No. 22-425

IN THE

Supreme Court of the United States

ROBIN CARNAHAN, ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION,

Petitioner,

v.

CAROLYN MALONEY, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

RESPONDENTS' RESPONSE TO SUGGESTION OF MOOTNESS

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RESPONSE TO SUGGESTION OF MOOTNESS

1. Respondents agree with petitioner that the Court should vacate the decision below in light of respondents' dismissal of their complaint in this case, which reflects their intention to abandon their claim and moots the appeal that gives rise to the proceedings now before this Court. As the government's suggestion of mootness explains, this Court's consistent practice in such circumstances, where the unilateral action of the party who prevailed below has mooted an appeal in which this Court has granted a petition for certiorari, has been to vacate the judgment below and remand with instructions that the case be dismissed. *See U.S. Forest Serv. v. Pac. Rivers Council*, 570 U.S. 901 (2013); *Arave v. Hoffman*, 552 U.S. 117, 118–19 (2008); *City of Cuyahoga Falls v. Buckeye Comty. Hope Found.*, 538 U.S. 188, 199–200 (2003); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512–13 (1989); *Frank v. Minn. Newspaper Ass'n*, 490 U.S. 225, 227 (1989) (per curiam); *Deakins v. Monaghan*, 484 U.S. 193, 199–201 (1988); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) ("[V]acatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court.").

Respondents further agree that their dismissal did not of its own force terminate the proceedings in this Court, *see* Suggestion, at 3, and that action by this Court is necessary to dispose of the case in light of their abandonment of their claim, *see id.* at 3–4. Put another way, respondents' dismissal of their claim has the *effect* of mooting the appeal and provides the predicate for action by this Court to terminate the proceedings before it, but does not itself accomplish that

result. Respondents also agree that they are not entitled to moot the appeal unilaterally while retaining the benefit of the favorable judgment in the court below, *see id.* at 5; rather, they took their action to withdraw their claim cognizant that the consequence under this Court's longstanding practices would be vacatur of the court of appeals' decision and the loss of its precedential status.

2. The government suggests that respondents should have proceeded differently in bringing the abandonment of their claim to the Court's attention, *see* Suggestion, at 3–4, but does not argue that the Court should treat this case differently from other cases in which respondents have advised this Court of their intention to abandon their claims. Respondents proceeded as they did because in the circumstances of this case—unlike others where respondents have abandoned the claims that were the subject of a writ of certiorari issued by the Court—they were in a position actually to dismiss their complaint by notice rather than merely advising this Court of their intent or desire to do so in a motion or brief, as in *Pacific Rivers*, *Arave*, *Cuyahoga Falls*, *Webster*, *Frank*, and *Deakins*.[1]

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[1] The government expresses doubts about whether respondents were entitled to dismiss their claim in light of the district court's stay of proceedings, *see* Suggestion, at 4, but a stay of "[f]urther proceedings" in a case does not prevent the *termination* of proceedings. In any event, even if the dismissal were not self-executing, it reflects respondents' intention to abandon their claim at least as clearly as the representations in briefs and motions in the cases where this Court has established its practice of vacating and ordering dismissal when a respondent abandons it claims. Thus, as the Government concedes, there is no need for the Court to resolve whether the notice of dismissal was proper. *Id.*

Respondents called their action to the Court's attention as soon as they had taken it, anticipating that the Court might act sua sponte or request that the parties advise it of their views on the appropriate course of action in light of the dismissal of the complaint. The government's filing obviates the need for such a request by the Court, and the parties agree that the Court should vacate the decision below and remand for dismissal. If, however, the Court agrees with the government that respondents should have immediately filed a motion to dismiss in this Court, respondents apologize for not having done so.[2]

3. In light of the parties' agreement on the appropriate course of action under the circumstances, the Court need not consider the government's theoretical observations about whether the Court would have the power to decide a standing question in an appeal that the parties agree is moot. The Court's statements that it has Article III authority to address threshold issues in any order, *see Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007), do not suggest that it should address a *disputed* threshold issue in a case where the parties are in agreement that a lower court's decision is subject to vacatur on another ground. As in *Pacific Rivers*, where the issues on which the Court had granted certiorari similarly included the threshold question of standing (as well as ripeness), the Court should vacate and remand for

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[2] The government mentions the alternative of an agreed stipulation of dismissal signed by both parties. *See* Suggestion, at 3. A stipulation was not a possibility in this case because it would likely have precluded vacatur under this Court's decision in *Bonner Mall*, 513 U.S. at 392–93, and there was no realistic possibility that the government would have agreed to a dismissal without vacatur of the court of appeals' decision.

dismissal now that the appeal has been mooted by the abandonment of respondents' claim, as the government itself acknowledges.

4. With respect to the government's argument that the vacatur should be accompanied by a remand for dismissal of the case "with prejudice" by the district court, respondents acknowledge that in four of the cases presenting similar circumstances, *Deakins*, *Webster*, *Cuyahoga Falls*, and *Arave*, the Court specified that the dismissal in the district court should be with prejudice. In another, *Frank*, however, the Court did not include the words "with prejudice." *See* 490 U.S. at 227. And in its most recent such ruling, *Pacific Rivers*, the Court stated that the action should be dismissed "as moot in its entirety," 570 U.S. at 901, not dismissed with prejudice.

The suggestion that the Court should order dismissal with prejudice is hard to square with the idea that the basis of the dismissal is mootness, because dismissals on jurisdictional grounds cannot be on the merits, *see Sinochem*, 549 U.S. at 431, and hence are necessarily "without prejudice," *see Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001). Indeed, if this matter were to proceed to decision in this Court and the government were to prevail on its standing arguments, the government would be entitled only to have the claims dismissed *without* prejudice.

On the other hand, the dismissal in the district court, which has already occurred, resulted not from mootness but from the plaintiffs' abandonment (by voluntary dismissal) of their claim, which in turn moots the *appellate* proceedings. Although some voluntary dismissals can be with prejudice, a Rule

41(a)(1)(A)(i) dismissal, like a jurisdictional dismissal, ordinarily is *without* prejudice. *See* Fed. R. Civ. P. 41(a)(1)(B).

The government, citing *Deakins*, asserts that dismissal with prejudice is necessary to ensure that respondents do not turn around and refile a lawsuit pursuing the same claim, a concern that it asserts is "particularly" present here "because respondents themselves have not explicitly renounced an attempt to relitigate this dispute in the future." Suggestion, at 6. Lest there be any misunderstanding, respondents' decision to dismiss their claims reflects that they are not attempting and will not attempt in the future to litigate an entitlement to the handful of remaining records at issue based on their Seven Member Rule request.[3] Their decision to forgo further litigation reflects their judgment that the importance of seeking to compel production of those few records (which might not be subject to production even if respondents were to prevail in this Court) does not justify the effort entailed in continued litigation, and their acceptance of the consequence of losing the precedential effect of the court of appeals' decision.

Finally, the statute of limitations on the Members' claim expires in a few weeks. And an attempt to renew litigation on the request at issue here after this Court terminated proceedings based on respondents' abandonment of the claims would obviously be rejected as improper and would likely subject counsel bringing it

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[3] As the government notes, respondents have not withdrawn their request and have not forsworn attempting to obtain production of additional responsive records through means *other than* litigation. The possibility of such nonjudicial efforts has no bearing on the mootness of the appellate proceedings in this case.

to sanctions. For these reasons, although respondents believe that the Rule 41(a)(1)(A)(i) dismissal without prejudice filed in the district court reflects the appropriate termination of this case, an order requiring the district court to revise the dismissal so that it is with prejudice would be without substantial practical significance.

CONCLUSION

The Court should vacate the decision below and remand with directions that the court of appeals dismiss respondents' appeal as moot.

Respectfully submitted,

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