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

DEFENDANTS-APPELLANTS' OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION TO VACATE PANEL OPINION

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INTRODUCTION

This case involves the now-revoked Presidential Proclamation 9945, and the parties agree that the President's revocation of that proclamation mooted this case. Plaintiffs-Appellees contend that, because the case became moot while their petition for rehearing en banc was pending, this Court should vacate the merits panel's opinion. But even if this case had remained live, no further review would have been warranted because the merits panel's opinion is correct and does not conflict with any other decision of this Court or another court of appeals. Therefore, to vacate the merits panel's opinion now would provide a windfall to Plaintiffs that they could not have received if this case were not moot. The Supreme Court's actions over decades in response to cases that became moot in a similar posture confirm that vacatur would be inappropriate here. This Court should deny Plaintiffs' motion to vacate the merits panel's opinion.

BACKGROUND

In October 2019, Plaintiffs—an organization and two certified subclasses represented by seven U.S. citizens and one noncitizen spouse of a U.S. citizen—challenged the implementation and enforcement of Presidential Proclamation 9945, "Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System in Order to Protect the Availability of Healthcare Benefits for Americans," 84 Fed. Reg. 53,991 (Oct. 9, 2019). Before Proclamation

9945 went into effect, the district court preliminarily enjoined Defendants from implementing or enforcing the Proclamation. *Doe #1 v. Trump*, 418 F. Supp. 3d 573 (D. Or. 2019) ("*Doe PI Order*"). A divided panel of this Court denied an administrative stay, *Doe #1 v. Trump*, 944 F.3d 1222 (9th Cir. 2019) ("*Doe Admin Order*"), and later denied Defendants' motion for a stay pending appeal, *Doe #1 v. Trump*, 957 F.3d 1050 (9th Cir. 2020) ("*Doe Stay Order*").

Subsequently, in deciding the merits of Defendants' appeal, this Court vacated the district court's preliminary-injunction order. *Doe #1 v. Trump*, 984 F.3d 848 (9th Cir. 2020) ("*Doe Merits Opinion*"). On January 19, 2021, Plaintiffs petitioned for rehearing en banc, and this Court ordered Defendants to respond. On May 14, 2021, President Biden issued Proclamation 10209, "Revoking Proclamation 9945," which revokes the Proclamation at issue in this case. 86 Fed. Reg. 27,015 (May 19, 2021).

On June 10, 2021, Plaintiffs moved to vacate the merits panel's opinion. ECF No. 96 ("Vacatur Mot."). The following day, Defendants filed an opposition to Plaintiffs' petition for rehearing en banc. ECF No. 97 ("En Banc Opp."). While Defendants mentioned their arguments against vacatur in their en banc opposition, they now submit this opposition to Plaintiffs' vacatur motion as well.

ARGUMENT

This Court should not vacate the merits panel's opinion because this case would not have warranted rehearing en banc even if it were not moot.

The parties agree that the revocation of Proclamation 9945 moots this case. *See* Vacatur Mot. 3-5; En Banc Opp. 2-3. Plaintiffs contend that, in light of the mootness of the case, this Court should vacate the merits panel's opinion—but not the motions panel or district court decisions—under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Vacatur Mot. 5-6. Vacatur is unwarranted here. "[N]ot every moot case will warrant vacatur"; rather, because vacatur on mootness grounds "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792-93 (2018) (per curiam) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)).

Vacatur is inappropriate where, as here, the Court has already issued a decision on the merits and the case would not have warranted further review in the absence of mootness. Even before this case became moot, en banc review was not warranted because the merits panel's decision does not conflict with any other decision of this Court or another court of appeals. And the panel correctly resolved this case by a straightforward application of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), in which the Supreme Court already rejected the same types of arguments that Plaintiffs pressed in this appeal. *See* Fed. R. App. P. 35(a) (noting that

rehearing en banc is disfavored and will not be ordered unless "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance"); 9th Cir. Rule 35-1 (en banc appropriate when "opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity").

A. Vacatur under *Munsingwear* is not warranted when a case becomes moot after this Court has entered judgment unless further review would otherwise have been warranted.

Vacatur under *Munsingwear* is not warranted where, as here, a case becomes moot after a court of appeals has entered judgment and no further discretionary review would have been warranted. The familiar "*Munsingwear* rule" holds that "[w]hen a case becomes moot *on appeal*, the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)) (emphasis added). But when a case becomes moot *after* this Court has already issued its decision on the merits of the appeal as of right, there is no basis for vacating the Court's judgment unless further discretionary review (rehearing or certiorari) would otherwise have been warranted. *See Camreta v. Greene*, 563 U.S. 692, 712 (2011) (vacatur of a lower court's decision because of intervening mootness is

generally available only to "those who have been prevented from obtaining the review *to which they are entitled*") (quoting *Munsingwear*, 340 U.S. at 39) (emphasis added).

Plaintiffs have no right to further review; en banc rehearing and certiorari are both discretionary. Indeed, en banc review is "not favored and ordinarily will not be ordered." Fed. R. App. P. 35(a); *cf.* Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."). If this Court would have denied en banc review in any event, then vacatur would give Plaintiffs a windfall that they would not have received if the controversy had remained live. *See Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 731 (9th Cir. 2007) (en banc) (Thomas, J., concurring in dismissal of appeal and dissenting from vacatur of panel opinion) (noting that where an "en banc panel has not considered [an] appeal on the merits," 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"). It has therefore been the longstanding position of the United States that, when a case becomes moot after the court of appeals enters its judgment, but before the Supreme Court acts on a petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have merited Supreme Court review. *See*, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp. v. United*

States, cert. denied, 435 U.S. 942 (1978) (No. 77-900); Gov't Br. in Opp. at 6-8, *Elec. Priv. Info. Ctr. v. Dep't of Com.*, *cert. denied*, 140 S. Ct. 2718 (2020) (No. 19-777). And the Supreme Court's "behavior across a broad spectrum of cases since 1978" suggests the Court's general acceptance of that position. Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019); *see Camreta*, 563 U.S. at 713 (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review").

Plaintiffs argue 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. Vacatur Mot. 5-6. Plaintiffs are incorrect. Instead, even the authorities on which Plaintiffs rely recognize that vacatur is not mandatory simply because the losing party has a pending petition for further review. *See, e.g.*, *Att'y Gen. of Guam v. Thompson*, 441 F.3d 1029, 1030 (9th Cir. 2006) (withdrawing panel opinion "as a matter of prudence"); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 355 F.3d 1203, 1204 (9th Cir. 2004) (noting that decision whether to vacate opinion is discretionary). Again, vacatur can be justified only if the case would actually have warranted rehearing en banc—which is discretionary and sparingly granted. *See Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc) ("[n]either party is *entitled* to additional appellate review" if the decision to grant that additional review is discretionary). Here, if en

banc review would have been denied even had the case not become moot, then vacating the merits panel's opinion would eliminate this Court's reasoned precedent without basis and give Plaintiffs an unjustified result that they have not earned.[1]

The Supreme Court recently denied certiorari and rejected the plaintiffs' request for *Munsingwear* vacatur of another decision of this Court that had a similar procedural posture. In *Kuang v. United States Department of Defense*, 778 F. App'x 418 (9th Cir. 2019), this Court vacated a preliminary injunction against a government policy after another panel had previously declined to stay the injunction pending appeal. After this Court ruled on the merits of the appeal, and while the plaintiffs' petition for a writ of certiorari was pending, the government policy at issue was rescinded. The plaintiffs acknowledged to the Supreme Court

[1] Plaintiffs also rely on a line of decisions suggesting that this Court should vacate its panel opinions when a habeas petitioner dies while his petition for rehearing en banc is pending. Vacatur Mot. 5-6 (citing *Farmer v. McDaniel*, 692 F.3d 1052 (9th Cir. 2012) (citing *Griffey v. Lindsey*, 349 F.3d 1157 (9th Cir. 2003)). But even in that unique context, the "decision whether to vacate a filed opinion based on post hoc mootness is within [the Court's] discretion based on equity." *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc) (internal citation omitted) (declining to vacate en banc panel's prior decision issued before habeas petitioner died). In fact, in *Dickens*, this Court rejected the movant's reliance on *Farmer* and *Griffey*, noting that the "decision to vacate in those cases does not compel vacatur here." *Id*. at 1148 n.2; *see also United States v. Payton*, 593 F.3d 881, 883 (9th Cir. 2010) (declining to vacate panel opinion where mootness arose after the decision was issued because, among other reasons, there "was a live controversy" at the time of the decision).

that their petition was moot, but sought vacatur of this Court's decision. *See* Reply Br. for Petitioners, *Kuang v. U.S. Dep't of Def.*, No. 19-1194, at 1-5 (Apr. 6, 2021). The government opposed that request, explaining that, because this Court's decision would not have warranted further review even if the case had not become moot, vacatur was not appropriate. *See* Br. in Opp., *Kuang*, *supra*, No. 19-1194, at 11-14 (Mar. 19, 2021). The Supreme Court declined to vacate this Court's decision and denied certiorari without comment. *Kuang*, *supra*, No. 19-1194, 2021 WL 1602645 (U.S. Apr. 26, 2021).

Similarly, here, after this Court issued its merits opinion but before the case became moot, Plaintiffs petitioned for rehearing en banc. But even if this case were not moot, the merits opinion would not have warranted further review because there is no intra-circuit conflict and the decision is correct. Accordingly, this Court should deny Plaintiffs' motion to vacate the merits panel's opinion because to do otherwise would grant Plaintiffs a result that they could not have obtained even if the case had not become moot.

B. There is no intra-circuit conflict on the lawfulness of Proclamation 9945 or the scope of the President's authority under INA § 212(f).

Contrary to Plaintiffs' suggestion, there is no intra-circuit conflict on the lawfulness of Proclamation 9945 or the scope of the President's authority under section 212(f) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(f).

In Plaintiffs' pending petition for rehearing en banc—on which their vacatur motion depends—Plaintiffs attempted to manufacture a "direct and irreconcilable conflict between the panel's published opinion on the merits" and "the published and precedential order issued by the stay panel." Pet. 1. Plaintiffs asserted that the two decisions "create inconsistent circuit precedent," Pet. 8, and that "there is uncertainty in this Court's precedents as to the precedential force of a published motions ruling," Pet. 9 n.1. These assertions are incorrect.

Plaintiffs misunderstand the import of those two decisions, which decided two different issues. The motions panel resolved Defendants' request for a stay of the preliminary injunction pending appeal—a decision that is "committed to the exercise of judicial discretion," *Doe Stay Order*, 957 F.3d at 1058, based on the motions panel's preliminary consideration of the case. The merits panel then resolved Defendants' appeal of the actual merits of the preliminary injunction. *Doe Merits Opinion*, 984 F.3d at 855.

In fact, the motions panel here repeatedly stressed that, "[a]s a motions panel," it "must take care" in its ruling "not to prejudge the merits of the appeal." *Doe Stay Order*, 957 F.3d at 1062. Rather, the motions panel merely assessed "the necessity of a stay pending presentation to a merits panel." *Id.*; *see also id*. at 1064 ("[W]e leave a complete analysis of these claims to the merits panel."); *id*. at 1067 ("Again, we do not prejudge the resolution of the merits" of Plaintiffs' argument

that the Proclamation "effectively rewrit[es] provisions of the INA" because "the question is whether the government has shown a strong likelihood of success."); *id*. at 1070 ("We do not prejudge the consideration of the merits appeal."). And according to the motions panel, the "most important factor" in its decision to deny a stay pending appeal was not Defendants' likelihood of success on the merits but rather that Defendants had not shown that "irreparable injury is likely to occur during the period before the appeal is decided." *Id*. at 1058-59; *see also id.* at 1061-62 (noting that the merits discussion was unnecessary to the motions panel's decision and that the "analysis could conclude" with finding an insufficient showing of irreparable harm because, in the absence of irreparable harm, "a stay may not issue, regardless of the . . . other stay factors").

The motions panel had good reason to take pains to emphasize these points. As this Court recently held, a "published motions panel order may be binding as precedent for other panels deciding the same issue," *i.e*., whether to grant or deny a stay of a preliminary injunction pending appeal. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 660 (9th Cir. 2021) (amended opinion). But such an order is *not* binding on the merits panel in the same case, because the motions panel is merely "predicting rather than deciding what [the] merits panel will decide," whereas the "merits panel is deciding the likelihood of success of the actual litigation." *Id*. Accordingly, the merits panel of this Court's later ruling in

Defendants' favor, after "re-examining the merits of the issues afresh in light of the now-completed merits briefing and argument," *Doe Merits Opinion*, 984 F.3d at 860, does not create any "conflict" but rather simply resolved a different question than the one answered by the motions panel. *See E. Bay Sanctuary Covenant*, 993 F.3d at 662 ("The inquiry with respect to the stay differs from the inquiry as to the preliminary injunction. To the extent the issues share predictive similarity, the motions panel may be persuasive but not binding.").

Although there may be unusual "circumstances where a motions panel *does* answer the same legal question that is presented to the merits panel," such as where a panel addresses a "pure question of law" like "whether the Supreme Court had abrogated a relevant circuit precedent," *id*. at 661 n.3 (citing *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015)), that is not the case here. Instead, the motions panel took pains to make clear that it was not definitively resolving the legality of the Proclamation. *See supra* at 9-10. Indeed, there would be no need for merits briefing at all if a merits panel was always bound by a motions panel's preliminary assessment of a case. Accordingly, the merits panel here was under no obligation to rule in Plaintiffs' favor on the merits simply because the motions panel had denied Defendants' request to stay the preliminary injunction pending appeal.

Because there is no merit to Plaintiffs' assertion that the merits panel's opinion creates a "conflict" with the stay-panel order that "[o]nly the *en banc*

Court can resolve," Pet. 1-2, en banc review would not have been warranted in this case even if it were not moot. Plaintiffs also argued that, "[t]o the extent there is uncertainty in this Court's precedents as to the precedential force of a published motions ruling, that is yet further reason to rehear this case *en banc*." Pet. 9 n.1. But there is no merit to that contention either: This Court has already very recently resolved the question of the precedential force of a motions panel's decision like the one at issue here, and held that it gives way to the merits panel's later determination. *See E. Bay Sanctuary Covenant*, 993 F.3d at 662.

C. The merits panel's decision is correct and straightforwardly applies the Supreme Court's decision in *Trump v. Hawaii*.

If this case had remained live, rehearing en banc would not have been warranted for the additional reason that the merits panel's decision is correct. As an initial matter, Plaintiffs did not seek rehearing en banc principally on the ground that the merits panel's decision was incorrect; Plaintiffs instead simply noted aspects of the merits panel's decision that they believe are inconsistent with the motions panel's decision, in service of their intra-circuit-conflict argument—an argument that is wrong for all the reasons discussed above. Plaintiffs primarily contended that this case is of "national importance" because it "stand[s] at the crossroads of presidential power and immigration law," *i.e.*, it involves the scope of the President's authority to issue proclamations under INA § 212(f). Pet. 15.

It is true that section 212(f) is an important presidential power, but the Supreme Court recently provided extensive guidance on the very issue here and rejected the same types of arguments for limiting the power that Plaintiffs have advocated in this appeal. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The merits panel here recognized, just as the Supreme Court recognized in *Hawaii*, that section 212(f) "exudes deference to the President in every clause" and "grants the President sweeping power to decide whether to suspend entry, whose entry to suspend, and for how long." *Doe Merits Opinion*, 984 F.3d at 863 (quoting *Hawaii*, 138 S. Ct. at 2408, 2413).

First, the merits panel properly rejected Plaintiffs' argument that Proclamation 9945 provided an insufficient explanation, noting that "the sole *prerequisite* set forth" in section 212(f) is that the President "find" that entry of the covered noncitizens "would be detrimental to the interests of the United States." *Doe Merits Opinion*, 984 F.3d at 864 (quoting *Hawaii*, 138 S. Ct. at 2408). The merits panel correctly concluded that "the Proclamation concisely explains the adverse impact" the Proclamation was designed to prevent, and that a more searching inquiry would be inconsistent with the "deference owed to the President and would improperly shift to the courts the weighing of policy justifications for" such restrictions. *Id*. (citing *Hawaii*, 138 S. Ct. at 2409). Likewise, the merits panel properly rejected Plaintiffs' argument that Proclamation 9945 violated a temporal

limit of section 212(f)'s "suspension" of entry, which does not "require[] a bright-line trigger for terminating additional restrictions." *Id*. at 865 (citing *Hawaii*, 138 S. Ct. at 2410).

Second, the merits panel correctly held that Proclamation 9945 did not impermissibly conflict with other provisions of law. *Doe Merits Opinion*, 984 F.3d at 865-69. Here again, the merits panel noted that a straightforward application of *Hawaii* resolved this question because the Supreme Court has already held that such an argument has no merit unless Plaintiffs could "show that the proclamation at issue" "*expressly over[o]de* particular provisions" of another statute, and Plaintiffs had identified no express conflict here. *Id*. at 865-66 (quoting *Hawaii*, 138 S. Ct. at 2411) (emphasis added). The merits panel thus observed that the Supreme Court had addressed and rejected very "similar arguments in *Trump v. Hawaii*" to the arguments Plaintiffs raised in this case. *Id*. at 865; *see id*. at 865-69 (citing *Hawaii*, 138 S. Ct. at 2411-12). Accordingly, applying *Hawaii*, the merits panel concluded "that the Proclamation's restrictions rest on a valid exercise of the authority delegated in section 212(f) and that those restrictions do not violate any of the other congressional enactments on which Plaintiffs rely." *Id*. at 869.

Finally, the merits panel correctly rejected the district court's suggestion that the President has less authority under section 212(f) when he acts based on so-called "domestic" policy concerns for the United States, as opposed to national-

security concerns. *Doe Merits Opinion*, 984 F.3d at 869-70 (citing *Hawaii*, 138 S. Ct. at 2408-15). That reasoning has no basis in the statutory text and would be "unworkable: because all additional restrictions under § 212(f) on who may *enter* the United States are ultimately based on the 'detrimental' impact of those [noncitizens'] presence in the United States, all such restrictions may be characterized as reflecting 'domestic' policy concerns to a greater or lesser degree." *Id*. at 870 (citing INA § 212(f)). The ongoing pandemic and the use of section 212(f) by both the current President and the former President to bar entry of certain individuals in order to address a "domestic" harm—preventing the spread of COVID-19 within the United States—amply demonstrates why the district court's reasoning was deeply flawed.

Again, Plaintiffs did not principally rest their request for rehearing en banc on the basis that the merits panel's decision was incorrect. They argued instead that this case has "national importance" because section "212(f) proclamations have been, and continue to be, the subject of important litigation." Pet. 15. But their argument is merely that other parties have approvingly cited the motions panel's order and the district court's decision. Pet. 16. Plaintiffs' and other litigants' preference for other decisions that have been superseded by this Court on the merits provide no basis for rehearing en banc.

Accordingly, Plaintiffs' motion to vacate is based entirely on a request for discretionary further review that would not have been warranted even if this case were not moot, and thus vacating the merits panel's opinion would grant Plaintiffs a result that they otherwise would not have been able to obtain.

CONCLUSION

Because en banc review would not have been warranted even if this case had not become moot, this Court should deny Plaintiffs' motion to vacate the merits panel's opinion.

DATED: June 21, 2021

Respectfully submitted,

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