21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103, -4108, -4112, -4114, -4115, -4117, -4133, -4149, -4152, -4157
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS THE PETITIONS AS MOOT

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1. Most petitioners did not file a response to the government's motion, and of those who responded, all but one agree that the pending cases are moot and that the petitions should accordingly be dismissed.[1] On January 26, 2022, the Occupational Safety and Health Administration withdrew the Vaccination and Testing emergency temporary standard. 87 Fed. Reg. 3928, 3928-3929 (Jan. 26, 2022). Because it is impossible to grant any effectual relief, the cases are moot and should be dismissed. Mot. 2 & n.2.

2. Some petitioners contend, however, that in dismissing the petitions, this Court should vacate its decision dissolving a stay previously entered by the Fifth Circuit. That contention misunderstands the principles governing vacatur and the procedural posture of this case. Vacatur is unwarranted.

a. First, this Court's stay decision was not a final adjudication on the merits with preclusive effect. "The *Munsingwear* doctrine serves to prevent a lower-court judgment from having preclusive effect when the merits are unable to be considered on appeal." *Ramsek v. Beshear*, 989 F.3d 494, 501 (6th Cir. 2021). Vacatur "clears the path for future relitigation of the issues between the parties," thus preserving "the rights of all parties." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950).

[1] One pro se petitioner urges (Abadi Opp. 2-3) that this Court should adjudicate his petition because "the law is relevant to the country to others in similar situations." That petitioner, however, does not explain how he has a live controversy or how this Court could provide him effectual relief from a regulation that is now withdrawn.

Here, this Court did not definitively resolve the merits of any claim but instead considered petitioners' likelihood of success on the merits in deciding the propriety of a stay. Courts have concluded that the tentative and preliminary nature of such rulings render "vacatur of a prior stay-panel opinion once a case becomes moot on appeal . . . inappropriate." *Hassoun v. Searls*, 976 F.3d 121, 134 (2d Cir. 2020); *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020) (same); *see Serv. Emps. Int'l Union Loc. 1 v. Husted*, 531 F. App'x 755, 755-756 (6th Cir. 2013) (unpub.) (similar). Likewise, this Court "typically do[es] not vacate a preliminary injunction in that it has no preclusive effect." *Ramsek*, 989 F.3d at 501 (quotation marks omitted); *see American Exp. Travel Related Servs. Co. v. Kentucky*, 730 F.3d 628, 632 (6th Cir. 2013) ("Denials of preliminary relief are generally not given preclusive effect."); *see also Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014) (stating that a motions-panel order is "not strictly binding upon subsequent panels"); *R.E. Dailey & Co. v. John Madden Co.*, No. 92-1397, 1992 WL 405282, at *1 n.1 (6th Cir. Dec. 15, 1992) ("we are not bound to follow the decision of the motions panel").

Petitioners' suggestion (Relig. Pets. Resp. 5) that vacatur is required whenever this Court decides to publish an interim decision fails to recognize that the stay ruling in this case is not a binding decision on the merits with preclusive effect on the parties. That it may have certain "precedential effect" (*id.*) is true whenever a court of appeals issues a published, interim decision. But there is no rule requiring vacatur every time this Court decides to publish an interim decision and the case later becomes moot.

Indeed, decisions frequently have precedential value even when parties decline to seek further review or cases become moot but the parties themselves are not entitled to the equitable remedy of vacatur. *See Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) ("Precedent, more often than not, is drawn from cases not involving either of the parties for or against whom the precedent is offered.").

b. Second, petitioners have not been denied any right of appellate review. Vacatur of a decision because of intervening mootness is generally available only to "those who have been prevented from obtaining the review to which they are entitled." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). Vacatur is "used to ensure that a losing party's right of appellate review is not frustrated by circumstances out of that party's control," *United States v. City of Detroit*, 401 F.3d 448, 452 (6th Cir. 2005), and protects a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" and "ought not in fairness be forced to acquiesce in the judgment," *U.S. Bancorp Mortg. Corp. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Petitioners have not been denied appellate review to which they were entitled. This Court's interim ruling is not the sort of decision that would warrant plenary review by the Supreme Court. The highly preliminary and interlocutory ruling about whether to dissolve the Fifth Circuit's stay presented a particularly poor candidate for certiorari. *See, e.g.*, *National Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., respecting the denial or certiorari). For that reason alone, vacatur would be

unwarranted. *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) (government opposing vacatur on that basis and Supreme Court declining to vacate); *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019) (describing Supreme Court practice); *see also Camreta*, 563 U.S. at 713 (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review").

The unsuitability for plenary Supreme Court review perhaps explains why petitioners chiefly sought emergency relief, which the Supreme Court granted. Parties are not entitled to vacatur based on a theory that they were deprived of appellate review when they actually secured relief from the Supreme Court, which declined to grant certiorari before judgment. Those parties that declined to seek certiorari from the stay decision were not deprived of such review in any sense. *See Bancorp*, 513 U.S. at 25-26; *see, e.g.*, *Camreta*, 563 U.S. at 712 n.11 ("leav[ing] untouched" a ruling that the losing party "chose not to challenge"); *Karcher v. May*, 484 U.S. 72, 83 (1987) (holding that vacatur in light of mootness was not warranted when the losing party declined to pursue an appeal). And even those who may have sought certiorari were not deprived of the right to seek such review—the Supreme Court simply denied it. In all events, petitioners suffered "no prejudice" from failing to obtain further review because they sought and obtained "emergency review of [this Court's] unfavorable decision from the

Supreme Court." *See Serv. Emps. Int'l Union Loc. 1*, 531 F. App'x at 756.[2] Because "mootness did not deprive [an] appealing party of any review to which he was entitled," the stay decision should be left "intact." *Camreta*, 563 U.S. at 712 n.10.

c. Third, it would be anomalous to vacate this Court's interlocutory decision dissolving the Fifth Circuit's stay pending further review when the Fifth Circuit's stay decision would remain in place. The determination whether to vacate a judgment when a case becomes moot "is an equitable one," *Bancorp*, 513 U.S. at 29, requiring the disposition that would be "most consonant to justice" in light of the circumstances, *id.* at 24 (citation omitted); *see Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (observing that because *Munsingwear* vacatur "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case'"). It is petitioners' "burden," as the parties "seeking relief from the status quo," to "demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *Bancorp*, 513 U.S. at 26. Petitioners cannot meet that burden. This Court and a panel of the Fifth Circuit reached different conclusions about petitioners' likelihood of success on the merits. Petitioners seek to vacate one decision but wish to leave another in place. This selective request undermines petitioners' claim to entitlement to an

[2] Petitioners' observation (Relig. Pets. Resp. 4-5) that the Supreme Court addressed only "the question of OSHA's statutory authority" and not the more fact-specific or constitutional issues in the case is beside the point. Courts often rule on one ground and stop. There is nothing unusual about the fact that the Supreme Court did not address each and every issue addressed by this Court.

equitable remedy, and this Court's equitable determination must, in any event, take account of the "public interest" in leaving both panel's views on these issues in place. *See Bancorp*, 513 U.S. at 26.

CONCLUSION

The consolidated petitions for review should be dismissed as moot without vacatur.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,435 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer
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