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.[1]

On Appeal from the United States District Court
for the District of Oregon

DEFENDANTS-APPELLANTS' OPPOSITION TO PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), President Joseph R. Biden, Jr., is automatically substituted for former President Donald Trump.

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INTRODUCTION

This Court should deny Plaintiffs-Appellees' petition for rehearing en banc because this case is now moot, as Plaintiffs have separately acknowledged. And even if there were a live controversy, en banc review would not 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.

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 Defendants' request for 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 reversed the district court's order and vacated the preliminary injunction. *Doe #1 v. Trump*, 984 F.3d 848 (9th Cir. 2020) ("*Doe Merits Opinion*"). On January 19, 2021, Plaintiffs petitioned for rehearing en banc. This Court ordered Defendants to respond and later extended the response deadline to June 11, 2021. On May 14, 2021, the President issued Proclamation 10209, "Revoking Proclamation 9945," which revokes the Proclamation at issue in this case. 86 Fed. Reg. 27,015 (May 19, 2021).

ARGUMENT

I. This Court should deny en banc review because this case is moot.

This case does not warrant rehearing en banc for several reasons. Most importantly, in light of the President's revocation of Proclamation 9945, this case is now moot. Under Article III of the Constitution, the jurisdiction of federal courts depends on the existence of a live case or controversy. *Chafin v. Chafin*, 568 U.S. 165, 171 (2013). A case loses its quality as a live controversy and becomes moot when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id*. at 172 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)).

As Plaintiffs acknowledge, this case no longer presents a live case or controversy. *See* ECF No. 96, Plaintiffs-Appellees' Suggestion of Mootness and

Motion to Vacate Panel Opinion ("Vacatur Mot.") 3-5. Plaintiffs no longer have any interest in the preliminary injunction that was the subject of this appeal; the only subject of that injunction was Proclamation 9945, which has since been revoked. As a result, there is no relief that this Court could grant Plaintiffs on rehearing. Accordingly, this Court should deny Plaintiffs' petition for rehearing en banc.

II. This Court should not vacate its opinion because this case would not have warranted rehearing en banc even if it were not moot.

Plaintiffs have suggested that, in light of the mootness of the case, this Court should vacate its opinion under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Vacatur Mot. 5-6.[2] But "not 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 en banc review in the

[2] Yesterday—the day before Defendants' deadline to respond to the en banc petition—Plaintiffs filed a motion seeking vacatur of the merits panel's opinion (but not the motions panel's or district court's decisions). Vacatur Mot. 5-6. Out of an abundance of caution, Defendants have included their arguments against vacatur in this response, but they also intend to respond separately to Plaintiffs' motion, *see* Fed. R. App. P. 27(a)(3)(A).

absence of mootness. 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 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, there is no basis for vacating the Court's judgment unless further 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*") (emphasis added) (quoting *Munsingwear*, 340 U.S. at 39).

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. 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 that position is consistent with the Supreme Court's "behavior across a broad spectrum of cases since 1978." 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 have argued 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. Vacatur Mot. 5-6. But 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) ("We exercise our discretion to withdraw the opinion."). Again, vacatur can be justified only if the case would actually have warranted rehearing en banc—which is discretionary and sparingly granted. Here, if en banc review would have been denied even had the case not become moot, then vacating the merits panel's opinion would give Plaintiffs an unjustified result that they have not earned.

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 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 the petition without vacating 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). Plaintiffs attempt 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 assert 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.2. 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. 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 say 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. at 9, n.1. But there is no merit to that contention either: This Court has already 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 do not seek rehearing en banc principally on the ground

that the merits panel's decision is incorrect; Plaintiffs instead simply note 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 contend 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 do not principally rest their request for rehearing en banc on the basis that the merits panel's decision is incorrect. They argue 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 opinion and the district court's opinion. Pet. 16. Plaintiffs' and other litigants' preference for other opinions that have been overturned by this Court on the merits provide no basis for rehearing en banc.

Plaintiffs' only other argument for rehearing en banc is that this case would have had "real-world impact" because they believe that the Proclamation would have "negatively affect[ed]" a large number of immigrant visa applicants. Pet. 16. There is no evidence or support for that argument. In any event, the fact that this Court's opinion on the merits has affected the parties would not have been a sufficient basis for granting en banc review.

CONCLUSION

There is no basis to grant rehearing en banc because Proclamation 9945 has been revoked. This Court should deny the petition for rehearing en banc and should not vacate the merits panel's opinion.

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DATED: June 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Courtney E. Moran
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United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Courtney E. Moran
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