No. 20-298

IN THE
Supreme Court of the United States

EL PASO COUNTY, TEXAS, ET AL.,
Petitioners,

v.

JOSEPH R. BIDEN, JR., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, petitioners El Paso County, Texas and the Border Network for Human Rights respectfully petition for rehearing of the Court's order denying the petition for a writ of certiorari in this case.

The government recently decided to cease expenditure of new funds on the construction of a wall along the Southwest border, effectively mooting this case. In recognition of these changed circumstances, and at the government's request, the Court vacated the lower courts' decisions in *Biden v. Sierra Club*, No. 20-138 (Order of July 2, 2021). Petitioners respectfully request the same remedy: that the Court rehear its July 2 denial of certiorari in this case, grant the petition, and vacate the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

FACTUAL BACKGROUND

Petitioners' complaint sought to enjoin the Executive Branch's use of funds for border-wall construction because Congress had appropriated those funds for other purposes. At the time petitioners filed the petition for certiorari before judgment on September 2, 2020, the district court had agreed with petitioners on the merits and enjoined respondents from spending $3.6 billion on the wall under 10 U.S.C. § 2808's military construction provision. Pet. 2. But the district court had declined to enjoin respondents from spending an additional $2.5 billion under 10 U.S.C. § 284's counterdrug support provision, even though the court had earlier held that expenditure unlawful. Respondents appealed the district court's decision to the court

of appeals, and petitioners cross-appealed the district court's denial of relief as to the § 284 counterdrug support expenditures and construction. Pet. 10. A motions panel of the Fifth Circuit stayed the district court's injunction and declaratory judgment pending appeal and declined to expedite the appeal. *Id.*

After the Ninth Circuit held in a parallel decision that the transfer was unlawful and the Solicitor General sought certiorari (*Trump v. Sierra Club*, No. 20-138, now styled *Biden v. Sierra Club*), petitioners filed a petition for a writ of certiorari before judgment. The petition argued that if the Court granted the government's petition for certiorari in *Sierra Club*, which presented the same § 284 question, the Court should also grant certiorari before judgment here and consider the cases together. *See* Pet. 3.

The Court granted the *Sierra Club* petition on October 19, 2020, and set the case for argument in February 2021. On December 4, 2020, the court of appeals issued its decision in this case, holding that petitioners lacked standing and vacating the district court's decision. *El Paso Cnty. v. Trump*, 982 F.3d 332 (5th Cir. 2020). The court of appeals recognized that its "decision conflicts with the Ninth Circuit's recent holding in *Sierra Club v. Trump*," involving a "parallel challenge" to respondents' border-wall expenditures and construction. *Id.* at 340. Given the acknowledged circuit conflict, petitioners asked the Court to grant certiorari to review the court of appeals' decision. Supp. Br. 1-3; *see, e.g.*, *United States v. Windsor*, 570 U.S. 744, 754-55 (2013) (treating petition for certiorari before judgment as petition for

certiorari when court of appeals issued decision after initial petition filed).

This Court did not immediately act on the petition, presumably holding it for *Sierra Club*. But the Court never reached the merits of that case. First, the government successfully moved the Court to hold the case in abeyance and remove it from the February argument calendar. No. 20-138 (Order of Feb. 3, 2021). That motion was based on newly inaugurated President Biden's January 20, 2021 proclamation that "[i]t shall be the policy of [his] Administration that no more American taxpayer dollars be diverted to construct a border wall," and that responsible Executive Branch officials should develop a plan "for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law." Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225-26 (Jan. 27, 2021).

Next, on June 11, 2021, the government successfully moved the Court vacate the Ninth Circuit's decision in *Sierra Club* in light of actions by the Departments of Defense ("DoD") and Homeland Security ("DHS") pursuant to President Biden's January 20 proclamation. In particular, the government explained that on June 11, DoD's plan to put the Biden Proclamation into effect—previewed in an earlier April 30 memorandum—was completed. Pet'rs' Mot. to Vacate & Remand ("Vacatur Mot.") 10, No. 20-138 (June 11, 2021). The plan was "composed of two parts: (1) cancellation of projects and (2) redirection of funds." *Id.* at App. 1a. "With respect to the redirection of funds, DoD announced that $2.2 billion of unobligated military construction funds that had been

made available for Section 2808 border-wall projects would instead be released to fund 66 military construction projects that had been deferred." *Id.* at 10.

DoD and DHS had earlier announced that DHS would take over the projects that had been funded under § 284, *id.* at 10, and DHS's June 11 announcement involved "measures that DHS will undertake to 'close out/remediate barrier projects turned over to DHS by' DoD"—including environmental and other remediation measures—but that "'[n]o new barrier construction work will occur on the DoD projects.'" *Id.* at 10-11 (first quoting *id.* at App. 15a, then quoting *id.* at App. 16a).

Because of these changes, the government urged this Court to vacate the Ninth Circuit's decision below—which had ruled against the government as to standing, other threshold procedural issues, and on the merits—under *Munsingwear* and its progeny. *Id.* at 14-19. The government argued that because no further funds would be used for border construction, the facts that had supported the court of appeals decision in that case had changed dramatically, and that "[i]n light of the actions by the President, DoD, and DHS set forth above, the Court should vacate the judgment below and remand so the lower courts can consider the impact of those changed circumstances on this case." *Id.* at 14.

The government recognized that the changed circumstances were brought about by *its own actions*, and that "that absent 'exceptional circumstances,' vacatur of a court of appeals' judgment in light of mootness may be unwarranted when 'the losing party has voluntarily forfeited his legal remedy by the ordinary

processes of appeal or certiorari,' such as when 'mootness results from settlement.'" *Id.* at 17 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25, 29 (1994)). But the government contended that this doctrine did not stand in the way of vacatur because vacatur is ultimately a question of equity, and the "equitable inquiry calls for vacatur here." *Id.* at 18.

This Court granted the government's motion over the objection of the *Sierra Club* respondents, concluding that the Ninth Circuit "judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate its judgments." No. 20-138 (Order of June 3, 2021).

GROUNDS FOR REHEARING

In light of the government's decision to cease expending funds on border wall construction and this Court's decision to grant the government's motion to vacate an unfavorable decision due to those changed circumstances, petitioners respectfully request that the appropriate disposition in this case is vacatur of the Fifth Circuit's decision under *Munsingwear*. The Court should thus grant the petition for rehearing, grant certiorari, and vacate the decision below. *See* Rule 44.2 (petition for rehearing may be based on "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented"); 28 U.S.C. § 2106 (permitting the Court to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances").

A. The Government's Final Decision To Cease Expenditure Of Funds On Border-Wall Construction Has Rendered This Case Moot

1. "If a dispute is not a proper case or controversy [under Article III], the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). A core Article III principle is mootness. "Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (cleaned up). Therefore, if an event transpires while an appeal is pending that deprives the parties of "a personal stake in the outcome of the lawsuit," the case becomes moot. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (internal quotation marks omitted).

This case is moot because the government's actions since the Fifth Circuit's decision have granted petitioners all the relief they seek—*viz.*, cessation of the expenditure of funds on a wall along the Southwest border. The only relief petitioners have sought in this case is an injunction precluding the Executive Branch from using §§ 2808 and 284 to expend funds on a border wall when Congress never appropriated funds for that purpose. *E.g.*, Am. Compl. (D. Ct. Dkt. No. 52) ¶¶ 142, 154, 163, 169. But as the government explained in its motion for vacatur in *Sierra Club*, the Executive Branch has formally decided to "halt all further border-barrier construction," Vacatur Mot. 11,

and will thus not expend any further funds on such construction. The behavior petitioners sought to enjoin is thus not reasonably expected to recur, and federal courts accordingly lack jurisdiction to continue adjudicating this moot dispute. *Cf. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

B. Especially In Light Of This Court's Vacatur Of The Ninth Circuit's Decision In *Sierra Club*, The Court Should Vacate The Decision Below Under *Munsingwear*

The relief petitioners sought became moot while the petition for certiorari was still pending before this Court. Vacatur of the Fifth Circuit's decision is warranted in those circumstances, because when a case that would otherwise merit this Court's review becomes moot "while on its way [to this Court] or pending [a] decision on the merits," the Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. That practice ensures that no party is "prejudiced by a decision which in the statutory scheme was only preliminary," and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41; *see U.S. Bancorp*, 513 U.S. at 21 ("If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require." (alterations in original) (quoting *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944))).

Vacatur is especially appropriate here for several reasons.

First, mootness here arose entirely through the unilateral conduct of the government—when this petition was filed, the Executive Branch was expending unappropriated funds on border-wall construction, and the government has since halted that unlawful practice, thereby mooting this case. Petitioners certainly welcome the government's change of position. But before that change, the government obtained a favorable standing ruling—adverse to petitioners' ongoing interests—that is now binding precedent in petitioners' home circuit. And as this Court has long held, vacatur is "clear[ly]" appropriate "when mootness occurs through the unilateral action of the party who prevailed in the lower court." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (cleaned up) (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 72 (1997)). That is because "'[i]t would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Id.* (quoting *Arizonans for Off. Eng.*, 520 U.S. at 75). By mooting this case, the government "has frustrated [petitioners'] ability to challenge the Court of Appeals' ruling," *Camreta v. Greene*, 563 U.S. 692, 713 (2011), and should thus not be allowed to "retain the benefit of [that] judgment," *Garza*, 138 S. Ct. at 1792.

Second, and relatedly, *Munsingwear* explained that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." 340 U.S. at 41. Through vacatur, the Court thus ensures "that no party is harmed by . . . a 'preliminary' adjudication" rendered moot by a prevailing party's actions or the vagaries of happenstance.

Camreta, 563 U.S. at 713. Here, the "legal consequences" of allowing the decision below to stand would be substantial; the Fifth Circuit's opinion imposes a considerable impediment to petitioners and similarly situated municipalities and organizations to demonstrate standing to challenge the actions of the federal government. This Court will not—indeed, cannot—review that decision because of the federal government's own conduct, so the federal government should not be allowed to retain the benefits of the judgment below.

That is especially so, moreover, because the standing issue decided below was independently cert-worthy, and indeed would have been decided in *Sierra Club*. As explained above, the court of appeals denied petitioners' standing but recognized that its decision on the issue "conflicts with the Ninth Circuit's recent holding in *Sierra Club v. Trump*." *El Paso Cnty.*, 982 F.3d at 340. This Court necessarily would have considered standing in *Sierra Club*, since standing must be considered on the Court's "own initiative if necessary." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 611 (1989). And the fact that there was an acknowledged circuit conflict as to the standing question demonstrates that it was independently worthy of this Court's review. *See* Supp. Br. 2-3 (arguing that standing question was necessarily before the Court in *Sierra Club* and independently cert-worthy given acknowledged split of authority). It would be especially inequitable to allow the government to retain the benefit of a lower court decision that this Court would in fact have reviewed but for the government's intervening acts.

Third, vacatur is especially warranted considering this Court's grant of the government's motion to vacate the Ninth Circuit's decision in *Sierra Club*. Ultimately, this Court's determination whether to vacate a lower-court decision because of mootness "is an equitable one," *U.S. Bancorp*, 513 U.S. at 29, that depends on what disposition would be "most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot," *id.* at 24 (cleaned up) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). The equitable analysis here requires vacatur because absent that remedy, the government would receive an entirely unwarranted windfall as a result of its own conduct.

Before the Executive Branch commendably decided to halt expenditure of funds for border-wall construction, the government was the subject of two appellate rulings relating to the border wall: the unfavorable Ninth Circuit's ruling enjoining that expenditure of funds, *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), and the favorable ruling below holding that petitioners lacked standing to challenge the government's expenditure of funds. After the government halted border-wall expenditures, the government sought vacatur of the unfavorable *Sierra Club* decision, and this Court granted the motion. As a result, the government was able to deprive the *Sierra Club* respondents of the benefit of favorable legal precedent, and to rid itself of an appellate precedent that substantially circumscribed federal authority, through its own unilateral action. And it was able to

do so despite the general rule that vacatur is *not* warranted when "the losing party"—in that case, the government—"has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari." *U.S. Bancorp*, 513 U.S. at 25.

If the government is able to obtain vacatur of an *unfavorable* judgment through its own unilateral conduct, any plausible conception of equity would require the government to forfeit the benefit of a *favorable* lower court ruling when the government itself precludes this Court's ability to review that ruling. That is the "established" practice regardless, *Camreta*, 563 U.S. at 712, but that rule's application as an equitable matter is especially appropriate when denying vacatur would result in a windfall to one party. After all, in conducting the equitable inquiry under *Munsingwear*, this Court considers whether vacatur would "further[] fairness." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 175 (1996). And fairness requires that if the government can escape the consequences of an unfavorable lower court ruling by unilaterally altering the facts to avoid this Court's review, then it should certainly not be able to retain the benefits of a favorable ruling that it has prevented this Court from reviewing.

Thus, the appropriate remedy in this case in light of the government's unilateral conduct—and especially considering this Court's July 2 order vacating the Ninth Circuit's decision in *Sierra Club*—is to vacate the decision below under *Munsingwear*. Petitioners respectfully request that the Court grant rehearing of the decision denying the petition for a writ of certiorari, grant the petition, and vacate the decision

below with instructions to the district court to dismiss the complaint as moot.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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RULE 44.2 CERTIFICATE OF COUNSEL

I, Anton Metlitsky, a member of the bar of this Court, hereby certify that the forgoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

/s/ Anton Metlitsky
Anton Metlitsky