No. 20-11083

In the United States Court of Appeals for the Fifth Circuit

VICTOR LEAL; PATRICK VON DOHLEN; KIM ARMSTRONG,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; JANET YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY; MARTIN WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; UNITED STATES OF AMERICA; DOUG SLAPE, IN HIS OFFICIAL CAPACITY AS TEXAS COMMISSIONER OF INSURANCE; TEXAS DEPARTMENT OF INSURANCE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division
Case No. 2:20-cv-00124-Z

APPELLANTS' MOTION FOR RECONSIDERATION

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
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State Defendants	State Defendants' Counsel
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/s/ Jonathan F. Mitchell
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Counsel for Plaintiffs-Appellants

The appellants respectfully move for reconsideration of the Court's order of June 3, 2021, because the Court's disposition claims to "dismiss" the appeal as moot, while simultaneously "vacating" the order of the district court and remanding with instructions to dismiss. *See* slip op. at 5 ("[W]e DISMISS this appeal as moot, VACATE the order of the district court as to the federal defendants, and REMAND with instructions to dismiss."). These dispositions are logically incompatible with each other. A Court that has "dismissed" an appeal has no ability to review or alter the district court's ruling in any way. *See Hollingsworth v. Perry*, 570 U.S. 693 (2013). And a court that has "dismissed" an appeal as moot cannot do anything to the district court's rulings unless it recalls and vacates its decision to dismiss the appeal. *See St. Louis–San Francisco Railway Co. v. R.R. Yardmasters of America, AFL-CIO*, 347 F.2d 983, 983–84 (5th Cir. 1965). The Court must *either* dismiss the appeal as moot and leave the district court's order untouched, *or* it must acknowledge its jurisdiction over the appeal and vacate the district court's order. It cannot do both. *See id.*

The appellants respectfully submit that the latter option is the appropriate one. The Court's jurisdiction over the *appeal* is secure because the appellants will suffer injury from the collateral-estoppel effects of the district court's ruling. *See* Appellants' Reply Br. at 1–4. The appellants therefore have standing to appeal—and they can maintain the appeal regardless of whether their *claims* have been mooted by subsequent events. *See id.* The panel opinion, as we understand it, did not deny any of this. *See* slip op. at 4.

Instead, the panel held that the plaintiffs' *claims* against the federal defendants had become moot, which required (in the panel's view) a vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

St. Louis–San Francisco Railway confirms that the panel should not have dismissed the appeal after concluding that the plaintiffs' claims had become moot. The Court wrote:

> When the substantive issue involved in this case was decided by the National Railway Adjustment Board, this Court dismissed the appeal as moot. The appellant has, by motion, urged that our judgment dismissing the appeal be recalled and vacated and that we reverse the injunctive order of the district court and direct that the complaint be dismissed. We conclude that the motion should be granted. The approved procedure, when a case has become moot while an appeal is pending, is to vacate or reverse the order or judgment from which the appeal was taken, "with directions * * * to dismiss the bill of complaint * * *, because the controversy involved has become moot and, therefore, no longer a subject appropriate for judicial action."

St. Louis–San Francisco Railway Co., 347 F.2d at 983–84 (citations omitted). The Court in *St. Louis–San Francisco Railway* held that it had erred by dismissing the *appeal* as moot in this situation, and that it instead should have vacated the district court's ruling under *Munsingwear* without dismissing the appeal. The appellants therefore respectfully ask the Court to amend its disposition by removing any claim that is has "dismissed" the "appeal."

This leads to a second issue that warrants reconsideration. Because the panel has concluded that the *claims* against the federal defendants are moot, the panel cannot avoid deciding the 28 U.S.C. § 1447(c) issue: Whether the

plaintiffs' claims against the federal defendants should be remanded to state court rather than dismissed. By declaring these claims moot, the panel has ruled that the federal judiciary no longer has subject-matter jurisdiction over the claims. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980) ("Mootness of a case or controversy . . . ousts the jurisdiction of the federal courts and requires the dismissal of the case."); *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). Yet that is precisely the situation in which the text of section 1447(c) compels a *remand* to state court, rather than a jurisdictional dismissal:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c) (emphasis added). This language allows for no exceptions, and a *Munsingwear* vacatur is (by definition) a ruling that "the district court lacks subject matter jurisdiction" over the plaintiffs' claims. So rather than ordering the district court to "dismiss" those claims, the panel should have instructed the court to remand the claims against the federal defendants to state court, consistent with the unambiguous text of section 1447(c). And if the panel is unwilling to order a remand to state court, it should (in the appellants' view) explain how section 1447(c) can allow the panel to order a jurisdictional dismissal rather than a remand to state court, especially when

this is one of the issues that the plaintiffs have specifically appealed. The appellants therefore respectfully the Court to amend its disposition by instructing the district court to remand the moot claims to state court.

CONCLUSION

The motion for consideration should be granted.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: June 19, 2021

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on June 19, 2021, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon:

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CERTIFICATE OF CONFERENCE

I certify that I have conferred with Karen Schoen, counsel for the federal defendants, and Matthew Bohuslav, counsel for the state defendants, and they intend to file a brief opposing this motion. *See* Fifth Circuit Rule 27.4.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellants

Dated: June 19, 2021

CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
and type-style requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 874 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and Fed. R. App. P. 32(a)(6) because it uses Equity Text B 14-point type face throughout, and Equity Text B is a proportionally spaced typeface that includes serifs.

/s/ Jonathan F. Mitchell
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Dated: June 19, 2021

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on June 19, 2021, this document was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, through the court's CM/ECF document filing system.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

/s/ Jonathan F. Mitchell
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Counsel for Plaintiffs-Appellants

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 3, 2021
Lyle W. Cayce
Clerk

No. 20-11083

VICTOR LEAL; PATRICK VON DOHLEN; KIM ARMSTRONG,

Plaintiffs—Appellants,

versus

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; JANET YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY; MARTIN WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; UNITED STATES OF AMERICA; DOUG SLAPE, IN HIS OFFICIAL CAPACITY AS TEXAS COMMISSIONER OF INSURANCE; TEXAS DEPARTMENT OF INSURANCE,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:20-CV-124

Before DENNIS and ENGELHARDT, *Circuit Judges*, and HICKS, *Chief District Judge*. *

* Chief Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

This case presents a constitutional challenge to 42 U.S.C. § 300gg-13(a)(4), the provision of the Affordable Care Act (ACA) that provides the statutory basis for what is commonly known as the "contraceptive-coverage mandate."

Plaintiffs originally filed their claims in Texas state court, naming as defendants the Secretaries of Health and Human Services, Labor, and the Treasury.[1] Defendants removed the suit to the Northern District of Texas under the federal officer removal statute, 28 U.S.C. § 1442. When a case is removed under § 1442, "the jurisdiction of the federal court is derived from the state court's jurisdiction." *Lopez v. Sentrillon Corp.*, 749 F.3d 347, 350 (5th Cir. 2014). Thus, if "the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none," even if "in a like suit originally brought in a federal court it would have had jurisdiction." *Id.* (internal quotation marks omitted). The district court concluded that sovereign immunity shielded these federal defendants from the state court's jurisdiction, and thus that it lacked derivative jurisdiction to hear Plaintiffs' claims.[2]

Plaintiffs challenge that ruling here, arguing that the state court's jurisdiction over Defendants was proper under the exception to sovereign

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[1] Plaintiffs originally named the United States as an additional defendant but conceded below that the United States is shielded by sovereign immunity in state court. They do not challenge the district court's ruling that it lacked derivative jurisdiction over their claims against the United States.

[2] Plaintiffs also challenged Texas's "contraceptive equity laws," TEX. INS. CODE §§ 1369.101–.109, naming as defendants Texas Commissioner of Insurance, Kent Sullivan, in his official capacity and the Texas Department of Insurance. Because it found no jurisdiction over the federal claims Plaintiffs asserted, the district court found that there was no basis for it to exercise supplemental jurisdiction, and it therefore remanded the state-law claims back to state court. We do not review or disturb the district court's ruling as to the state-law claims.

immunity established in *Ex Parte Young*, 209 U.S. 123 (1908), and hence that the district court should have exercised derivative jurisdiction.

As a threshold matter, Defendants assert that this appeal is moot. They point out that Plaintiffs have already filed directly in the Northern District of Texas (and had dismissed with prejudice on other grounds) challenges to the ACA against these same defendants that are substantially identical to the underlying claims they raise here. *See Leal v. Becerra*, No. 2:20-cv-185 (N.D. Tex.). They argue that a decision by this court that the district court did have jurisdiction over Plaintiffs' underlying claims in this action could allow only for the district court to hear the merits of Plaintiffs' claims, and since that has already occurred in Plaintiffs' parallel suit, it is unclear how such a ruling could provide any relief.

We agree. As the Supreme Court held in *Campbell-Ewald Co. v. Gomez*, "a case becomes moot . . . when it is impossible for a court to grant any *effectual* relief whatever to the prevailing party." 577 U.S. 153, 161 *as revised* (Feb. 9, 2016) (citing *Knox v. Serv. Emps.*, 132 S. Ct. 2277, 2287 (2012)) (internal quotation marks omitted) (emphasis added). Our precedents indicate that where a plaintiff has filed a parallel suit that renders any relief this court may grant in the action before it redundant, that potential relief is ineffectual, and thus the case is moot. *See Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997) (holding that plaintiff's challenge to district court's denial of leave to amend was rendered moot "[i]nsofar as [she] ha[d] successfully refiled the same causes of action that she sought to allege in her proposed amended complaint"); *Woods v. Resol. Tr. Co.*, 71 F.3d 875 (5th Cir. 1995) (per curiam) (unpublished)[3] (dismissing appeal from

[3] Unpublished opinions of this Court issued before January 1, 1996 "are precedent." 5TH CIR. R. 47.5.3.

district court's dismissal for failure to exhaust administrative remedies as moot where plaintiff, during pendency of appeal, exhausted his administrative remedies and refiled his suit).

Plaintiffs attempt to argue that this appeal is not moot only by pointing to the potential collateral-estoppel effects of the district court's ruling on unspecified future lawsuits that they may potentially file in state court against these federal defendants, and that *Lowery*, 117 F.3d 242, and *Woods*, 71 F.3d 875, are inapposite because the challenges mooted on appeal in those cases were to district court rulings with no collateral-estoppel effects in future litigation. They argue that their standing to request relief is no different than that of an appellant who seeks vacatur of a lower court ruling after a case has become moot, citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

But in *Munsingwear*, the Supreme Court stated that where, as here, a "civil case from a court in the federal system . . . has become moot while on its way [to an appellate court] or pending [a] decision on the merits," the "duty of the appellate court" is to "reverse or vacate the judgment below and remand with a direction to dismiss" to avoid such collateral effects. 340 U.S. at 39 (1950) (footnote omitted) (citing *Duke Power Co. v. Greenwood Cnty.*, 299 U.S. 259, 267 (1936)). Thus, even if Plaintiffs are correct that the potential collateral-estoppel effects on an as-yet unfiled and speculative future lawsuit constitute a "concrete interest . . . in the outcome of the litigation[,]" *Chafin v. Chafin,* 133 S. Ct. 1017, 1023 (2013)—a necessary predicate to prevent a case from becoming moot—such an interest would not allow us to reach the merits in this case if we follow the dictate of *Munsingwear*. We thus decline to issue an advisory opinion on the jurisdictional question before us.

Accordingly, we DISMISS this appeal as moot, VACATE the order of the district court as to the federal defendants, and REMAND with instructions to dismiss.

United States Court of Appeals

FIFTH CIRCUIT
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June 03, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-11083 Leal v. Becerra
USDC No. 2:20-CV-124

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Laney Lampard

By: _____
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