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.

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

PETITIONERS' REPLY IN SUPPORT OF MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS

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TABLE OF CONTENTS

Page

A. Vacatur is warranted 3
B. Respondents offer no sound basis for leaving the decision below in place 3

TABLE OF AUTHORITIES

Cases:

Alvarez v. *Smith*, 558 U.S. 87 (2009) 1, 3, 4, 6, 7, 8
Board of Regents of the Univ. of Texas Sys. v. *New Left Educ. Project*, 414 U.S. 807 (1973) 4
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 4
Karcher v. *May*, 484 U.S. 72 (1987) 5, 6
U.S. Bancorp Mortg. Co. v. *Bonner Mall P'ship*, 513 U.S. 18 (1994) 2, 4, 5, 6, 7, 8
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 1, 3

Miscellaneous:

13C Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2008) 4, 5

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Respondents concede (Vacatur Opp. 1) that they no longer have any "interest in the prospective relief entered by the district court" concerning the Migrant Protection Protocols (MPP) and that the controversy before this Court is therefore moot. The Court's "normal[]" practice in such a circumstance is to "vacate the lower court judgment" and thereby "'clear[] the path for future relitigation of the issues.'" *Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009) (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). That ordinary course makes eminent sense here. The preliminary-injunction decision of the divided Ninth Circuit merits panel—which disagreed with the prior decision of the

Ninth Circuit stay panel and which manifestly warranted this Court's review—should not be allowed to control future litigation about important questions of immigration law in the Nation's largest circuit simply because this appeal became moot for reasons unrelated to the pending legal challenges to MPP.

Respondents contend that a different course is warranted in this case, however, because mootness arose as a result of the government's own actions. That contention is misplaced. This Court has never adopted respondents' proposed categorical rule, under which a party whose voluntary actions have caused a case to become moot could never obtain vacatur. Instead, consistent with vacatur's status as an "equitable" determination, *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 29 (1994), the Court has applied a "flexible," case-specific approach, and it has found vacatur appropriate when the petitioning party acted for good-faith reasons external to the litigation rather than "a desire to avoid review," *Alvarez*, 558 U.S. at 94, 97.

Applying that approach here, the case for vacatur is clear: after a months-long review directed by the President, the Secretary of Homeland Security terminated the MPP program because he determined that continuing to apply it would be contrary to the interests of the United States, not because he sought to avoid further litigation over MPP's legality. In no way does equity demand that, as a consequence of the Secretary's determination about the Nation's immediate immigration-enforcement and foreign-relations needs, the decision below must be left in place as a potential obstacle to the future implementation of federal immigration law by the Department of Homeland Security (DHS). Instead, the Court should vacate the decision below and clear the

path for fresh consideration of the issues if and when they arise in the context of a live dispute.

A. Vacatur Is Warranted

Because the Secretary has terminated MPP based on his determination that continuing to apply it would be contrary to the interests of the United States, it is now common ground that respondents retain no "interest in the prospective relief entered by the district court." Vacatur Opp. 1. The dispute over whether the district court's entry of a preliminary injunction was justified has therefore become moot. And the Court's "established practice" when a case becomes moot while "pending [a] decision on the merits" has long been to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39; see, *e.g.*, *Alvarez*, 558 U.S. at 94 ("[W]e normally do vacate the lower court judgment in a moot case."). That course "'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez*, 558 U.S. at 94 (citation omitted).

The Court's ordinary practice is particularly warranted in the circumstances here. As the government's motion for vacatur explained (at 14-15), the court of appeals made multiple significant pronouncements, and its decision should not be permitted to impose future "legal consequences" now that the appeal has become moot. *Munsingwear*, 340 U.S. at 41.

B. Respondents Offer No Sound Basis For Leaving The Decision Below In Place

Respondents resist application of this Court's standard vacatur practice here, arguing (Vacatur Opp. 4-10)

that vacatur should be denied because the mootness of this appeal resulted from the government's voluntary actions rather than some external cause. That argument is unpersuasive for multiple reasons.

1. In the first place, respondents' proposed rigid rule—that the government may never obtain vacatur when "mootness is attributable solely to the government's own 'voluntary conduct,'" Vacatur Opp. 6 (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 n.6 (2000))—is inconsistent with the equitable nature of the *Munsingwear* doctrine. This Court has emphasized that "[t]he statute that enables [the Court] to vacate a lower court judgment when a case becomes moot is flexible," *Alvarez*, 558 U.S. at 94, and allows the Court to select the outcome "'most consonant to justice'" in light of the specific facts of a given case, *U.S. Bancorp Mortgage*, 513 U.S. at 24 (citations omitted). That equitable discretion should not be applied in a wooden manner that "deter[s]" public actors from taking "good faith" governmental actions that have the incidental effect of mooting a pending court challenge. 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10.1, at 583 (3d ed. 2008) (*Federal Practice & Procedure)* (discussing *Board of Regents of the Univ. of Texas Sys.* v. *New Left Educ. Project*, 414 U.S. 807 (1973)).

Here, the Secretary terminated MPP based on a months-long evaluation of the program that considered the best ways to address the immigration-enforcement and foreign-relations interests of the United States. See Mot. App. 1a-15a. The Secretary ultimately determined (among other things) that continued use of MPP would "not adequately or sustainably enhance border management in such a way as to justify the program's

extensive operational burdens and other shortfalls," and would "draw[] away from other elements that necessarily must be more central to the bilateral relationship" with Mexico. *Id.* at 7a, 13a. The Secretary should not be deterred from acting on such significant governmental concerns by the prospect that doing so would render unreviewable an intermediate judicial decision that "may have untoward consequences in the unforeseen future." *Federal Practice & Procedure* § 3533.10.1, at 583.

2. Respondents effectively concede (Vacatur Opp. 7) that the categorical anti-vacatur rule they propose is inconsistent with this Court's decision in *New Left Education Project* and the Court's indications in *Munsingwear* itself that vacatur would have been available had the government sought it. Respondents instead suggest (*ibid.*) that this Court implicitly overruled those decisions in *U.S. Bancorp Mortgage*. But that decision affirmatively "express[ed] no view on *Munsingwear*'s implicit conclusion" in this regard, 513 U.S. at 25 n.3, and it predated other decisions illustrating the Court's willingness to vacate a judgment adverse to the government when mootness resulted from voluntary governmental action unrelated to pending litigation.

It is true, of course, that a party which voluntarily forfeits the ordinary means of judicial review through its litigation conduct—such as by failing to appeal or settling the claims against it—ordinarily has no equitable right to use "the secondary remedy of vacatur as a refined form of collateral attack on the judgment" below. *U.S. Bancorp Mortgage*, 513 U.S. at 27; see Vacatur Opp. 6 (discussing *U.S. Bancorp Mortgage* and *Karcher* v. *May*, 484 U.S. 72 (1987)). In *Karcher*, for example, the legislature had not amended the law that

had been invalidated by the court of appeals; instead, the legislature's officers had simply abandoned the litigation by failing to file a notice of appeal. 484 U.S. at 83 ("The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."). And in *U.S. Bancorp Mortgage*, the creditor agreed to a comprehensive settlement of its claim in bankruptcy court—including resolving its "differences [with the debtor] on th[e] particular contested legal point," *Alvarez*, 558 U.S. at 95—while the case was pending in this Court. See *U.S. Bancorp Mortgage*, 513 U.S. at 20.

This case bears no resemblance to those situations. And this Court has recognized that vacatur may remain appropriate where, as here, a case becomes moot because of good-faith actions outside the litigation that are taken by the appealing party for reasons other than "a desire to avoid review." *Alvarez*, 558 U.S. at 97.

In *Alvarez*, for example, this Court had granted a writ of certiorari to review a decision holding that Illinois law violated due process by failing to provide a sufficiently speedy opportunity for individuals to test the lawfulness of warrantless seizures of their property. See 558 U.S. at 89. Before the Court could render a decision, some plaintiffs abandoned their claims and Illinois agreed to return the property it had seized from the remaining plaintiffs. See *id.* at 91-92. Because the plaintiffs' complaint had sought only injunctive relief, not damages, that voluntary return of the property mooted the dispute over the State's procedures. See *id.* at 92-94. The Court then followed its "normal[]" practice and vacated the court of appeals' now-unreviewable decision. *Id.* at 94; see *id.* at 94-97. In doing so, the

Court rejected the plaintiffs' argument—materially indistinguishable from respondents' argument here—that the "'settlement' exception" precluded vacatur because the State had voluntarily "agreed to return" the plaintiffs' property. *Id.* at 94.

The *Alvarez* Court explained that the State's voluntary return of property was not "the kind of settlement that the Court" had considered sufficient to make vacatur inequitable. 558 U.S. at 94. In *U.S. Bancorp Mortgage*, the parties had agreed to a settlement for the purpose of resolving the very claim at issue, with the result that the appealing party had "voluntarily forfeited [its] legal remedy by the ordinary process of appeal or certiorari." *Alvarez*, 558 U.S. at 95 (quoting *U.S. Bancorp Mortgage*, 513 U.S. at 25). In *Alvarez*, by contrast, the State had evidently agreed to return the property not in order to resolve the plaintiffs' suit about the timeliness of the State's procedures, but simply because, having completed the "related criminal proceedings," the State determined "for evidentiary reasons that it did not wish to claim the cars." *Id.* at 96. In those circumstances, where the State's actions were not prompted by "a desire to avoid review" in the case pending before this Court, "there [wa]s not present * * * the kind of 'voluntary forfeit[ure]' of a legal remedy that [had] led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id.* at 97 (second set of brackets in original).

The same principle supports vacatur in this case as well. As discussed above, see pp. 4-5, *supra*, the Secretary's decision to terminate MPP was based on the immigration-enforcement and foreign-policy interests of the United States—not a desire to avoid this Court's review of MPP's legality. Just as it would have been

inequitable to require Illinois to continue withholding the plaintiffs' property in *Alvarez* solely to avoid the future legal consequences of the court of appeals' adverse decision, so too would it be inequitable to require the Secretary to maintain MPP here—even after he determined that doing so would be contrary to the national interest—solely to avoid the future legal consequences of the Ninth Circuit merits panel's divided decision. These are among "the vagaries of circumstance" under which the government "ought not in fairness be forced to acquiesce in the judgment" below. *U.S. Bancorp Mortgage*, 513 U.S. at 25; see *Alvarez*, 558 U.S. at 94 ("[T]his case more closely resembles mootness through 'happenstance' than through 'settlement'—at least the kind of settlement that the Court considered in *Bancorp*.").

3. Finally, respondents' arguments for leaving the decision below in place are particularly unpersuasive given the procedural posture of this case. In urging a narrow conception of the *Munsingwear* doctrine, respondents contend that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." Vacatur Opp. 5 (quoting *U.S. Bancorp Mortgage*, 513 U.S. at 26). Whatever caution that observation might ordinarily counsel, however, it has substantially less force here, where the court of appeals' divided decision was issued at the preliminary-injunction stage; contradicted an earlier published opinion of the court of appeals at the stay-pending-appeal stage, see Pet. App. 97a-107a; and was itself subsequently stayed by this Court, see 140 S. Ct. 1564.

Relatedly, respondents themselves acknowledge (Vacatur Opp. 9) that "the decision below considered

the legality of MPP only in a preliminary injunction posture," and that the court of appeals "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." If that is truly all that the Ninth Circuit merits panel held, then it is difficult to see what value there would be in preserving the court's decision now that the Secretary has indicated that the government has no intention of resuming the MPP program. See Mot. App. 14a. If this Court vacates the judgment below, respondents and other litigants would remain free to invoke any of the lower-court opinions in this case as persuasive authority in any subsequent litigation about distinct programs or practices that the government might adopt in the future; what they would *not* be able to do is argue that the Ninth Circuit merits panel's decision has a binding effect in such future cases—the very argument that respondents now disclaim.

* * * * *

The judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the district court's April 8, 2019 order granting a preliminary injunction.

Respectfully submitted.

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