No. 19-1212

IN THE

Supreme Court of the United States

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

—v.—

INNOVATION LAW LAB, ET AL.,

Respondents.

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

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO VACATE

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INTRODUCTION

Respondents agree that the appeal of the preliminary injunction is moot. The Secretary of Homeland Security has now terminated the Migrant Protection Protocols ("MPP"), thus eliminating Respondents' interest in the prospective relief entered by the district court. This Court should therefore dismiss the writ.

The government, however, has not demonstrated that the equitable remedy of vacatur, reserved for "extraordinary" circumstances, is warranted. Vacatur is available where a losing party is prevented from seeking judicial review either through happenstance or the actions of the prevailing party. But here it was the losing party, the government itself, that rendered its own appeal moot. It sought and obtained a stay of the preliminary injunction while failing to request expedited briefing, and then it voluntarily rescinded MPP, the policy at issue. This case therefore falls squarely within the rule that vacatur is not available where the losing party forfeits review through its own actions.

Moreover, the government is not prejudiced or harmed absent vacatur. The decision below merely affirms a preliminary injunction, and does not constitute a final decision on the merits. The government suggests that maintaining the decision will impede future use of the contiguous-territory-return statute. But the decision below merely found Respondents likely to succeed under these particular circumstances. The government has provided no specifics on how it has used the statute in the past, or how it intends to do so in the future, much less how any such use may be impaired. Its claims of "legal

consequences" are thus entirely speculative. Any dispute about the legality of any future use of the contiguous-territory-return statute can and should be taken up when and if the government in fact does use it, in a case that presents a live and concrete dispute about that future policy.

STATEMENT

Respondents accept Petitioners' account of the procedural history recounted in their Statement, except to the extent we note a disagreement in the Argument below regarding whether the entire case, rather than just the preliminary injunction appeal, is moot.

ARGUMENT

A. Respondents Agree that the Appeal from the Preliminary Injunction is Moot.

Respondents agree that the Court should dismiss the writ because the appeal from the preliminary injunction is now moot. The Secretary of Homeland Security, following more than four months of agency review, has directed "[Department of Homeland Security] personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." Pet'r's Suggestion of Mootness and Mot. to Vacate ("Mot.") at App. 15a. The Secretary also indicated that the government has "no intention to resume MPP in any manner similar to the program as

outlined in the January 25, 2019 Memorandum and supplemental guidance." Mot. at App. 14a.

The preliminary injunction "enjoined and restrained [the government] from continuing to implement or expand [MPP.]" Pet. App. 83a. It also required the government to allow the 11 individual respondents to pursue their asylum claims from within the United States. *Id.* For the reasons stated by the government, *see* Mot. at 11, the individual respondents no longer have a live interest in that relief. The preliminary injunction did not require the government to return or provide any other relief to those already placed in MPP and returned to Mexico.[1]

Thus, because MPP has now been terminated, Respondents have no interest in the preliminary injunction. As "[n]o live dispute remains between the parties over the issue with respect to which certiorari was granted," Respondents ask this Court to dismiss the writ and remand the matter for further proceedings in the district court. *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (per curiam).

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[1] To the extent that the government suggests that the case before the district court is also moot, however, Respondents disagree. Any injuries stemming from the unlawful returns to Mexico under MPP, and any relief due, must be addressed by the district court in the first instance. *See Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam) ("No order of this Court could affect the parties' rights with respect to the injunction we are called upon to review. Other claims for relief, however, still remain to be resolved by the District Court."); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) ("This, then, is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot.").

B. No Extraordinary Circumstances Justify Vacatur.

That the appeal of the preliminary injunction is now moot, however, does not mean that the government is entitled to the "extraordinary" remedy of vacatur. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Vacatur is an "equitable remedy" that "ensures that those who have been prevented from obtaining the review to which they are entitled are not treated as if there had been a review." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (alternations, internal quotations, and citation omitted); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–41 (1950). The emphasis is on whether the party seeking review has been *prevented* from obtaining that review, and vacatur is *not* warranted where a party forfeits its right to review through its own actions. *See Bancorp*, 513 U.S. at 24 ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action."); *see also Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (noting that "in deciding whether to disturb prior judgments in a case rendered nonjusticiable, we have inquired, *pivotally*, 'whether the party seeking relief from the judgment below caused the [nonjusticiability] by voluntary action.'" (quoting *Bancorp*, 513 U.S. at 25) (emphasis added)); *Karcher v. May*, 484 U.S. 72, 83 (1987) (holding that "the *Munsingwear* procedure is inapplicable" where the losing party simply "declined to pursue its appeal").

Vacatur is appropriate only where either the "unilateral action of the party who prevailed below" or "vagaries of circumstance" prevent a party from

obtaining review of an adverse ruling, to rescue the losing party whose only opportunity to have an adverse judgment set aside has been frustrated by developments outside its control. *Bancorp*, 513 U.S. at 25; *see also Camreta*, 563 U.S. at 713 (vacating judgment below where "the happenstance of S.G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights"). And as with any decision concerning equitable relief, the decision whether to vacate the decision below "must also take account of the public interest." *Bancorp*, 513 U.S. at 26. "Judicial precedents are presumptively correct and valuable to the legal community as a whole . . . and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* (internal quotation marks and citation omitted).

Here, the party seeking vacatur has mooted its own appeal through its own actions, the classic instance in which vacatur is not appropriate. The review of the preliminary injunction appeal was not prevented by any action of the Respondents—the prevailing party below—or by "happenstance." *Camreta*, 563 U.S. at 713. Rather, the government has, through its own actions, terminated MPP before this Court could hear the merits of its appeal. Following the court of appeals decision affirming the preliminary injunction, the government sought an immediate stay of the injunction, and did not seek to expedite the merits briefing and argument schedule. The government also unilaterally and voluntarily announced a review of MPP, and sought a pause of the policy. And, of course, the government chose the timing and the result of that review. Ultimately, the government chose to abandon the challenged policy altogether.

Vacatur is not warranted under these circumstances, where mootness is attributable solely to the government's own "voluntary conduct." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 n.6 (2000) (noting that "it is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court"). To permit vacatur in these circumstances would allow a losing party to erase an unfavorable judgment by simply lodging an appeal, then mooting the appeal. But "Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments." *Bancorp*, 513 U.S. at 27. Here, the government chose to step off that path and rescind the challenged policy. "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *Id.* Thus, just as the losing party in *Bancorp* decided to settle the case, and the losing party in *Karcher* decided not to appeal, the government's decision to rescind the challenged policy "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering [its] claim to the equitable remedy of vacatur." *Bancorp*, 513 U.S. at 25; *see also Munsingwear*, 340 U.S. at 41.

None of the cases cited by the government support vacatur here. In *United States v. Microsoft*, 138 S. Ct. 1186, new federal legislation was enacted while the appeal before the Court was pending, and

that in turn mooted the dispute concerning a particular warrant. *See id.* at 1187–88. This case, however, does not concern "intervening changes in federal law" enacted by Congress and thus beyond the control of the appealing party. *See* Mot. at 13. Instead, it concerns the unilateral decision of Petitioners to abandon the very policy at issue in its petition for certiorari before this Court.

Munsingwear and *Board of Regents of the University of Texas System v. New Left Education Project*, 414 U.S. 807 (1973) (Mem.), are similarly unavailing. This Court itself has recognized that the vacatur discussion in *Munsingwear* that the government invokes was dicta, and that "all that was needful for the decision was (at most) the proposition that vacatur should have been sought, *not that it necessarily would have been granted*." *Bancorp*, 513 U.S. at 23 (emphasis added). The Court was very clear that the question whether the actions of the executive branch mooting the dispute there could be attributed to the government, such that vacatur would not be appropriate, remained unresolved. *See id.* at 24 n.3. Here, there is no doubt that the losing party mooted its own appeal. Thus, *Munsingwear* does *not* hold that "vacatur would have been available had the government requested it," as the government contends. *See* Mot. at 16. And *New Left Education Project* was a *per curiam* dismissal, and this Court has expressed "skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion." *Bancorp*, 513 U.S. at 24. That case also predates *Bancorp*, in which this Court, after reasoned consideration, squarely held that "voluntary forfeiture of review" disentitled a party to the equitable remedy of vacatur. *Id.* at 26.

The government's assertions about the supposed "legal consequences" of the decisions below also do not support vacatur. The government suggests that maintaining the decision will impede future use of the contiguous-territory-return statute. But the government has previously made clear that, in its view, an injunction forecloses only the policies specifically enjoined. *See* U.S. Resp. to Mot. to Enforce Prelim. Inj. 1-2, 5-6, *Washington v. Trump* (W.D. Wash. Mar. 14, 2017) (No. 17-141). Here, the decision below merely held that one particular policy, MPP, was likely invalid. *See* Pet. App. 25a, 38a. And the government has disclaimed any intent to reinstitute MPP. *See* Mot. at 14a. It has provided no explanation of how the decision below concerning MPP specifically will impede any other potential use of the authority under the contiguous-territory-return statute in the future given that it has disclaimed any intent to reinstitute MPP, or even on how it has used the contiguous-territory-return statute in the past or intends to do so going forward. The government's fears of "legal consequences" are both speculative, as the government admits, and vague. *See* Mot. at 14 (speculating that the "preliminary injunction . . . *could* have important 'legal consequences' in the future" and that the court of appeals' "statutory analysis . . . *could* restrict . . . [or] *could* cast doubt on DHS's longstanding discretion"), 15 (speculating nonrefoulement "holdings *could* have implications for other circumstances") (emphases added throughout).

Any dispute about the legality of any particular future use of the contiguous-territory-return statute can and should be taken up when and if the government in fact does use it, in a concrete case. Nothing in the decisions below would prevent such a

challenge from being heard, or prevent the government from adopting some (or all) of the legal arguments pressed by the prior administration to defend against any such challenge.

Moreover, the decision below considered the legality of MPP only in a preliminary injunction posture. The court of appeals decision, therefore, only held that Respondents were *likely* to succeed on their claims that MPP was not statutorily authorized and conflicted with the United States' nonrefoulment obligations. *See, e.g.*, Pet. App. at 25a (holding "that plaintiffs have shown a *likelihood* of success on the merits of their claim that the MPP is inconsistent with 8 U.S.C. § 1225(b)"), 38a (holding "that plaintiffs have shown a *likelihood* of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations under § 1231(b)") (emphasis added throughout). There has been no final judgment in this case. Respondents' fears of the "legal consequences" of the decision below do not support the rare grant of vacatur.

The government suggests that vacatur is appropriate because the court of appeals affirmed a nationwide injunction in support of vacatur, asking the Court to undo the judgment below based on a substantive disagreement with the scope of the relief granted. *See* Mot. at 15. But the propriety of nationwide injunctive relief in this case is irrelevant to whether vacatur is warranted, as this Court has been clear that it is "inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of

assumptions about the merits." *Bancorp*, 513 U.S. at 27.[2]

Finally, this Court has held that it must "take account of the public interest" in deciding whether to afford the "extraordinary" remedy of vacatur, and here, the public interest supports rejection of such relief. *Bancorp*, 513 U.S. at 26. The decision of the court of appeals, analyzing the scope of the contiguous-territory-return statute, and the United States' nonrefoulment obligations, on an issue of first impression, albeit only in the context of a preliminary injunction, constitutes guidance that is "valuable to the legal community as a whole . . . and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* (internal quotation marks and citation omitted). Simply put, the public interest in valuable legal precedent outweighs the speculative and unsupported assertions of "legal consequences" stemming from the decision below.

CONCLUSION

For the above reasons, the Court should dismiss the writ as moot and remand for further proceedings in the district court.

[2] Moreover, within the Ninth Circuit itself there are other court of appeals cases upholding such injunctions in appropriate cases. *Compare E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021) (affirming nationwide injunction) *with City & Cty. of S.F. v. USCIS*, 981 F.3d 742, 763 (9th Cir. 2020) (reversing nationwide injunction). Vacating the decision below as moot would do nothing to alter the state of the law on this issue.

Respectfully submitted,

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