No. 19-1194

In the Supreme Court of the United States

JIAHAO KUANG, ET AL.,

Petitioners,

V.

U.S. DEPARTMENT OF DEFENSE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTRODUCTION

The Department of Defense (DoD) does not dispute that this case meets the traditional criteria for vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Nor could it. This case "became moot" while the petition for a writ of certiorari was pending, because of DoD's "unilateral action" in rescinding its October 13, 2017 accession policy. *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018). And when a case becomes moot through the unilateral actions of the prevailing party, this Court's "duty" is to grant the petition, vacate the decision below, and remand with instructions to dismiss. *Munsingwear*, 340 U.S. at 39-40 (quoting *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936)).

Yet DoD resists vacatur, and instead proposes a new criterion: the case must "independently be worthy of this Court's review." Opp. 13. The Court has never endorsed a "certworthiness" test. And any such test would be particularly misplaced here—where it is undisputed that the case is moot due to the prevailing party's unilateral actions.

Even if this Court were inclined to consider certworthiness, this is an easy case. The petition presents an important question on which the courts of appeals are badly divided: whether a federal court can decline to adjudicate an otherwise justiciable challenge to a military policy, based on the judge-made laundry list of "prudential" factors announced in *Mindes v. Seamen*, 453 F.2d 197, 199 (5th Cir. 1971). There is an entrenched split among the three circuits that have rejected *Mindes*; the three that have adopted it; and the five that endorsed it initially but have since reconsidered. The Ninth Circuit's

decision conflicts with this Court's approach to reviewing military policies, which asks only whether a traditional limit on the exercise of judicial power—like subject-matter jurisdiction or the political question doctrine—bars review. *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1953). And (but for mootness) this case would have presented an appropriate vehicle to decide the issue.

In the end, though, this Court does not need to decide whether it would have granted review. It only has to decide whether to adhere to its established practice of vacating lower court decisions where the prevailing party unilaterally moots the case before any such decision can be made.

ARGUMENT

1. When "a civil case from a court in the federal system" becomes moot while a certiorari petition is pending, this Court's "'established practice' is 'to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950)). Vacatur prevents the lower court's judgment from "spawning" legal consequences despite the Court's inability to review it. *Camreta v. Greene*, 563 U.S. 692, 713 (2011). While grounded in equity, "[o]ne clear example where '[v]acatur is in order' is 'when mootness occurs through . . . the "unilateral action of the party who prevailed in the lower court."'" *Garza*, 138 S. Ct. at 1792 (alterations in original) (citation omitted). After all, "[i]t would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the

judgment." *Id.* (citation omitted); *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994).

That is precisely what happened here. DoD obtained a favorable judgment in the Ninth Circuit. While this petition was pending, and before the Court had an opportunity to grant review, DoD voluntarily rescinded the October 13, 2017 accession policy. That unilateral action mooted this case. The textbook application of this Court's "established practice" makes clear that vacatur is "in order."

2. DoD does not dispute that this case meets the traditional criteria for *Munsingwear* vacatur. DoD instead asks this Court to adopt a new requirement: the case must also present a question that would "independently be worthy of this Court's review." Opp. 13-14. The Court should reject that invitation.

The United States first proposed a certworthiness test over forty years ago. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4 n.34 (11th ed. 2019) ("*Supreme Court Practice*"). And it has consistently urged the Court to adopt such a test in the ensuing years. Opp. 13. Yet, as the United States has admitted in prior filings, "this Court has never expressly endorsed that approach." ITC Opp. Br. 8, *LG Elecs., Inc. v. InterDigital Commc'ns, LLC*, 572 U.S. 1056 (2014), 2014 WL 1101426 ("*LG Elecs.* ITC Opp."). That remains true today.

Nor can DoD point to any consistent pattern of decisions that would prove implicit endorsement. The Court has vacated decisions under *Munsingwear* in cases that the United States argued were undeserving of review. *See* Opp. 8-12, *Beers v. Barr*, 140 S. Ct. 2758 (2020), 2020 WL 1957383; *LG Elecs.*

ITC Opp. 9-15. And when the Court has denied *Munsingwear* vacatur, there were arguments that the case failed under traditional criteria. *See, e.g.*, Opp. 16-19, *Epic Privacy Info. Ctr. v. Dep't of Commerce*, 140 S. Ct. 2718 (2020), 2020 WL 1318981 (equitable grounds); Suggestion of Mootness Resp. 9-12, *Idaho Dep't of Corr. v. Edmo*, 141 S. Ct. 610 (2020), 2020 WL 5441147 (not moot); Reply in Supp. of Pet. 11-13, *Lee v. City of Los Angeles*, 139 S. Ct. 2669 (2019), 2019 WL 2121380 (same); Pet. 34, *Southern Baptist Hosp. of Fla., Inc. v. Charles*, 138 S.Ct. 129 (2017), 2017 WL 2460797 (parties settled); Opp. 1-2, *Samsung Elecs. Co. v. Apple, Inc.*, 136 S. Ct. 2522 (2016), 2016 WL 2997342 (not moot and petitioner voluntarily abandoned opportunity to appeal).

DoD argues that "[o]bservation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in *arguably* moot cases unless the petition presents an issue (other than mootness) worthy of review." Opp. 13 (quoting *Supreme Court Practice* § 19.4 n.34). The word "arguably" is key. When the Court would have to devote resources to deciding the sometimes "difficult question of mootness" (Opp. 13), then it might make sense to deny if the case is not otherwise worthy of review. But when everyone agrees that a case is rendered moot through the unilateral action of a prevailing party, there is no "difficult question of mootness." The only "difficult question" would be certworthiness. The most efficient course in those circumstances is to vacate the lower court decision, without engaging in the hypothetical exercise that DoD invites. 13C Richard D. Freer & Edward H. Cooper, *Federal Practice and Procedure* § 3533.10.3

(3d ed. 2020, Westlaw) (government's test would impose an "unwarranted burden").

DoD's concern that vacatur would represent a "windfall" to petitioners (Opp. 12-13), is also misplaced. As the United States previously admitted, "[a] reasonable argument could be made" that its proposed certworthiness test "should not apply" at all "where . . . mootness was caused by the unilateral act of the party that prevailed in the court of appeals." *LG Elecs.* ITC Opp. 7-10. "A respondent that voluntarily abandons the field, thus preventing any possibility that this Court will grant a writ of certiorari and reverse, arguably should not be allowed to retain the potential future benefits of a favorable appellate decision, whether or not the Court would have granted the petition if the dispute had remained live." *Id.* at 8-9. Petitioners fully agree.

In sum, there is no reason for this Court to expend resources deciding whether it would have granted review in a case that all parties agree is now moot due to the prevailing party's unilateral action. The far more efficient and defensible course is to apply the traditional *Munsingwear* criteria and vacate the Ninth Circuit's decision.

3. Vacatur would be appropriate here regardless. This case is a viable candidate for certiorari. To the extent the Court is inclined to engage in the certworthiness inquiry at all, that should be sufficient to justify vacatur. But even if more were required, this case presents questions that independently warrant the Court's review.

a. There is a deep and entrenched circuit split on whether a court can decline to review military decisions under the *Mindes* test. Pet. 14-21. DoD

does not meaningfully argue otherwise. And DoD's attempts to reduce the intractable split to a "mere abstract disagreement" are unpersuasive. Opp. 20-23.

The result in this case absolutely "would have been different in a circuit that did not employ the *Mindes* doctrine." *Id.* at 21. The courts of appeals that have rejected *Mindes* would never have dismissed the case on justiciability grounds. They would have considered petitioners' APA claim on its merits.

The Third Circuit, for example, reviews challenges to military actions unless they present a nonjusticiable political question, *Gilligan v. Morgan*, 413 U.S. 1, 11-12 (1973), or otherwise fall outside the court's jurisdiction, *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). *See Dillard v. Brown*, 652 F.2d 316, 322-23 (3d Cir. 1981). Following these "parameters," the Third Circuit would have heard petitioners' APA claim because it does not ask the courts "to run the military." *Id.* at 322. And in the Eleventh Circuit, *Mindes* "no longer applies to statutory claims," *Winck v. England*, 327 F.3d 1296, 1303 n.5 (11th Cir. 2003) (citation omitted), so petitioners' APA claim would have been unaffected. *See also Harkness v. Secretary of the Navy*, 858 F.3d 437, 444 (6th Cir. 2017) (adopting *Mindes* only for constitutional claims), *cert. denied*, 138 S. Ct. 2648 (2018). In any of those circuits, petitioners would have had their day in court.

That includes the D.C. Circuit. DoD says there is no conflict with *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989), because the D.C. Circuit recognized "a 'realm of nonjusticiable military personnel decisions.'" Opp. 21 (quoting 866 F.2d at

1511). But that "realm" is the one demarcated by this Court's decisions in *Gilligan* and *Orloff*. And DoD does not even argue that petitioners' APA claim would be unreviewable under that framework.

DoD asserts that the circuits broadly agree on how to treat claims by members of the National Guard arising from their military service. Opp. 22-23. But the cases DoD cites hold only that 42 U.S.C. § 1983 does not give National Guard members a cause of action for damages against their superior officers. Opp. 22-23 (citing cases); *see also Chappell v. Wallace*, 462 U.S. 296 (1983) (rejecting similar remedy for a members of the U.S. military). Those cases rejected *Mindes*, assessed the merits, and concluded that they failed to state a claim under § 1983.

Nor did the Court previously make a decision to allow the conflict to persist. DoD cites four examples—one each decade, over the course of forty years—where the Court has denied review. Opp. 22. Each is readily distinguishable. In *Harkness v. Spencer*, 138 S. Ct. 2648 (2018), the petitioner did not challenge *Mindes*. *Harkness* Pet. 23-25, 2017 WL 6812146. In *Burnett v. Alabama National Guard*, 537 U.S. 822 (2002), the petitioner argued only that *Chappell* displaced *Mindes*. *Burnett* Pet. 3-7, 2002 WL 32135735. In *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 768-70 (7th Cir.), *cert denied*, 510 U.S. 933 (1993), the court of appeals correctly rejected *Mindes*. And in *Nieszner v. Orr*, 460 U.S. 1022 (1983), the split was limited to the Third and Fifth Circuits. *Nieszner* Opp. 2-3, 1983 WL 962095.

The conflict is real. It is entrenched. It is outcome-determinative. And it is important. But for DoD's unilateral conduct in mooting this case, review would have been warranted.

b. The bulk of DoD's opposition is devoted to defending the merits of *Mindes*. Opp. 15-20. The widespread disagreement on that very question is the reason why this Court's review is warranted. But to the extent it bears on certworthiness—in a moot case where the only issue is whether to deny or vacate—the Ninth Circuit's decision was in fact wrong.

This Court has squarely rejected the notion that federal courts may "limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). That is what *Mindes* does. *See Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir. 1985) (*Mindes* represents "a prudential judgment that the military's decision should not be reviewed in a judicial forum."). And it is why several courts of appeals have rejected *Mindes* as "erroneously 'intertwin[ing] the concept of justiciability with the standards to be applied to the merits of [the] case.'" *Kreis*, 866 F.2d at 1512 (second alteration in original) (quoting *Dillard*, 652 F.2d at 323).

DoD suggests that "the types of considerations" motivating this Court's jurisdiction and justiciability precedents—namely, the military's special expertise in national security and personnel matters—also underlie the *Mindes* test. Opp. 18. But DoD does not explain why those traditional and accepted limitations on judicial authority in cases against the military are insufficient. *See Gilligan*, 413 U.S. at 11 (justiciability); *Orloff*, 345 U.S. at 94 (habeas jurisdiction); *Chappell*, 462 U.S. 304-05 (recognition of cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). *Mindes* plainly does something

more, and its freewheeling, prudential approach to reviewability finds no support in this Court's case law.

That DoD is left to rely on *Feres v. United States*, 340 U.S. 135 (1950), and its progeny is telling. As several Members of this Court have noted, the *Feres* doctrine suffers from similar flaws: it reflects nothing more than the policy preferences of individual judges concerning the reviewability of claims against the military. *See Daniel v. United States*, 139 S. Ct. 1713, 1713-14 (2019) (Thomas, J., dissenting from denial of certiorari); *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting); *see also* Pet. 31, *Doe v. United States*, No. 20-559 (U.S. filed Oct. 26, 2020) (asking Court to overrule the "judge-made" *Feres* doctrine (citation omitted)).

DoD also attempts to distinguish this Court's many decisions reviewing "challenges to military statutes, regulations, and policies" as having involved "constitutional challenges." Opp. 23. But DoD does not identify any doctrinal basis for such a distinction. Federal courts have a "virtually unflagging" obligation to exercise the jurisdiction Congress has given them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In suits against the military, the bounds of that jurisdiction are set by this Court's decisions in *Gilligan*, *Orloff*, and other cases. *See* Pet. 21-27. And the APA contemplates challenges to military authority unless exercised "in the field in time of war or in occupied territory." 5 U.S.C. § 551(1)(G).

c. Finally, DoD argues this case would not have been a suitable vehicle. Particularly in the context of a case indisputably made moot by DoD's unilateral conduct, these arguments should have little traction.

First, petitioners have not forfeited their challenge to the *Mindes* test. *See* Opp. 14-15. Petitioners previously argued within the "*Mindes* framework" because there were binding Ninth Circuit decisions adopting and applying *Mindes* that the panel was compelled to follow. *See Wallace v. Chappell*, 661 F.2d 729, 731-34 (9th Cir. 1981), *rev'd on other grounds,* 462 U.S. 296 (1983); *Khalsa*, 779 F.2d at 1396-97; *see also Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019). And although petitioners did not ask the en banc Ninth Circuit to reject *Mindes*, petitions for rehearing en banc are a discretionary filing, and DoD cites no authority suggesting that a party who chooses to make such a filing thereby limits the issues upon which it can later seek certiorari.

In any event, it is well-settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original) (citation omitted); *see also Supreme Court Practice* § 6.26(B). Petitioners have always maintained that their APA claim challenging the October 13 policy is reviewable on its merits. Petitioners' challenge to the *Mindes* test is an argument in support of that claim, not a new claim. *See Lebron*, 513 U.S. at 379; *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992).

Second, the Ninth Circuit's decision is not supported by alternative grounds. Contrary to DoD's contention (Opp. 19-20, 24), the Ninth Circuit did not hold that the October 13 policy survived APA review. In assessing the "nature and strength" of petitioners' claim under the *Mindes* "justiciability" test, the Ninth Circuit merely identified what it thought were two

"factual underpinnings" for the policy. Pet. App. 3a-4a. That cursory and flawed analysis simply illustrates what other courts have said about *Mindes*: it wrongly "intertwines" justiciability and the merits. *Kreis*, 866 F.2d at 1512; *Dillard*, 652 F.2d at 323.

The panel did not even mention DoD's second alternative ground, that the Policy was "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). If anything, § 701(a)(2) further highlights the *Mindes* error. Congress has *already* given courts a mechanism to assess the reviewability of APA claims in light of agency expertise. Petitioners should not have to clear a second reviewability hurdle (*Mindes*)—made up by the courts—simply because their APA claim runs against the military.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the Ninth Circuit's judgment, and remand with instructions to dismiss the case.

Respectfully submitted,

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April 6, 2021