ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5357

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

P.J.E.S., A MINOR CHILD, by and through his father and NEXT FRIEND, Mario Escobar Francisco, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

ALEJANDRO MAYORKAS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia
No. 20-cv-02245-EGS-GMH
Hon. Emmet G. Sullivan
Hon. G. Michael Harvey

PLAINTIFF-APPELLEE'S PARTIAL OPPOSITION TO DEFENDANTS' MOTION TO TERMINATE ABEYANCE, VACATE PRELIMINARY INJUNCTION, AND REMAND TO THE DISTRICT COURT

Stephen B. Kang
American Civil Liberties Union
Foundation, Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0783

Attorneys for Plaintiff-Appellee

Lee Gelernt
American Civil Liberties Union
Foundation, Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

(Additional Counsel on Next Page)

Cody Wofsy
Morgan Russell
My Khanh Ngo
American Civil Liberties Union Foundation, Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0783

Kathryn Huddleston
American Civil Liberties Union Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, Texas 77007
(713) 942-8146

Karla M. Vargas
Texas Civil Rights Project
1017 W. Hackberry Ave.
Alamo, Texas 78516
(956) 787-8171

Anne Dutton
Blaine Bookey
Karen Musalo
Neela Chakravartula
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877

Daniel A. Galindo
Omar Jadwat
American Civil Liberties Union Foundation, Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

Melissa Crow (D.C. Bar. No. 453487)
Center for Gender & Refugee Studies
1121 14th Street, N.W.
Suite 200
Washington, DC 20005
(202) 355-4471

Robert Silverman
Irit Tamir
Oxfam America
226 Causeway Street, Suite 500
Boston, MA 02115
(617) 482-1211

Scott Michelman
Arthur B. Spitzer
American Civil Liberties Union Foundation of the District of Columbia
915 15th Street, NW, 2nd floor
Washington, D.C. 20005
(202) 457-0800

INTRODUCTION

Plaintiff-Appellee ("Plaintiff") does not oppose termination of the abeyance of this appeal, and does not oppose remand to the district court to address the effects of recent developments on this case.

However, this Court should leave any mootness questions for the district court to address in the first instance, especially given that Defendants-Appellants ("Defendants") rely on factual changes that the district court is in a better position to evaluate. *See* Mot. at 6-9 & Attachment 1. Defendants acknowledge that the district court would be an appropriate venue to resolve the parties' disputes concerning mootness regarding the case as a whole. Mot. at 15.

Plaintiff also opposes Defendants' request to vacate the district court's decision. Such a decision would be premature given that the district court should address any mootness questions on remand.

If this Court decides the case is moot and therefore reaches Defendants' request to vacate the district court's opinion, that request should be denied. The equities strongly disfavor vacatur in circumstances like these, where the losing party is responsible for the circumstances that purportedly render the case moot. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26-27 (1994). This Court has explained that it "do[es] not wish to encourage litigants who are dissatisfied with the decision of the trial court to have them wiped from the books

by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision." *United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988) (internal quotations and citations omitted). That is exactly what Defendants seek to do here. Moreover, granting vacatur would allow Defendants to "moot" this case, evade an adverse ruling, then simply issue similarly unlawful agency action. Discouraging such potential strategic behavior weighs strongly against granting the "equitable" and "extraordinary remedy" of vacatur here. *Bancorp*, 513 U.S. at 26.

Earlier this year, this Court applied these principles to reject a similar government request for vacatur of a district court opinion in an immigration case. *See I.A. v. Garland*, No. 20-5271, 2022 WL 696459 (D.C. Cir. Feb. 24, 2022) (unpublished). As the Court explained there, "vacatur is generally inappropriate when 'the party seeking relief from the judgment below caused the mootness by voluntary action.'" *Id.* at *1 (quoting *Bancorp*, 513 U.S. at 24); *see also id.* (Jackson, J., concurring) ("[R]ote vacatur of district court opinions, without merits review and simply because the dispute is subsequently mooted, is inconsistent with well-established principles of appellate procedure and practice."). The Court should follow the same path here, should it decide the case is moot and reach the question of vacatur.

BACKGROUND

Plaintiff commenced this challenge to the Title 42 Process on August 14, 2020, on behalf of himself and other unaccompanied children seeking safety in the United States. Plaintiff moved for classwide preliminary injunctive relief based on claims that, inter alia, the Title 42 Process exceeded the government's statutory authority, and violated the asylum and withholding statutes, and the Convention Against Torture. Plaintiff also raised claims under the Torture Victims Protection Reauthorization Act of 2008 ("TVPRA"), which grants unaccompanied children special safeguards against removal. *See generally* 8 U.S.C. § 1232.

On November 18, 2020, the district court issued a classwide preliminary injunction barring application of the Title 42 Process against unaccompanied children, adopting a lengthy report and recommendation issued by the Magistrate Judge. *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020). The district court found a likelihood of success on multiple grounds, including that 42 U.S.C. § 265's general authority could not displace the specific protections the immigration statutes granted to unaccompanied children. *Id.* at 514-16. The district court also found that class members would suffer multiple irreparable harms absent a preliminary injunction, including persecution, torture, or even death. *Id.* at 517.

On November 30, 2020, Defendants appealed the district court's preliminary injunction and sought a stay of the injunction pending appeal. This Court granted the stay on January 29, 2021.

On February 11, 2021, the Centers for Disease Control & Prevention ("CDC") issued a notice publicizing the agency's temporary suspension of the application of the Title 42 Process to unaccompanied children, pending further reassessment. 86 Fed. Reg. 9,942-01 (published in Federal Register Feb. 17, 2021). The suspension order cited this litigation and noted the stay pending appeal. *Id.*[1]

On March 2, 2021, the Court granted the parties' joint motion to hold this case in abeyance to enable the parties to resolve or narrow the dispute. The Court directed the parties to file periodic joint reports at 60-day intervals.

During the abeyance period, the parties engaged in discussions in an effort to narrow or resolve the disputes in this appeal. The parties also met and conferred concerning certain Class Members who were expelled from the United States to Guatemala while the district court's preliminary injunction was in effect. The parties discussed the government's efforts to ensure that such Class Members can

[1] On July 16, 2021, the CDC issued a superseding order that provided further explanation for its continuing decision to suspend the application of the Title 42 Process to unaccompanied children. *See* 86 Fed. Reg. 38717-01 (published in Federal Register July 22, 2021).

return to the United States, should they choose to do so. Although most of the Class Members have since returned to the United States, Plaintiff continues to confer with Defendants concerning certain Class Members who remain in Guatemala, in an effort to independently verify those Class Members' wishes.

On March 11, 2022, CDC permanently terminated the application of the Title 42 Process with respect to unaccompanied noncitizen children. 87 Fed. Reg. 15243-01 (published in Federal Register Mar. 17, 2022). This termination order expressly stated that "[n]othing in this Termination will prevent [the CDC Director] from issuing a new Order under 42 U.S.C. 265, 268 and 42 CFR 71.40 based on new findings, as dictated by public health needs." *Id.* at 15253. The termination order cited this litigation as evidence of "legal uncertainty over the government's authority to apply Section 265 to [unaccompanied children]." *Id.* at 15251.

In the meantime, other developments have taken place that may be relevant to this case. On March 4, 2022, this Court issued its decision in *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022), which partly affirmed the district court's preliminary injunction enjoining the application of the Title 42 Process to a class of noncitizen *families* seeking relief from persecution and torture. This Court held that "in short, the Executive can expel the Plaintiffs from the country," but "it cannot expel them to places where they will be persecuted or tortured." *Id.* at 722.

On April 1, 2022, CDC issued another order seeking to terminate all prior orders authorizing expulsion under 42 U.S.C. § 265, with an effective date of May 23, 2022, to give time for the relevant agencies to "implement appropriate COVID-19 mitigation protocols." 87 Fed. Reg. 19941-01, 19942 (published in Federal Register Apr. 6, 2022). This April 2022 order did not affect the prior March 2022 order that permanently terminated Title 42 with respect to unaccompanied children.

The April 2022 order was later preliminary enjoined, on the basis that CDC should have engaged in a notice-and-comment period before the order's issuance. *See Louisiana v. CDC*, 2022 WL 1604901, __ F. Supp. 3d __ at *1 (W.D. La. May 20, 2022) (on appeal, *Louisiana v. CDC*, No. 22-30303 (5th Cir.)).

ARGUMENT

I. Plaintiff Does Not Oppose Termination of the Abeyance and Remand to the District Court, But Any Mootness Questions Should Be Left to the District Court on Remand.

Plaintiff-Appellee ("Plaintiff") does not oppose termination of the abeyance, and does not oppose remand to the district court to address the effects of recent developments on this case.

However, any mootness questions—regarding the preliminary injunction or the case as a whole—should be left to the district court on remand. As the party asserting mootness, Defendants bear the "heavy burden of persuading the court

that the challenged conduct cannot reasonably be expected to start up again." *Am. Clinical Laboratory Ass'n v. Becerra*, 40 F.4th 616, 622 (D.C. Cir. 2022) (quoting *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 189 (2000)) (alterations omitted). As described below, Defendants' mootness claims rely on an array of changed factual and legal circumstances, including multiple actions by the CDC altering, suspending, or terminating various aspects of the Title 42 Process. *See* Mot. at 6-9. The district court should address the effect of these circumstances in the first instance. Defendants concede that path would be appropriate with respect to questions regarding the mootness of the case as a whole. Mot. at 15 ("If plaintiff disagrees about the mootness of the entire case and its dismissal, arguments that the case as a whole is moot can appropriately be made to the district court in the first instance").

Defendants chiefly rely on CDC's March 2022 order terminating the Title 42 Process with respect to unaccompanied children, but that order expressly reserves CDC's power to revisit its determinations in the future "based on new findings, as dictated by public health needs." 87 Fed. Reg. at 15253.[2] Obviously, CDC's view of the public health landscape has been fluid. Given that CDC's prior orders were issued without notice and comment, CDC may face few, if any, "structural

[2] As Defendants note, there is also active litigation in Louisiana and the Fifth Circuit concerning CDC's attempt to terminate the Title 42 Process in its entirety. *Louisiana v. CDC*, 2022 WL 1604901; *Louisiana v. CDC*, No. 22-30303 (5th Cir.).

obstacles" that prevent reversion to the agency's prior positions. *Am. Clinical Laboratory Assoc.*, 40 F.4th at 623.[3]

Moreover, the parties still have a dispute concerning the scope of CDC's statutory authority to promulgate the Title 42 Process generally. The agency has not rescinded the underlying regulations that supply the foundation for the CDC's various orders, and not eschewed its authority to apply the Title 42 Process to noncitizens like the Class Members in the future. *See generally* 42 C.F.R. § 71.40. As the district court has explained, there are serious questions concerning whether 42 U.S.C. § 265 authorizes such action and, if it does, how such action can be reconciled with immigration statutes that grant unaccompanied children and asylum seekers special protections against removal. *See P.J.E.S.*, 502 F. Supp. 3d at 511-16.

Defendants have also submitted a new declaration on appeal concerning the Guatemalan Class Members who were expelled while the preliminary injunction was active, *see* Mot., Attachment 1, which the district court should have the

[3] Defendants' cases addressed no such threat. *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981) involved a disability discrimination claim brought by an individual graduate student, who graduated while the appeal was pending. The Court held that "the terms of the injunction . . . have been fully and irrevocably carried out" and no further injunctive relief could be awarded in light of the student's graduation. *Id.* at 398. In *Nat'l Kidney Patients Ass'n v. Sullivan*, 902 F.2d 51 (D.C. Cir. 1990), *Congress* mooted the appeal by expressly authorizing what the injunction forbade. *Id.* at 53-54.

opportunity to address given its greater familiarity with these issues. *See e.g., Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 846 (D.C. Cir. 1982) (remanding to district court to address mootness in first instance, where factual questions remained concerning availability of injunctive relief).

In light of all these circumstances, the best course of action is to remand to the district court to address potential mootness.

II. Vacatur of the District Court's Preliminary Injunction is Premature, And Also Would Be Inequitable in Light of the Circumstances.

Plaintiff also opposes the government's request to vacate the preliminary injunction. Addressing vacatur would be at a minimum premature, given that any mootness determinations should be made by the district court.

However, if this Court decides the mootness issues and therefore reaches the question of vacatur, it should deny Defendants' motion to vacate the opinion below. That is because Defendants have not met their burden of showing "equitable entitlement to the extraordinary remedy of vacatur." *Bancorp*, 513 U.S. at 26. As the Supreme Court has explained, "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Bancorp*, 513 U.S. at 24; *Karcher v. May*, 484 U.S. 72, 83 (1987) (denying vacatur request when "[t]he controversy ended when the losing party . . . declined to pursue its appeal"); *Garde*, 848 F.2d at 1311 ("The distinction between litigants who are and are not

responsible for the circumstances that render the case moot is important.").

Similarly, this Court has expressed its reluctance "to encourage litigants who are dissatisfied with the decision of the trial court 'to have them wiped from the books' by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision." *Garde*, 848 F.2d at 1311; *see also Ctr. for Sci. in the Pub. Int. v. Regan*, 727 F.2d 1161, 1165–66 (D.C. Cir. 1984) (declining to vacate parts of district court judgment where "review was prevented, not by 'happenstance,' but by the deliberate action of the losing party before the district court, the Treasury").

Here, Defendants, who lost below, are the parties that have sought to moot the appeal via their own action. After vigorously litigating Plaintiff's classwide preliminary injunction, appealing an adverse decision, and obtaining a stay of the district court's order, the government "temporarily" suspended application of the Title 42 Process to unaccompanied children "pending the outcome of its forthcoming public health reassessment of the Order." 86 Fed. Reg. 9942-01, 9942. After agreeing to put the D.C. Circuit appeal in abeyance for about a year, in March 2022, CDC terminated the application of the Title 42 Process with respect to unaccompanied noncitizen children. 87 Fed. Reg. 15243. Thus, to the extent the appeal is moot, it was not mooted by the separate actions of Congress, as in *Nat'l Kidney Patients Ass'n*, 902 F.2d at 53, or by the actions of the party that

prevailed below, as in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (both cited Mot. at 12). Defendants have "voluntarily forfeited [their] legal remedy" through their own conduct. *Bancorp*, 513 U.S. at 25.[4]

This is also not a case mooted by the mere "vagaries of circumstance." *Id.* To the contrary, the agency's actions have repeatedly manifested awareness of Plaintiff's challenge. For example, the February 2021 suspension order noted this litigation, including the proceedings in the D.C. Circuit. 86 Fed. Reg. at 9,942. The March 2022 termination order similarly cited this litigation as evidence of ongoing "legal uncertainty over the government's authority to apply Section 265 to [unaccompanied children]," which undermined any reliance interests in the Title 42 Process's continued application to the Class. 87 Fed. Reg. at 15251.

[4] Defendants' other cases are similarly inapposite. *Animal Legal Def. Fund v. Shalala*, 53 F.3d 363, 365-66 (D.C. Cir. 1995), involved an appeal from a denial of a preliminary injunction, where the plaintiffs sought access to the meetings of an agency committee tasked with producing recommendations to the agency. During the appeal, the relevant agency committee completed its work, ceased meeting, and "[did] not contemplate any further meetings." *Id.* at 366 & n.3. Here, by contrast, Defendants chose to cease an indefinite program's application to the Class, but reserved the right to again begin expulsions at any time.

Defendants also cite dicta from *Humane Soc. of U.S. v. Kempthorne*, 527 F.3d 181 (D.C. Cir. 2008), but there the Court ultimately granted vacatur based solely on an intervening party's motion, relying on the fact that the intervenor bore no responsibility for the case's mootness. *Id.* at 187 (explaining that vacatur was warranted when mootness "occurs through happenstance—circumstances not attributable to the parties") (citation and quotation marks omitted).

Accordingly, Defendants cannot say that this case and the CDC's actions were unconnected.

Defendants, relying on dicta from *United States v. Munsingwear*, 340 U.S. 36 (1950), contend that vacatur is warranted "where the government has sought review of a lower-court decision but intervening changes in the challenged federal regulations or policy render further review of that decision moot." Mot. at 12. But all *Munsingwear* said was that the government *could* have filed a motion to vacate a judgment in that case, but did not do so. 340 U.S. at 40-41. Far from "indicat[ing] that vacatur could have been an appropriate disposition if the United States had sought that remedy," Mot. at 13, *Munsingwear* merely indicated that "vacatur should have been sought, not that it necessarily would have been granted," *Bancorp*, 513 U.S. at 23. Indeed, *Bancorp* expressly reserved the question of *Munsingwear*'s applicability to the "repeal of administrative regulations" in cases against the U.S. government. *Id.* at 25 n.3.

Defendants also rely on the per curiam, unreasoned orders in *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (per curiam), and *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (per curiam). But the Supreme Court has expressed "skepticism toward per curiam dispositions that lack the reasoned consideration of a full opinion." *Bancorp*, 513 U.S. at 24.

In contrast, this Court recently applied *Bancorp* and like cases to reject a

similar government vacatur request. *See I.A.*, 2022 WL 696459, at *1. As the Court explained there, "vacatur is generally inappropriate when 'the party seeking relief from the judgment below caused the mootness by voluntary action.'" *Id.* at *1 (quoting *Bancorp*, 513 U.S. at 26). Then-Judge Ketanji Brown Jackson concurred, explaining that "[r]ote vacatur of district court opinions, without merits review and simply because the dispute is subsequently mooted, is inconsistent with well-established principles of appellate procedure and practice." *Id.*; *see also 19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 76 F.3d 1142, 1144-45 (10th Cir. 1996) (refusing to vacate decision where "the City unquestionably caused the mootness by withdrawing the policy the district court had found invalid").

Defendants vaguely suggest that the district court's opinion "could have important 'legal consequences' in the future if the injunction were allowed to remain in place," Mot. at 13, but Defendants do not explain what those consequences might be. Indeed, such collateral effects are especially hard to imagine where Defendants are claiming that the agency will cease engaging in the offending conduct, and where the district court's decision was preliminary, not final. *See I.A.*, 2022 WL 696459, at *2 (Jackson, J., concurring) ("[W]here the district court's ruling pertains to an agency rule that is subsequently pulled and replaced . . . it is hard to imagine any legal consequence or residual impact

that might warrant vacatur.").

Defendants also argue that vacatur would "clear the path for future relitigation," and state that the district court's preliminary injunction may be broader in some respects than this Court's reasoning in *Huisha-Huisha*, which addressed Title 42's applicability to asylum-seeking families. Mot. at 13-14. But the D.C. Circuit expressly stated that its legal analysis in *Huisha-Huisha* arose in a preliminary posture and was subject to further development in the district court. 27 F.4th at 733 ("No one should read our opinion to bind the District Court or future circuit panels regarding the final answer to the challenging merits questions raised by this case."). More importantly, *Huisha-Huisha* did *not* address claims arising under the TVPRA, which applies only to unaccompanied children (not family migrants) and formed part of the basis of the district court's preliminary injunction here. *See P.J.E.S.*, 502 F. Supp. 3d at 514-16 (addressing applicability of TVPRA).

Finally, this Court must "take account of the public interest" in deciding whether to award the "extraordinary" remedy of vacatur. *Bancorp*, 513 U.S. at 26. Here, the public interest supports rejection of such relief. The decision of the district court, on a critical issue of first impression involving the humanitarian rights of vulnerable noncitizen children, constitutes guidance that is "valuable to

the legal community as a whole." *Id.* (internal quotation marks and citation omitted).[5]

CONCLUSION

For these reasons, this Court should terminate the abeyance and remand to the district court to address any mootness questions in the first instance. This Court should deny vacatur of the preliminary injunction.

[5] Defendants suggest that further briefing on the vacatur question may be warranted. Mot. at 14. Plaintiff would provide supplemental briefing if needed, but respectfully submits that the Court should simply deny Defendants' vacatur request at this juncture, especially given that the mootness issues should be decided below on remand.

Dated: September 9, 2022

Respectfully submitted,

/s/Lee Gelernt
Lee Gelernt
Daniel A. Galindo
Omar Jadwat
American Civil Liberties Union Foundation, Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

Kathryn Huddleston
American Civil Liberties Union Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, Texas 77007
(713) 942-8146

Karla M. Vargas
Texas Civil Rights Project
1017 W. Hackberry Ave.
Alamo, Texas 78516
(956) 787-8171

Anne Dutton
Blaine Bookey
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Neela Chakravartula
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877

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American Civil Liberties Union Foundation, Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0783

Melissa Crow (D.C. Bar. No. 453487)
Center for Gender & Refugee Studies
1121 14th Street, N.W.
Suite 200
Washington, DC 20005
(202) 355-4471

Robert Silverman
Irit Tamir
Oxfam America
226 Causeway Street, Suite 500
Boston, MA 02115
(617) 482-1211

Scott Michelman
Arthur B. Spitzer
American Civil Liberties Union Foundation of the District of Columbia
915 15th Street, NW, 2nd floor
Washington, D.C. 20005
(202) 457-0800

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing brief with the Clerk for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/Stephen B. Kang
Stephen B. Kang

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion satisfies the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,422 words. This Motion also complies with the typeface and type-style requirements of Rules 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/Stephen B. Kang
Stephen B. Kang