dismissal below will also be effectively unreviewable on appeal from a final judgment, because success on the merits of this claim would bar the government from further pursuing a retaliatory Clean Water Act enforcement action against Appellants. Dismissal of the retaliation claim subjects Appellants to trial on the retaliatory Clean Water Act claim, which will significantly frustrate the important constitutional right to be free from retaliatory government enforcement. This harm cannot be avoided on appeal after final judgment. This Court should rule that the dismissal below falls under the collateral order doctrine, and deny the motion.

If the Court rules the dismissal below not to be appealable, Appellants respectfully request that the Court treat the notice of appeal as a petition for writ of mandate.

The following pages begin by describing First Amendment retaliation claims and the relief they afford, then provides a brief overview of the government's retaliation against Appellants as alleged in the pleadings, proceeds to a necessarily detailed review of the procedural history below, and then analyzes the dismissal below under the appropriate legal authorities to demonstrate that the collateral order doctrine applies. This opposition concludes with a request in the alternative that the Court treat Appellants' notice of appeal as a petition for writ of mandate.

LEGAL BACKGROUND
FIRST AMENDMENT RETALIATION DOCTRINE

First Amendment retaliation claims exist to protect citizens from adverse government action that is motivated by the citizen's exercise of rights to free speech, free association, and to petition government. Even where government has discretion to take adverse action in general, it may not do so in retaliation for the target's exercise of First Amendment rights. *See generally, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). A First Amendment retaliation claim requires a showing of three elements: (1) that the plaintiff was engaged in First Amendment-protected activity, (2) [that] "the defendant's actions would chill a

person of ordinary firmness from continuing to engage in that activity," and (3) that the plaintiff's First Amendment-protected activity "was a substantial or motivating factor in the defendant's conduct." *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (citations omitted). First Amendment retaliation claims can be brought against federal agencies, in the context of environmental enforcement litigation. *Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. 1243, 1256 (E.D. Cal. 1994) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. 274).

Under the first element, suing government agencies is a well established First Amendment-protected activity. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)).

The second element is directed to whether a person of ordinary firmness would be chilled in the exercise of First Amendment rights, not whether the particular plaintiff has been chilled. *Mendocino Environmental Center v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

The third element addresses the role that the plaintiff's protected activity played in the government's decision to act against the plaintiff. The plaintiff must show that First Amendment conduct was a "substantial" or "motivating" factor in the government's decision. *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287.

Once this prima facie showing is made, the burden shifts to the government to show that it would have taken the same action even without the plaintiff's First Amendment activity. *Id.*

Federal courts may enjoin federal enforcement proceedings as a remedy for First Amendment retaliation. *Denney v. DEA*, 508 F. Supp. 2d 815 (E.D. Cal. 2007) (physician had standing to seek injunctive relief against federal investigation retaliating against his speech in favor of medical marijuana); *Cf. American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1065-66 (9th Cir. 1995) (injunction against policy of deporting aliens in retaliation for exercise of First Amendment right of association), *vacated on other grounds by*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

APPELLANTS' DUE PROCESS LAWSUIT AGAINST THE U.S. ARMY CORPS OF ENGINEERS RESULTED IN A RETALIATORY CLEAN WATER ACT ENFORCEMENT AGAINST APPELLANTS

On February 23, 2013, under the auspices of the Clean Water Act, 33 U.S.C. section 1251, *et seq*. (the Act), the U.S. Army Corps of Engineers (Corps) ordered Duarte Nursery, Inc. (Duarte Nursery), and it's president John Duarte (jointly Duarte), to cease all work in any waters of the United States on certain California farmland (the Property) which Duarte Nursery owns and had plowed for a wheat crop the prior Fall. The only action Duarte Nursery took in any waters of the U.S. that may be on

the Property was plowing, which is not a "discharge" under applicable regulations and therefore not subject to the Clean Water Act. 33 C.F.R. § 324.4(a)(1)(iii)(D). Furthermore, normal farming practices are generally exempt from permitting under the Act. 33 U.S.C. § 1344(f)(1)(A). So, Duarte wrote the Corps, denying liability for exempt activities under the Act, requesting a hearing and all available information on which the order was based, and offering to cooperate in further investigation once the agency provided the requested information. *See* Duarte Points and Authorities in Support of Motion for Summary Judgment on Due Process Claims, ECF 136-1 at 13-17, and Duarte Separate Statement of Undisputed Facts on Due Process Claim, ECF 136-2.[1]

Corps staff dismissed this letter as "a ranting fishing expedition," and then purged the investigation file to prevent disclosure under the Freedom of Information Act. The Corps' response to Duarte's letter provided almost none of the information Duarte had requested.[2] The Corps withheld its entire investigation file, and provided no details on how the Corps claimed Duarte had violated the Act. *Id.*

On October 10, 2013, Duarte sued the Corps for violating Duarte's procedural due process rights, in the U.S. District Court for the Eastern District of California. On

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[1] All ECF references are to the district court docket below, *Duarte Nursery Inc., v. United States Army Corps of Engineers*, E.D. Cal., No. 2:12-cv-02095-KJM-DB.

[2] The Corps did send an expired wetland delineation on the Property, done for a different owner in 1994.

that very day, the Corps staff was finalizing documents to refer its investigation in the matter to the U.S. Environmental Protection Agency (EPA) for possible administrative enforcement, although they had low expectations that EPA would take action. But then, as a direct response to Duarte's lawsuit, and substantially motivated in retaliation for that lawsuit, the Corps changed course and instead referred the case directly to the Department of Justice for a civil enforcement lawsuit. The Justice Department, also substantially motivated in retaliation against Duarte's lawsuit, approved the enforcement suit and on May 7, 2014, the United States filed a civil enforcement action against Duarte as a counterclaim in Duarte's pending suit against the Corps. Second Amended Complaint, ¶¶ 81-85, ECF 90 at 14-15.

PROCEDURAL HISTORY

On October 10, 2103, Duarte filed the due process Complaint against the Corps. ECF 1. On May 7, 2014, The United States filed an Answer, and its retaliatory Counterclaim.[3] ECF 28. In response to the retaliatory Counterclaim, Duarte sought leave to supplement the Complaint to state a claim against the Corps for First Amendment retaliation. ECF 34. The government did not oppose this motion, and on

[3] The Counterclaim alleges that Duarte "deep ripped" the Property. *See generally Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001) ("deep ripping" in waters of U.S. without Corps permit may violate Clean Water Act). But, when the government's experts actually inspected the Property for the first time, they learned that it had not been deep ripped, and the government changed its theory of the case. It now contends that mere plowing violates the Act.

August 6, 2014, the court granted it. ECF 40. On August 20, 2014. Duarte filed the First Supplemental Complaint. ECF 41.

The U.S. then moved to dismiss the retaliation claim, on grounds including failure to state a claim and sovereign immunity. ECF 46. On March 23, 2105, the district court granted the motion, on the ground that Duarte failed to sufficiently plead the necessary facts, with leave to amend within 21 days. ECF 63 at 7-8.[4]

After leave to amend had expired, Duarte ultimately obtained evidence necessary to allege the facts required for First Amendment retaliation. So on July 7, 2015, Duarte moved a second time to amend. ECF 80. Duarte supported the motion with evidence obtained in discovery, including deposition testimony that a Justice Department attorney explained the Counterclaim as follows: "You know they sued us. . . . Well, so we are suing them." Decl. In Support of Motion to Amend, ¶ 10 and Exhibit F thereto, ECF 80-2 at 3:14-17, ECF 80-8 at 3.

This time, the government opposed amendment, arguing only that amendment would be futile, on the claimed ground that the proposed pleading still did not allege adequate facts to make out a claim for First Amendment retaliation. ECF 82. On September 2, 2015, the district court granted leave to amend, finding that "[t]he claim is [] legally sufficient and amendment would not be futile." ECF 89 at 6:17-18. On

[4] The district court did not address sovereign immunity at this time.

September 3, 2015, Duarte filed the Second Amended Complaint, including the claim for First Amendment retaliation. ECF 90 at 14-15.

The allegations[5] include that Duarte filed the original due process complaint against the Corps, and engaged in a variety of related public statements in connection with the lawsuit. Second Amended Complaint, ¶ 81, ECF 90 at 16:16-22. Duarte further alleges that prior to the due process lawsuit, the Corps determined that its Clean Water Act investigation did not warrant a referral for litigation, but that after the lawsuit, the Corps abandoned this determination, as well as its already-prepared administrative referral to EPA. ECF 90 at 17:8-17. Duarte also alleged that the referral to the Justice Department was not legally warranted, that the due process lawsuit and related press activity were substantial or motivating factors in the Corps' decision to refer the matter to the Justice Department, and that the decision to file the Counterclaim against Duarte would not have been made absent the Corps' retaliatory motive. ECF 90 at 17:11-20. The Second Amended Complaint seeks a prohibitory injunction preventing the Corps and United States from prosecuting the Counterclaim and taking other enforcement actions in violation of Duarte's First Amendment rights. ECF 90 at 23:10-13.

[5] The dismissal below was pursuant to Fed. R. Civ. P. 12(b)(1). As such, the well-plead allegations of the Second Amended Complaint are to be taken as true by the court. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

On October 23, 2015, the parties filed multiple summary judgment motions. Both Duarte and the government moved for summary judgment on whether Duarte's plowing violated the Act. ECF 127 (Duarte motion); ECF 139 (government's motion). In opposition to the government's motion, Duarte interposed its First Amendment retaliation claim as a bar to the government's further prosecution of its retaliatory enforcement Counterclaim. ECF 150 at 14-15.

Also on October 23, 2015, the government again moved to dismiss Duarte's First Amendment retaliation claim, on sovereign immunity grounds. ECF 134, 134-1 at 5-8. Duarte opposed this motion, and presented extensive evidence to show that: prior to Duarte filing the due process lawsuit, the Corps did not consider this matter suitable for enforcement litigation and instead intended to refer it to the EPA for possible administrative action; that the Corps staff had low expectations that EPA would do anything; that after Duarte filed the due process lawsuit, the Corps abruptly changed course and abandoned its referral to EPA (despite having completed the work on it); that Duarte's lawsuit was the "but for" reason why the Corps referred the matter to the Justice Department for litigation; and that the government's retaliatory purpose was openly stated by a Justice Department attorney to the tractor operator who plowed the Property: "Well, you know Duarte sued us, well, we are suing them." ECF 154 at 12-15 (reviewing and analyzing evidence); 154-1 at 7-9 (response to

government's separate statement, identifying evidence of First Amendment retaliation).

On June 10, 2016, the district court dismissed Duarte's First Amendment retaliation claim, on the ground of sovereign immunity. The district court did not reach the merits of the claim, or make any factual findings as to Duarte's evidence of retaliation. ECF 195 at 35-37. The district court also granted the government summary judgment on liability under the Clean Water Act. ECF 195 at 24-35.[6]

A pretrial conference is set in the district court for September 2, 2016, at which the parties expect a trial date will be set on remaining issues, including affirmative defenses and any remedy under the Act. ECF 222 at 4. On August 5, the parties filed their joint pre-trial conference statement, ECF 232, and the United States filed its proposed judgment, ECF 232-1. The government seeks a civil penalty of $2.8 million from Duarte (for plowing a field), and extensive injunctive relief. ECF 232-1 at 5:22-24; *id.* at 2:13-21 (flattening all plow furrows in vernal pools and planting grasses); *id.* at 3:17 - 4:4 (permanent injunction against further use of the Property without advance permission from the Corps, whether a permit is required or not); *id.* at 4:6-10 (purchase of 66 to 132 acres of vernal pool mitigation credits).

[6] Duarte moved for reconsideration of this ruling, or in the alternative for certification of issues to this Court. ECF 196. That motion is submitted, and as of this filing has not been ruled on. Duarte contends that neither the company nor its president are liable under the Act.

On July 27, 2016, Duarte filed this appeal. The only issue in this appeal is whether the district court erred in dismissing Duarte Nursery's First Amendment retaliation claim on sovereign immunity grounds.

STANDARD OF REVIEW

On appeal from dismissal under Fed. R. of Civ. P. 12(b)(1), the reviewing court is to take the allegations in the complaint as true. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

28 U.S.C. § 1291 gives this Court jurisdiction over appeals from final judgments of the district courts. The collateral order doctrine provides a narrow exception to the final judgment requirement, for interlocutory orders which (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citing *Abney v. United States*, 431 U.S. 651, 658 (1977)).

Whether an order resolves an "important issue," under the second part of the test, involves "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will v. Hallock*, 546 U.S. 345, 351-52 (2006) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878-79 (1994)). Constitutional protections against suit are frequently the type of "important issue" which the Supreme Court has protected through the collateral order

doctrine. *See, e.g., Abney*, 431 U.S. at 658 (denial of dismissal of indictment on double jeopardy grounds); *see generally Will v. Hallock*, 546 U.S. at 352 (collecting cases). A key indicator of whether an order is "effectively unreviewable" after final judgment, under the third part of the test, is whether the order subjects the appellant to "a trial that would imperil a substantial public interest." *Will v. Hallock*, 546 U.S. at 352.

ARGUMENT

The dismissal of Duarte's First Amendment retaliation claim "conclusively determine[d] the disputed question." The district court entertained extensive motion practice on Duarte's retaliation claim: an unopposed motion to supplement the complaint in order to allege the claim, a successful motion to dismiss for failure to allege sufficient facts, a second motion to amend to re-plead the claim following discovery of evidence, the government's opposition on the continuing ground of failure to allege sufficient facts, the court's grant of leave to amend, finding that the proposed allegations of First Amendment retaliation were "legally sufficient," and finally the government's second, successful, motion to dismiss, on sovereign immunity grounds. On June 10, 2016, the district court dismissed Duarte's retaliation claim, on the ground of sovereign immunity, with prejudice. ECF 195 at 37. This order "conclusively determine[d] the disputed question."

The dismissal also "resolve[s] an important issue completely separate from the merits of the action." The district court expressly stated that it was not addressing the merits of Duarte's First Amendment retaliation claim in the dismissal. ECF 195 at 37. Whether sovereign immunity bars Duarte from bringing its retaliation claim before the federal courts is an important issue, well within the ambit of the collateral order doctrine.[7] The Supreme Court has established that First Amendment-protected activity deserve particular protection from retaliatory government enforcement or other adverse action, specifically through the right to bring First Amendment retaliation claims that bar the adverse government action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. at 287. This Court has stated that First Amendment rights deserve proactive protection from the federal courts. *See*, *e.g.*, *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d at 1065 ("Our First Amendment jurisprudence rests on the fundamental principle that limitations on First Amendment rights are themselves damaging to the values underlying First Amendment protections."). As discussed above, *supra* at 2-4, a First Amendment retaliation claim serves as a bar to government retaliation, that is analogous to an immunity from suit, and protects bedrock civic interests under the First Amendment. These are values that

[7] The government's sovereign immunity is an important issue, separate from the merits of Duarte's retaliation claim. And, dismissal of the retaliation claim is an important issue, separate from the merits of the government's counterclaim, which the retaliation claim seeks to bar.

should not "be lost through rigorous application of a final judgment requirement." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. at 878-79.

The district court's dismissal of Duarte's First Amendment retaliation claim is also "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. Many of the recognized categories of collateral orders deal with various types of immunity. *Abney*, 431 U.S. at 658 (double jeopardy); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (Eleventh Amendment immunity); *Figueroa v. United States.*, 7 F.3d 1405, 1408 (9th Cir. 1993) (judicial immunity); *see generally Will v. Hallock*, 546 U.S. at 352 (collecting cases). This Court holds that immunities against trial tend to support application of the collateral order doctrine, as opposed to immunities that go to liability (i.e. affirmative defenses). *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1262 (9th Cir. 2010) (government contractor defense an affirmative defense, not an immunity from suit).

Here, Duarte's First Amendment retaliation claim would bar the government's retaliatory Clean Water Act counterclaim. The dismissal of the retaliation claim on sovereign immunity grounds subjected Duarte to a finding of liability under the Act, and subjects Duarte to further trial on the government's requested $2.8 million in civil penalties and related injunctive relief. For the retaliation claim to ever provide relief, it's dismissal must be reversed now on appeal, while the district court can still

reconsider its liability ruling and before trial on Clean Water Act remedies. If the dismissal cannot be reviewed until after final judgment on the Clean Water Act claims, then Duarte will have suffered exactly the harm that the retaliation claim is designed to prevent: subjection to trial in a retaliatory suit. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. at 287. The only way to effectively review the dismissal is to review it while the trial court can still reconsider its ruling on Clean Water Act liability, and before Duarte is subjected to trial on remedies. This bar to suit or other adverse government action, imposed by the First Amendment retaliation doctrine, is a right to avoid "a trial that would imperil a substantial public interest." *Will v. Hallock*, 546 U.S. at 352. The collateral order doctrine applies.

THE DISTRICT COURT DISMISSED AN AFFIRMATIVE CLAIM, NOT AN AFFIRMATIVE DEFENSE

The United States argues that Duarte's retaliation claim is an affirmative defense rather than an affirmative claim, and therefore cannot be a collateral order. But the facts of the case, and the authorities the United States cites, support the application of the collateral order doctrine.

Duarte's First Amendment retaliation claim is alleged in its Second Amended Complaint, not its answer. ECF 90. It seeks to bar the continued litigation of the government's Clean Water Act counterclaim and any other enforcement action that the government might take, not to refute any necessary element of the counterclaim.

ECF 90, at 23:10-13. While the relief sought under the retaliation claim includes barring the prosecution of the counterclaim, it also seeks affirmative relief as to any other enforcement action the government might take arising from Duarte's plowing.[8] It is therefore broader than a mere defense against the counterclaim, while at the same time not directly contesting any of the elements of the counterclaim.[9]

The cases cited by the government on affirmative defense are inapposite. In *Rodriguez v. Lockheed Martin Corp.*, survivors of a soldier killed in a mortar explosion during training sued the manufacturer of the mortar round. The manufacturer moved for summary judgment under the government contractor defense, which the district court denied, and the manufacturer appealed. The Ninth Circuit held that the government contractor defense is a defense to liability, not a right to avoid trial, and that the order denying summary judgment was not a collateral order. 627 F.3d at 1262. *Rodriguez* also applies the rule that a denial of an immunity claim based on a disputed issue of material fact is not a collateral order. *Id.* at 1264. In *Rodriguez*, the manufacturer was not trying to vindicate a constitutional right, but was

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[8] For example, under its regulations the Corps may still consider Duarte to be a violator, thus limiting Duarte's eligibility for an after-the-fact permit for activities on the Property. 33 C.F.R. § 326.3(e)(1)(iv).

[9] Duarte has moved in the district court for leave to amend its answer to allege First Amendment retaliation as an affirmative defense, based in part on the United States' repeated characterization of the claim in this manner during this litigation. If the district court grants leave to amend, the defense would be limited to barring the prosecution of the counterclaim, and would not extend to other actions that the Corps might take against Duarte.

merely seeking to "borrow" an aspect of the federal government's sovereign immunity. *Id.* at 1265-66.

Nor is *Fed. Land Bank of Spokane v. L.R. Ranch Co.*, 926 F.2d 859 (9th Cir. 1991), germane to this case. *L.L. Ranch* involved a statutory requirement that lenders consider loan restructuring before proceeding with foreclosure. 926 F.2d at 862. The applicable statutory provision had already been construed as not creating an affirmative claim. *Id.* at 862-63. In this case, Duarte's First Amendment retaliation claim is a well-recognized affirmative claim.

Meek v. Cty. of Riverside, 183 F.3d 962 (9th Cir. 1999), supports Duarte's position. In the relevant portion of that opinion, the Ninth Circuit analyzed defendants' claim of absolute political immunity, and concluded that the claim required the court to assess whether the plaintiff possessed a specific First Amendment right (to not be terminated from employment for running for office) in the first instance. 183 F.3d at 968-69. Thus, the claimed political immunity was not a bar to trial. *Id.*

IF THE DISMISSAL BELOW IS NOT A COLLATERAL ORDER, THE COURT SHOULD TREAT DUARTE'S NOTICE OF APPEALAS A PETITION FOR WRIT OF MANDATE

When it is unclear whether immediate appeal under the collateral order doctrine, or a petition for writ of mandamus, is the proper procedure, the appellant

may request that the Court treat the notice of appeal as a petition for writ of mandate. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Five factors are considered on a petition for writ of mandamus: (1) whether the petitioner has "no other adequate means to obtain the desired relief"; (2) whether the petitioner will be "damaged or prejudiced" in a way not remedial by later appeal; (3) "whether the district court's order is clearly erroneous as a matter of law"; (4) "whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules"; and (5) "whether the district court's order raises new and important problems or issues of first impression." *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Not all of the factors need be present for mandamus to be appropriate. *Burlington Northern & Santa Fe Ry. Co. v. United States District Court*, 408 F.3d 1142, 1146 (9th Cir. 2005).

Here, if the Court determines that the dismissal below is not an appealable collateral order, the first mandamus factor is met. *Perry*, 591 F.3d at 1157. The above discussion of why post-final judgment appellate review would be inadequate, also satisfies the second factor for mandamus.

The third factor, clear error, is met in this case. The district court failed to address the key authority in the Ninth Circuit for the scope of 5 U.S.C. § 702's waiver of sovereign immunity, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989) (§ 702 waiver of sovereign immunity not limited to "agency action"

as defined in APA; extends broadly to constitutional claims not seeking money damages). Instead, the district court relied on cases addressing whether parties may challenge litigation decisions under 5 U.S.C. § 704, ECF 195 at 36, which Duarte's retaliation claim does not do.

Finally, the dismissal satisfies the fifth factor, by raising an important issue of apparent first impression: is the United States immune from a First Amendment retaliation claim where it has itself invoked the jurisdiction of the federal courts by bringing the retaliatory action in question?

CONCLUSION

For these reasons, the motion should either be denied, or this Court should issue a writ of mandamus directing the district court to reverse the dismissal on sovereign immunity grounds and exercise jurisdiction over Duarte's First Amendment retaliation claim.

DATED: August 22, 2016.

Respectfully submitted,

M. REED HOPPER
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/s/ Anthony L. François
ANTHONY L. FRANÇOIS

Attorneys for Appellants, Duarte Nursery, Inc., and John Duarte

CERTIFICATE OF COMPLIANCE

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DATED: August 22, 2016.

Respectfully submitted,

/s/ Anthony L. François
ANTHONY L. FRANÇOIS

Attorneys for Appellants, Duarte Nursery, Inc., and John Duarte

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing **OPPOSITION TO UNITED STATES MOTION TO DISMISS APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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DATED: August 22, 2016.

Respectfully submitted,

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/s/ Anthony L. François
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Attorneys for Appellants, Duarte Nursery, Inc., and John Duarte

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Case Number:	16-16325
Document(s):	Document(s)

Docket Text:
Filed (ECF) Appellants Duarte Nursury, Inc. and John Duarte response opposing motion ([5] Motion (ECF Filing), [5] Motion (ECF Filing) motion to dismiss for lack of jurisdiction). Date of service: 08/22/2016. [10095174] [16-16325] (Francois, Anthony)

Notice will be electronically mailed to:

Mr. Robert Harris Oakley, Attorney
Anthony L. Francois
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David Ivester
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