No. 22-31

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

BRIAN MECINAS; ET AL. AND KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Respondents

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The State asks the Court to grant certiorari for the limited purpose of ordering vacatur of the Ninth Circuit's opinion below, 30 F.4th 890 (9th Cir. 2022) (the "Opinion"). The State seeks to vacate the Opinion because the DNC and Secretary Hobbs's collusive actions to dismiss the district court case while the appeal was ongoing mooted the case, thus depriving the State of the chance to seek further review of the Opinion.[1] The Court's "established practice" in such cases "is to reverse or vacate the judgment below and remand with a direction to dismiss." *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

As the DNC now admits in its brief in opposition (the "BIO"), two weeks *after* the State moved to intervene in the Ninth Circuit, the DNC reached a secret written agreement with Defendant Secretary of State Katie Hobbs to dismiss the district court case—but without prejudice to the DNC refiling it. For her part, Secretary Hobbs—without the knowledge of the State or the Attorney General's Office (the "AGO")—made the further dual concessions (1) not to seek to challenge the Opinion, and (2) not to seek vacatur of that Opinion. The State learned of this agreement only when the DNC attached it as an exhibit to their BIO.

In *Arizonans for Official English v. Arizona,* 520 U.S. 43 (1997), the State—in language that applies equally here—urged that its plea for vacatur in that

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[1] Just as in the State's Petition, we refer to the Plaintiff Respondents collectively as the "DNC."

case was "compelling" given the "extraordinary course" of the litigation. As the State there said:

"It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment." 520 U.S. at 75.

To which this Court, after quoting the statement, gave a two-word response: "We agree." *Id.* The Court then ordered vacatur of the Ninth Circuit's opinion, as the Court should do here.

The BIO's main argument for rejecting review is that the Court lacks jurisdiction to deal with a moot case. That argument misses the mark, though, because as the Court has said many times, when a suit "becomes moot pending appeal," 28 U.S.C. § 2106 gives the Court authority to vacate the judgment below. *Camreta v. Greene,* 563 U.S. 692, 712 (2011). And the equitable remedy of vacatur ensures that where, as here, "those who have been prevented from obtaining the review to which they are entitled [are] not … treated as if there had been a review." *Id.* (quoting *Munsingwear,* 340 U.S. at 40).

Moreover, when a case become moot while on appeal, the Court can grant certiorari and direct vacatur without "definitively resolv[ing] whether the party seeking certiorari has Standing under Article III to pursue appellate review." *Arizonans,* 520 U.S. at 66 (ordering vacatur without resolving "grave doubts" about petitioners' appellate standing).

Vacatur is an equitable remedy, and the "point of vacatur" is to "prevent an unreviewable decision" from "spawning any legal consequences," so that no party is harmed by what the Court has called a "preliminary adjudication." *Camreta,* 563 U.S. at 713 (citing *Munsingwear*). Because the unreviewed and unreviewable Opinion is now established precedent that binds the State both in the Arizona district court and in the Ninth Circuit, the State has suffered a concrete, ongoing, injury.

ARGUMENT

I. The Court Has Jurisdiction to Grant Certiorari and Direct Vacatur of the Opinion.

The DNC argues that the Court lacks jurisdiction both because the underlying case has become moot and because the State lacks any cognizable interest at this point. The DNC is wrong on both points.

A. Mootness does not deprive the Court of jurisdiction.

As shown by the cases the BIO cites, mootness assuredly does not deprive the Court of jurisdiction to grant the relief the State seeks: vacatur of the Opinion. We begin with *Iron Arrow Honor Soc'y v. Heckler,* 464 U.S. 67 (1983), the only Supreme Court case the BIO cites on this point. There—despite the Court concluding that the underlying case was moot—the Court nonetheless accepted jurisdiction, granted certiorari, and vacated the opinion of the court of appeals under *Munsingwear*. 464 U.S. at 73.

The Court has many times done the same, so that it has become an "established," though "not exceptionless" practice. *Camreta,* 563 U.S. at 712 (directing vacatur when underlying case was moot). The Court set forth the general rule in *Munsingwear*, 340 U.S. at 39:

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here … is to reverse or vacate the judgment below and remand with a direction to dismiss."

In footnote 2, the *Munsingwear* Court said that "this has become the standard disposition in federal civil cases," and then listed dozens of cases following that practice. And since the 1950 *Munsingwear* case the Court has adhered to that practice. *See, e.g. Arizonans,* 520 U.S. at 72, 80 (directing vacatur; stating that when the underlying case became moot pending appeal, this was the "established practice"); *Alvarez v. Smith,* 558 U.S. 87, 93 (2009) (directing vacatur; stating we "normally do vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties," without prejudicing anyone "by a decision which "was only preliminary"); *Selig v. Pediatric Specialty Care, Inc.,* 551 U.S 1142 (2007) (vacating court of appeals' decision when case rendered moot during pendency of certiorari petition).

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) highlights the exception, denying vacatur because the actions of the party seeking vacatur caused the mootness. But

Bonner Mall nonetheless restates the rule that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* 513 U.S. at 25. Indeed, as the Court underscored: "We thus stand by *Munsingwear's* dictum that mootness by happenstance provides sufficient reason to vacate." *Id.,* n. 3.

The BIO mostly ignores the above cases, and instead cites a decision of the Fifth Circuit for the supposed principle that "intervention in a case that does not exist is a legal impossibility." *DeOtte v. State* 20 F.4th 1055, 1066 (5th Cir. 2021). But the DNC misconstrues the case. The *DeOtte* court held that "even though mootness would remain," there was still "some life to the case because of the relief the parties are contesting, namely vacatur." *Id.* at 1067. Specifically, the "intervention controversy" was still alive because "if it were concluded on appeal that the lower court had erred in denying the intervention motion," then the "applicant would have standing to seek vacatur of the order." *Id.* The Fifth Circuit went on to conclude that Nevada "should have been granted intervention as of right," and then ordered vacatur of the "unappealable district-court judgment." *Id.* at 1070-71. *DeOtte* thus supports the relief the State seeks.

The BIO also relies on *United States v. Ford,* 650 F.2d 1141, 1143 (9th Cir. 1981), which denied intervention when there was "no longer any action in which [to] intervene." But later Ninth Circuit cases

with facts more akin to those here have distinguished *Ford* and allowed intervention.

In *Allied Concrete and Supply Co. v. Baker,* 904 F.3d 1053 (9th Cir. 2018), for example, a group of ready-mix concrete suppliers challenged a state wage law as in violation of the Fourteenth Amendment's equal protection clause. The International Brotherhood of Teamsters ("IBT") moved to intervene on the side of the State to defend the law. The district court denied IBT's motion to intervene, and granted the plaintiffs' summary judgment on the equal protection claim.

On appeal, the Ninth Circuit reversed the district court's judgment on the merits, and directed judgment for the state defendants. For its part, IBT filed a separate appeal of the district court's denial of its motion to intervene. IBT argued that even though the Ninth Circuit decision directed judgment for defendants—on whose side IBT had moved to intervene—its appeal would not be moot "because Plaintiffs could still move for rehearing en banc or petition for a writ of certiorari with the Supreme Court." 904 F.3d at 1066.

The Ninth Circuit said it was "not aware of any decision from our Circuit that addresses whether a potential petition for rehearing or certiorari keeps a case alive for the purpose of appealing a motion to intervene." *Id.* Distinguishing *Ford,* the court concluded that, "where the district court has entered judgment, but a party has appealed some aspect of the case, an appeal of the motion to intervene is not moot."

Id. The court went on to find that the district court erred in not granting IBT's motion to intervene.

The above-discussed cases are consistent with Supreme Court case law on granting motions to intervene in the face of mootness arguments.

B. The State has a cognizable interest in vacating the Ninth Circuit opinion.

The DNC also argues that the State has no "cognizable injury" flowing from the Ninth Circuit opinion because the underlying lawsuit has been dismissed, with Arizona's election laws "unaltered," so that "there is nothing left for Arizona to defend against." BIO at 12. Moreover, the DNC asserts, Arizona does not "suffer any potential preclusive effect" from the Ninth Circuit opinion. *Id.*

In fact, though, the DNC's lawsuit was dismissed without prejudice, and if the DNC reinstates its suit, the Opinion, absent vacatur, will be directly-on-point, binding precedent on the State—even though, due to the collusive acts of the DNC and Secretary Hobbs, the State had no opportunity to challenge that opinion.

The issue is not whether the State would be bound by res judicata or collateral estoppel based on the appellate decision. The issue is the binding nature of Ninth Circuit precedent itself on a federal district court. As the Opinion itself says, quoting a leading case on the matter:

> Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.

Mecinas v. Hobbs, 30 F.4th 890, 899, n. 4 (9th Cir. 2022) (quoting *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001)).

The Opinion found that the DNC has standing to attack a specific Arizona statute, A.R.S. § 16-502(E) (the Ballot Order statute), and that resolving the ballot order was not a political question, overruling the district court on both issues. In a subsequent federal suit, not only will the district court be bound by the Opinion, but any Ninth Circuit panel reviewing the issue will be equally bound, because "the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." *Hart,* 266 F.3d at 1171. A "later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule," *id.,* even though this "system of strict binding precedent" suffers from the "defect" of giving "undue weight to the first case to raise a particular issue." *Id.* at 1175.

Thus, it is hardly the case that "Arizona's only claimed injury is that there exists a court of appeals opinion with which it disagrees." BIO at 14. The State's injury stems from both the binding, on-point nature of the opinion, and the State's inability to seek further, en banc or Supreme Court review of the

panel's decision. This Court is well aware of the problem, and has developed vacatur to deal with it.

II. This Case Merits Certiorari.

This case merits a grant of certiorari because the Ninth Circuit's decision denying both the State's motion to intervene, and its subsequent request for vacatur of the Opinion, conflicts with relevant decisions and the "established" practice of this Court.

The State's Petition sets out the details underlying the State's motion to intervene. Until the Opinion was issued on April 8, 2022, and Secretary Hobbs thereafter refused to tell the AGO whether she would seek further appeal, the State had no reason to intervene. With the occurrence of those events, however, it became clear that Secretary Hobbs's interest diverged from those of the State. Hence, at the direction of Arizona Attorney General Brnovich, on April 22, 2022 the State moved to intervene and concurrently filed a motion seeking rehearing en banc. Both motions were thus filed within the 14-day FRAP Rule 40 period for filing a petition for rehearing. And just as the State feared, Secretary Hobbs did *not* file a petition for rehearing.

When the State moved to intervene, the case was decidedly *not* moot because the Opinion remanded the case back to the district court for trial on the merits, and the Ninth Circuit had not resolved the State's motions to intervene and for en banc review. While those motions were pending, the DNC got together with Secretary Hobbs—who by then was an

announced Democratic candidate for governor—and they on or about March 2, 2022, reached the agreement to dismiss discussed above.

Under the Court's recent decisions in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022) and *Berger,* discussed in the State's Petition, the State's motion to intervene was timely. The DNC's brief ignores the timeliness standards of those cases, however, and simply tries to distinguish them based on facts not relevant to the pertinent holdings of the cases. For example, while *Berger* may have involved an "ongoing challenge to North Carolina's voter-identification law," the underlying principle is that different state officials may have differing views, but "a State will as a practical matter often retain a strong interest in this kind of litigation," because it can "implicate the continued enforceability of the State's own statutes." *Berger v. North Carolina State Conf. of the NAACP,* 142 S. Ct. 2191, 2197 (2022) (cleaned up). Here, the DNC's attack on the State's ballot order statute has not been resolved, yet the State is bound by the Opinion's unfavorable precedent.

Similarly, while it's true that *Cameron* involved a request to intervene to appeal a Sixth Circuit decision that affirmed a decision holding a Kentucky statute unconstitutional, that hardly means that intervention is untimely and should be rejected in other circumstances.

Accepting certiorari for the limited purpose of allowing intervention and vacating the Opinion is warranted, especially given the intentional efforts of

the DNC and Secretary Hobbs to preserve the unreviewable Opinion they viewed as helpful to their causes.

III. Vacatur Is The Proper Remedy

As discussed above, regardless of issues relating to standing, the established practice of the Court is to grant vacatur when a case becomes moot while on appeal and the mootness was not caused by the acts of the party seeking vacatur.

The BIO's argument that vacatur is "inappropriate in these circumstances," wholly ignores the repeated statements by this Court that vacatur is generally the "established practice." Even the *Bancorp Mortgage* case acknowledges that "mootness by happenstance provides sufficient reason to vacate." 513 U.S. 25, n. 3.

Respondents colluded to make this case moot. And under long established precedent, the State, "in fairness," should not be "forced to acquiesce" in the adverse Opinion of which the State sought review but was "frustrated" in that quest when Respondents' actions mooted the case.

Finally, the notion that granting certiorari would "disrupt" the secret agreement between the DNC and Secretary Hobbs, so as to "greatly harm" their "settlement expectations," is laughable. The State filed its motions to intervene and for en banc review *two weeks prior* to that agreement. No "settled expectations" were possible given those facts.

CONCLUSION

Respondents' deliberate attempt to make the case moot harmed the State by depriving the State of its right to seek full appellate review of the Opinion and to resolve the merits of the case. And because the case became moot while on appeal, this Court's established practice is to vacate the judgment below. The State thus asks the Court to grant the petition for writ of certiorari and to vacate the Opinion.

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Respectfully submitted,

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