No. 19-36020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon
No. 3:19-cv-01743-SI
Hon. Michael H. Simon

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION TO VACATE PANEL OPINION

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The government acknowledges that Presidential Proclamation 10209 mooted this case while Appellees' en banc petition was pending. Nevertheless, it asserts that vacatur is inappropriate because "this case would not have warranted rehearing en banc even if it were not moot." Opposition ("Opp.") at 3. That cursory assertion sidesteps the proper analysis (set forth in Appellees' Motion ("Mot.")) that demonstrates vacatur is the equitable outcome here.

ARGUMENT

I. THE EQUITIES OF THIS CASE FAVOR VACATUR.

The vacatur inquiry "is rooted in equity," and so "the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); *see also* Mot. at 5-6. As Plaintiffs explained, when a case becomes moot while a petition for en banc rehearing is pending and the Court's mandate has not issued, "the appropriate disposition is to vacate the panel's opinion and dismiss the appeal." *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992). That equitable result is warranted because Plaintiffs "did not have the opportunity to exhaust the entire appellate process, including the possible pursuance of a petition for writ of certiorari in the Supreme Court." *Farmer v. McDaniel*, 692 F.3d 1052, 1052 (9th Cir. 2012) (mem.); *see also United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam) ("When a case

becomes moot on appeal, whether it be during initial review or in connection with consideration of a petition for rehearing or rehearing en banc, this court generally vacates the District Court's judgment, vacates any outstanding panel decisions, and remands to the District Court with direction to dismiss."). Likewise, a court of appeals may "vacate its own judgment if it is made aware of events that moot the case during the time available to seek certiorari." *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc) (quoting Charles Alan Wright et al., Federal Practice & Procedure § 3533.10, at 435 (1984)). Any other rule would permit the government to manipulate the law of the circuit by securing a favorable panel opinion and then unilaterally mooting the appeal before Plaintiffs exhausted (or abandoned) their options for further review.[1]

What is especially "important" to the vacatur inquiry is "[t]he distinction between litigants who are and are not responsible for the circumstances that render the case moot." *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991). Indeed, as the government has argued elsewhere in favor of vacatur, "[t]he 'principal condition to which [courts have] looked is whether the party seeking relief from

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[1] Plaintiffs have never "argue[d] that, when a case becomes moot while a petition for rehearing en banc is pending, the appropriate disposition is vacatur of the panel's opinion *without further inquiry*," and certainly never argued that it is "mandatory." Opp. at 6 (emphasis added). Plaintiffs instead argued (correctly) that this is the "usual practice" and "appropriate." Mot. at 5.

the judgment below caused the mootness by voluntary action.'" U.S. Reply on Vacatur Mot., *United States v. Sabre Corp.*, No. 20-1767 (3d Cir. May 29, 2020), Dkt. 20, at 7 ("*Sabre* Reply"), https://bit.ly/3d6W8d5; *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1984) (similar). "But that condition is absent—and vacatur is appropriate—where 'mootness results from unilateral action of the party who prevailed below.'" *Id.* In *Sabre*, the Third Circuit agreed with the government on this point, and granted vacatur. *United States v. Sabre Corp.*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. July 20, 2020).

As in *Sabre Corp.*, vacatur is appropriate here. The panel issued its merits opinion, *Doe #1 v. Trump*, 984 F.3d 848 (9th Cir. 2020), but the mandate had not yet issued when Plaintiffs filed a timely petition for rehearing en banc, which extended the proceedings in this Court. *See* Fed. R. App. P. 41(b). Unlike a petition for certiorari, the en banc process is not a separate proceeding; it is a continuation of the same appeal. *See, e.g.*, *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 728 (9th Cir. 2007) (en banc) (Bybee, J., concurring) ("When we decide to rehear a case en banc, as the name suggests, we *rehear* the case and issue a new opinion and judgment on behalf of the court. In effect, we start over again. By granting rehearing en banc, we are not engaging in another level of appellate review. We do not affirm or reverse the panel; rather, we review the judgment of the lower court."); *Sierra Club v. Trump*, 963 F.3d 874, 903 n.5 (9th Cir. 2020) (Collins, J.,

dissenting) ("Although the motions panel decision is a precedent, it remains subject to reconsideration by this court until we issue our mandate."); *cf. Missouri v. Jenkins*, 495 U.S. 33, 46 (1990) ("A timely petition for rehearing operates to suspend the finality of the court's judgment . . . . To put the matter another way, while the petition for rehearing is pending, there is no 'judgment' to be reviewed." (alterations omitted)).

While this appeal was still pending, defendant President Biden unilaterally revoked the previous proclamation on which the appeal was based. *See* Procl. No. 10209, 86 Fed. Reg. 27,015, 27,015-16 (May 14, 2021). Even the timing—that the case became moot before the rehearing petition was considered—is attributable to the government, which sought and received two extensions totaling nearly four months to respond to Plaintiffs' petition. Dkt. 90, 91, 94, 95. Had the government responded by February 10 as originally ordered, Dkt. 81—or even by April 12, Dkt. 91—the Court could have ruled on the en banc petition and issued its mandate long before the appeal became moot in May.

Furthermore, the government's attempt to limit the *Munsingwear* doctrine is at odds with the Supreme Court's recent decision in *Mayorkas v. Innovation Law Lab*, --- S. Ct. ----, 2021 WL 2520313 (2021). There, the Acting Solicitor General argued that a "narrow conception of the *Munsingwear* doctrine" like the one the government advances here "has substantially less force . . . where the court of

appeals' divided decision was issued at the preliminary-injunction stage" and "contradicted an earlier published opinion of the court of appeals at the stay-pending-appeal stage." Pet'r Reply in Supp. of Mot. to Vacate at 8, *Mayorkas v. Innovation L. Lab*, No. 19-1212 (U.S. June 2021), https://bit.ly/3wW4Gvg. The Supreme Court granted the government's vacatur motion there, citing *Munsingwear*. *Mayorkas*, 2021 WL 2520313. This Court should likewise grant Plaintiffs' vacatur motion here.

II. THE GOVERNMENT'S ARGUMENTS OTHERWISE ARE UNPERSUASIVE AND IRRELEVANT TO PLAINTIFFS' VACATUR REQUEST.

The government's arguments against vacatur are simply irrelevant to the equitable inquiry facing this court and are inconsistent with the government's arguments seeking vacatur in other cases. Its principal argument here is that *Munsingwear* vacatur "is not warranted when a case becomes moot after this Court has entered judgment unless further review would otherwise have been warranted." Opp. at 4. But the law does not support any such "rule."

Rather, as the government recently argued elsewhere, "*Munsingwear* vacaturs . . . are based on a party's inability to appeal an adverse decision, not on any assessment of the appeal's underlying merits." *Sabre* Reply at 2. This is so, as the Supreme Court recognized, because it would be "inappropriate . . . to vacate mooted cases, in which [courts] have no constitutional power to decide the merits,

on the basis of assumptions about the merits." *Bonner Mall*, 513 U.S. at 27; *id.* at 28 ("We again assert the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits."). As the government argued in *Sabre*, if courts were permitted to peek at the merits in ruling on a vacatur motion, "appellants would have to fully brief moot appeals to motions panels in 5,200 words just to obtain vacatur." *Sabre* Reply at 8. Indeed, the government has tried to "fully brief" this "moot appeal[]" twice now. *See* Opp. at 12-16 (arguing that the case would not have warranted en banc rehearing on the merits); Gov't Opp. to Pet. for Reh'g En Banc ("En Banc Opp."), Dkt. 97, at 3-15 (same).

Nor is it true that "vacatur would 'leave[] the incorrect and misleading impression that the en banc panel has considered and ruled on the merits of the three-judge panel opinion,'" as the government suggests. Opp. at 5 (quoting *Veneman*, 490 F.3d at 731 (Thomas, J., concurring/dissenting)). Rather, the practice of vacating panel opinions under these circumstances recognizes the equities of the situation: those "who seek[] review of the merits of an adverse ruling, but [are] frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25.

Finally, the government not-so-subtly implies that the Supreme Court—in an unsigned, unreasoned order, no less—adopted the government's position here. *See*

Opp. at 7-8. But denials of certiorari carry no precedential weight. *See, e.g.*, *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."). The Supreme Court's adherence to *Munsingwear* in *Mayorkas* is a far more explicit indication of the appropriate outcome here. In sum, the Court should disregard the government's arguments on the merits of the now-moot en banc petition and instead follow the established equitable inquiry set forth in *Munsingwear* and *Bonner Mall*.

III. EVEN IF THE MERITS OF PLAINTIFFS' EN BANC PETITION WERE RELEVANT, THEY WOULD FAVOR VACATUR.

As discussed, the appeal's merits are irrelevant to the question now before this court. But even if examining the merits of a now-mooted appeal were appropriate, that examination would support Plaintiffs' motion for vacatur as well. The en banc petition demonstrated that the published stay opinion in this case and the panel decision are irreconcilable. Pet. for Reh'g En Banc, Dkt. 80-1, at 8-15.

According to the government, there is no conflict because "[t]his Court has already very recently resolved the question of the precedential force of a motions panel's decision . . . and held that it gives way to the merits panel's later determination." Opp. at 12. Not so. The three-judge panel that decided *East Bay* could not have "recently resolved the question" because it was resolved by a published panel opinion years before, *see Lair v. Bullock*, 798 F.3d 736, 747 (9th

Cir. 2015), and a later panel generally cannot overrule an earlier published panel decision, *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013).[2] Plaintiffs' en banc petition here therefore asked the Court to rehear the case to help address "the undeniable reality that . . . [the Ninth] Circuit doesn't have anything close to a cognizable rule about how merits panels should treat motions panels' earlier published stay opinions." *E. Bay*, 993 F.3d at 704 (VanDyke, J., dissenting from denial of en banc rehearing).

The Government correctly states that "Plaintiffs did not seek rehearing en banc principally on the ground that the merits panel's decision was incorrect." Opp. at 12. That is, of course, irrelevant; the Federal Rules do not permit an en banc petition on that basis. *See* Fed. R. App. P. 35(b)(1) (specifying the two exclusive grounds for en banc petition). As set forth in the Petition, en banc determination was needed both to settle the intra-circuit conflict and to address

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[2] *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 697 (9th Cir. 2021) (VanDyke, J., dissenting from denial of en banc rehearing) ("Although the revised *East Bay* panel opinion now no longer purports to overrule *Lair v. Bullock*—which, of course, it never had the authority to do in the first place—the replacement rationale it provides is no less troublesome, and can only serve as an ever-ready escape valve for merits panels who wish to disregard a published motions panel decision that decided effectively identical issues." (citation omitted)); *id.* at n.1 ("It's worth emphasizing up front that I'm somewhat ambivalent as to whether the *Lair-Gonzalez* rule was the *correct* rule. But right or wrong, it clearly was *the* rule in our circuit, and if we wanted to change it, we should have done so en banc.").

legal issues "of exceptional importance." Fed. R. App. P. 35(b)(1)(B). As the government argued elsewhere in a similar case, "this case present[ed] exceptionally important questions concerning the President's authority to exclude aliens abroad based on his national-security and foreign-policy judgments." Pet. for Writ of Cert. at 33-34, *Trump v. Hawaii*, No. 17-965 (U.S. Jan. 5, 2018), https://bit.ly/3gVTjwA.[3]

Nor is it correct to say that certiorari was unlikely because *Hawaii* "rejected the same types of arguments for limiting [section 212(f)] power." Opp. at 13. Indeed, *Trump v. Hawaii* expressly *did not* address these arguments because the parties had not developed them. *See* 138 S. Ct. 2392, 2411 (2018) ("We may

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[3] The government casually asserts that "[t]here is no evidence or support" for the assertion that the now-revoked Proclamation "would have 'negatively affect[ed]' a large number of immigrant visa applications." En Banc Opp. at 15. Apart from the statement's factual inaccuracy, it is also inconsistent with the defunct Proclamation's supposed finding that "the United States Government is . . . admitting thousands of aliens who have not demonstrated any ability to pay for their healthcare costs," and that "lawful immigrants are about three times more likely than United States citizens to lack health insurance." Procl. No. 9945, 84 Fed. Reg. 53,991, 53,991 (Oct. 9, 2019). If the Proclamation intended to ease purported "substantial costs in paying for medical expenses incurred by people who lack health insurance," *id.*, it *necessarily* needed to exclude "a large number of immigrant[s]." En Banc Opp. at 15; *see also* Gov't Merits Br., Dkt. 23, at 4 ("The President issued PP 9945 to address the 'substantial costs' U.S. healthcare providers and taxpayers bear 'in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare.'"); *id.* at 24 ("The harms to the national interest the Proclamation was designed to address will continue as long as the injunction is in place . . . .").

assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation . . . ."). Further development of *Hawaii*'s reasoning would certainly merit Supreme Court review. *See* S. Ct. R. 10(c) (certiorari appropriate where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

In sum, Plaintiffs disagree that the merits of a now-moot appeal are appropriate considerations in the vacatur inquiry. But even accepting the government's supposed standard, the issues presented here would have merited both en banc rehearing and, if necessary, Supreme Court review. Due to the government's unilateral conduct—requesting multiple extensions of time to respond to Plaintiffs' en banc petition, and then revoking Proclamation 9945 before responding— Plaintiffs lost "the opportunity to exhaust the entire appellate process, including the possible pursuance of a petition for writ of certiorari in the Supreme Court," *Farmer*, 692 F.3d at 1052, and so vacatur is appropriate.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs-Appellees' Motion, the panel opinion should be vacated, and the appeal should be dismissed as moot.

Dated: June 28, 2021

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/s/ Tacy F. Flint
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,593 words. This document also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(4)-(6) because it was prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word.

/s/ Tacy F. Flint

Tacy F. Flint

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I caused the foregoing Plaintiffs-Appellees' Reply in Support of Motion to Vacate Panel Opinion to be submitted electronically via the Court's Appellate Electronic Filing System, which will automatically notify the other parties and counsel registered for electronic service.

/s/ Tacy F. Flint

Tacy F. Flint