[ORAL ARGUMENT NOT YET SCHEDULED]

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, Plaintiffs-Appellees, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants-Appellants.	No. 20-5357

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO TERMINATE ABEYANCE, VACATE THE DISTRICT COURT'S PRELIMINARY INJUNCTION, AND REMAND TO THE DISTRICT COURT FOR A DETERMINATION OF WHETHER THE CASE AS A WHOLE IS MOOT

INTRODUCTION

This appeal presents only one issue: whether the district court properly entered a preliminary injunction barring the government from applying the Title 42 process to class members. But the CDC has terminated the Title 42 process with respect to class members, and the government has resolved the status of 32 class members who were expelled immediately following the issuance of the injunction. Because there is no longer a live controversy with respect to the correctness of the district court's injunction, the preliminary injunction is moot and should be vacated. Plaintiffs present no persuasive argument to the contrary.

Plaintiffs contend the appeal remains live because CDC could change its mind and reapply the Title 42 process to class members. But that hypothetical possibility does not keep the appeal of the preliminary injunction live. Plaintiffs also suggest that there may be a factual dispute that defeats mootness or is at least a reason for this Court to remand rather than decide the question. But they provide no evidence to contradict the government's sworn declaration. Nor is there any other reason why this Court should remand for the district court to

determine whether the preliminary injunction is moot, given that the issue is a question of law that this Court reviews de novo.

Plaintiffs do not make the case against vacatur of the preliminary injunction either. They contend vacatur is disfavored when mootness is caused by the losing party's "voluntary action," but that is the case where mootness is produced by settlement or the failure to appeal, not under the present circumstances. The Supreme Court has twice recently vacated lower court decisions when intervening changes in the challenged federal regulations or policy rendered further review of the decisions moot, and this Court should follow suit. Nor do plaintiffs provide any evidence for their contention that vacatur is unwarranted because of the government's supposedly manipulative litigation tactics.

The equitable case for vacatur strongly favors the government. The district court's preliminary injunction had effect for only two months before this Court stayed it pending appeal, and that stay has been in place for the last 20 months. Plaintiffs would have this Court vacate its stay but leave the preliminary injunction intact. It would be inequitable for this Court to stay the injunction while the appeal remained live, but to permit the injunction to take effect now that the

appeal is moot. And if the preliminary injunction takes effect in the absence of vacatur, it will have continuing adverse legal consequences for the government and will be at odds with the public interest. At a minimum, the government should be unencumbered by a continuing preliminary injunction that it has no opportunity to appeal, so that it can fully exercise its authority in the event of a future unforeseen public health emergency.

ARGUMENT

1. The Preliminary Injunction is Moot.

Invoking the voluntary cessation exception to mootness, plaintiffs argue (Opp. 7-8) that the appeal of the preliminary injunction is not moot because CDC could revisit its determination in the future and reinstitute Title 42 orders with respect to the class members. But that is always true where mootness occurs because Congress repeals a statute, or an agency rescinds a regulation or changes its policy, yet there is no invariable bar to mootness in those situations. "[T]he mere power to reenact a challenged rule is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists absent evidence indicating that the challenged rule likely will be

reenacted." *Akiachack Native Community v. Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016). Moreover, the purpose of a preliminary injunction is to maintain the status quo on an interim basis while a case proceeds on the merits. But here, the rescission of the orders affecting unaccompanied noncitizen children removes any basis for that relief. It is also far-fetched in any event to conclude that the CDC would reinstitute its Title 42 process for unaccompanied noncitizen children during the course of plaintiffs' litigation (particularly given that plaintiffs' entire case is moot, *see* Motion 14-15). And if the CDC did so, plaintiffs could again seek a preliminary injunction.

Given that the Title 42 process as applied to unaccompanied noncitizen children was temporarily suspended in February 2021, class members were fully exempted in July 2021, and the CDC terminated all prior Title 42 orders with respect to class members in March 2022, *see* Motion 6-7, there is no reasonable basis to conclude that CDC will reapply its Title 42 process to the class members during the COVID-19 pandemic, let alone during the course of plaintiffs' proceedings on the merits. That is particularly true given that the temporary and permanent rescissions remained in place through the Delta and

Omicron waves. These circumstances "provide[] [a] strong and sufficient assurance that the Government has changed its practice regarding" the challenged actions, thus satisfying its burden under the voluntary cessation doctrine. *In re Al-Nashiri*, --- F.4th ----, 2022 WL 4004002 at *3 (D.C. Cir. 2022). Plaintiffs' reliance (Opp. 7-8) on *Am. Clinical Lab. v. Becerra*, 40 F.4th 616, 623 (D.C. Cir. 2022), is misplaced. That case involved an agency's "temporar[y] alter[ation]" of its rules, rather than "full repeal." *Id.*[1]

Plaintiffs suggest (Opp. 8-9) that the government's declaration regarding the resolution of the 32 unaccompanied noncitizen children who were expelled under Title 42 immediately following issuance of the district court's preliminary injunction is insufficient to establish that the preliminary injunction is moot, or they suggest that there is a factual question requiring remand. But plaintiffs do nothing to dispute the substance of the government's declaration — sworn under penalty

[1] Plaintiffs note (Opp. 7 n.2) that termination of the CDC orders with respect to *non*-class members is the subject of ongoing litigation, but plaintiffs do not dispute that the ongoing litigation in that case has no impact on the CDC's March 11, 2022 order terminating all prior suspension orders to the extent they apply to the class members here. *See* Motion 8.

of perjury — nor have they submitted a contrary declaration of their own. Opp. 5. Regardless, any potential issues concerning those 32 individuals would not warranting keeping an ongoing class-wide preliminary injunction in place. Finally, plaintiffs' argument for a remand (Opp. 9) is not aided by *Gull Airborne Instruments v. Weinberger*, 694 F.2d 838 (D.C. Cir. 1982), where (unlike here) a remand was appropriate in part to address a remaining live claim for damages, *id.* at 846 n.10.

Plaintiffs also argue that the district court should decide mootness of the preliminary injunction in the first instance. Opp. 6-7. But whether the preliminary injunction is moot is a question of law, which would be reviewed de novo on appeal. *See, e.g., Gul v. Obama*, 652 F.3d 12, 15 (D.C. Cir. 2011). This Court is just as well positioned as the district court to decide the question, and this Court frequently decides mootness questions arising on appeal rather than remand. *See, e.g., Voyageur Outward Bound School v. United States*, 2022 WL 829754 (D.C. Cir. 2022) (per curiam); *Oceana, Inc. v. Raimondo*, 2021 WL 4771915 (D.C. Cir. 2021) (per curiam); *Maryland v. Dep't of Education*, 2020 WL 7868112 (D.C. Cir. 2020) (per curiam). Indeed, the very

premise of *Munsingwear* vacatur is that the higher court should evaluate mootness and vacate the lower-court judgment when appropriate. Plaintiffs provide no persuasive reason to depart from that usual course.

Finally, plaintiffs note that the government agrees it could be appropriate for this Court to remand to decide if the *entire case* is moot. Opp. 7. But that is a separate question from whether the *preliminary injunction* is moot, and because the preliminary injunction is the only issue before this Court on appeal, it is sensible for this Court to determine in the first instance whether the appeal of the injunction is moot even if it concludes that a remand is appropriate for determining whether the *entire case* is moot.

2. This Court Should Vacate the Preliminary Injunction.

In opposing vacatur of the preliminary injunction, plaintiffs rely principally on the statement in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994), that when considering vacatur, "the principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." Opp. 9. But *Bancorp* addressed only "mootness by

reason of settlement," 513 U.S. at 29, and this Court "interpret[s] *Bancorp* narrowly," suggesting that "the *Bancorp* exception may be limited to appeals mooted by settlement," *Humane Society v. Kempthorne*, 527 F.3d 181, 185, 187 (D.C. Cir. 2008). And in any event, the determination of whether to grant vacatur is ultimately "an equitable one" that depends on the circumstances of the case. *Bancorp*, 513 U.S. at 29.[2]

Moreover, and as plaintiffs note (Opp. 12), *Bancorp* expressly distinguished mootness by settlement from mootness caused by an Executive Order or other conduct attributable to the Executive Branch. 513 U.S. at 25 n.3. And there is good reason to distinguish those circumstances in the present case. Mootness here results from the

[2] Plaintiffs' only response to *Humane Society* is to label its analysis as dicta, and to argue that mootness here was caused by the government's "own conduct," whereas vacatur was warranted in *Humane Society* because the intervenor bore no responsibility for mootness. Opp. 11 & n.4. But that answer just begs the question of whether *Bancorp*'s "voluntary action" applies beyond settlement or applies to a coordinate branch of government at all. Moreover, plaintiffs' emphasis on who bears the "fault" for mootness is at odds with its own reliance (Opp. 13) on then-Judge Jackson's concurring opinion in *I.A. v. Garland*, 2022 WL 696459 at *2 (D.C. Cir. Feb. 24, 2022) ("the agency's lack of *fault* for the enactment of a new rule that moots the appeal * * * is largely beside the point").

CDC's conclusion that the Title 42 process as applied to class members was no longer "required in the interest of public health." 85 Fed. Reg. 15,243, 15,243 (Mar. 17, 2022). If that determination were to moot the preliminary injunction, but nonetheless precludes vacatur, the Executive Branch would be forced to choose between continuing a policy that it has concluded is no longer required in the interest of public health, on the one hand, and acquiescing to an erroneous preliminary injunction, on the other. Neither justice nor the public interest would be served by that outcome. Accordingly, *Bancorp*'s statement about "voluntary action" does not cover the present circumstances, nor does it bar or counsel against vacatur in this case.

The Supreme Court has twice recently vacated lower court decisions when intervening changes in the challenged federal regulations or policy render further review of that decision moot, and has done so after consideration of the parties' full briefing on the questions of mootness and vacatur. *See Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (per curiam); *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (per curiam). These decisions demonstrate that, contrary to plaintiffs' argument, vacatur is

not unavailable in such circumstances. Plaintiffs brush these decisions aside because they were issued per curiam, but in the very next sentence (Opp. 12-13) they rely on an unpublished and non-precedential per curiam order from this Court. *I.A. v. Garland*, 2022 WL 696459 (D.C. Cir. Feb. 24, 2022); *see* D.C. Cir. Rule 36(e)(2). Regardless, *I.A.* does not hold that vacatur is per se unavailable in these circumstances, but only that the equitable basis for vacatur was unwarranted under the specific circumstances of that particular case. And contrary to plaintiffs' contention, Opp. 13, then-Judge Jackson's concurring opinion has no bearing here. Her view addressed the equitable case for vacating "district court *opinions*," reasoning that such opinions are just "the official record of an Article III judge's non-binding views" and serve as nothing more than "persuasive force as precedent" lacking in "any legal consequence or residual impact." *Id.* at 2 (emphasis added). But the government is not seeking vacatur of the district court's *opinion*, but vacatur of its *preliminary injunction*, *see University of Texas v. Camenisch*, 451 U.S. 390, 393-94 (1981) (vacating a moot preliminary injunction regardless of whether case as a whole is moot), and there is

no question that an injunctive order (absent vacatur) has real and continuing legal consequences for the government. *See infra* at 12-13.

Plaintiffs nonetheless argue (Opp. 10-12) that vacatur is not warranted, suggesting that the government engaged in manipulative litigation tactics to try to "wipe[] from the books" an adverse decision by mooting the case and seeking vacatur. But plaintiffs provide no evidence to support their speculation. "At least in the absence of overwhelming evidence (and perhaps not then), it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose." *Clarke v. United States*, 905 F.2d 699, 705 (D.C. Cir. 1990) (en banc).

Plaintiffs also question whether the district court's preliminary injunction has "legal consequences" that warrant vacatur. Opp. 13. In the absence of vacatur, the injunction will prohibit the government from applying the Title 42 process against any class members, and that prohibition will presumably apply until the conclusion of the litigation. It is true that there is no reasonable expectation that CDC will resume

the application of that process to class members, but the government should be free from the effect of an injunction it now has no opportunity to appeal even if the chance of its future effect is only small and remote. And even if the government does not re-apply its terminated Title 42 process to unaccompanied noncitizen children, leaving the preliminary injunction in place could have continuing legal consequences regarding compliance with that injunction if, for example, plaintiffs challenge the government's processes for determining the age of an arriving noncitizen. Nor can it be known what public health crisis might arise in the future that might require the exercise of Title 42 authority. In the absence of vacatur of the preliminary injunction, the government might not be free to act expeditiously and as necessary in the public interest with respect to class members. Accordingly, and contrary to plaintiff's claim (Opp. 14), the public interest strongly counsels in favor of vacating the injunction so that the government can be free to respond to any public health emergency unencumbered by an injunction it can no longer appeal.

Further still, the equitable case for vacatur points strongly in the government's favor given how briefly the district court's preliminary

injunction operated in actual practice. The original CDC order was issued in March 2020 and was in effect for nearly eight months before the district court's preliminary injunction. And the district court's injunction lasted just over two months before being stayed by this Court pending appeal, and that stay has remained in place for the last 20 months. Under plaintiffs' view, although the injunction was stayed by this Court for nearly all of the time that this appeal was live, now that the appeal is moot this Court should lift its stay and allow the preliminary injunction to take effect without being vacated. Plaintiffs make no effort to justify that counterintuitive result.

CONCLUSION

For the foregoing reasons and those in the government's Motion, this Court should terminate its prior abeyance order, vacate the district court's preliminary injunction as moot, and remand this case to the district court to decide in the first instance whether plaintiff's whole case is moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 2593 words. This Motion also complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Joshua Waldman
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

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