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May 16, 2023

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Arizona v. Mayorkas*, No. 22-592

Dear Mr. Harris,

Petitioner States submit this letter in response to the May 12, 2023 letter of Federal Respondents. The States oppose both dismissal on mootness grounds and vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950).[1]

Federal Respondents contend that their merits brief argued this case would become moot with the expiration of the public health emergency on May 11, 2023. *See* Ltr. at 1 (citing Gov't Br. at 12). That is a stretch. Federal Respondents' brief contains only a single paragraph discussing potential mootness—purely in the *background* section of their brief. That paragraph, which announced the government's intended response to expiration, asserted in one conclusory sentence (at 12) that expiration "would render this case moot." The point was never developed into an argument. And it stretches credulity that such a cursory and background-section-only contention satisfies the government's "heavy burden" to establish mootness. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000).

But that is hardly the United States' principal problem. The States' Reply Brief specifically argued at length that this case would not become moot on May 11. *See* Reply Brief at 3-4, 20-24. And the States further argued that even if this dispute were otherwise moot, the voluntary cessation and capable-of-repetition/yet-evading-review exceptions would defeat mootness here. *Id.*

Federal Respondents' letter makes no effort to respond to those contentions. Indeed, Federal Respondents have yet to offer this Court even a *single word*—in a background section or anywhere else—as to why *both* of those exceptions would not apply here. The States' arguments that the mootness exceptions apply are thus effectively conceded—and certainly not rebutted. And application of those exceptions is particularly warranted here, as Federal Respondents have again

[1] The State of Arizona takes no position on these issues.

engaged in the "tactic of 'rulemaking-by-collective-acquiescence'"—the legality of which previously evaded this Court's review in *Arizona v. San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring) (citation omitted).

Federal Respondents further make no effort to explain why this Court's precedents, which require that "postcertiorari maneuvers designed to insulate a decision from review by this Court … be viewed with a critical eye," do not preclude mootness here. *Knox v. SEIU*, 567 U.S. 298, 307 (2012). Indeed, they do not offer even a bare assertion that they would have terminated the public health emergency as they did if this Court had not granted certiorari and a stay, let alone evidence to that effect. They have, in other words, offered nothing to dispel the obvious possibility that their actions were taken with the specific intent of mooting this case. (They could, for example, have easily chosen a later expiration date that was after the end of this Court's term, which also would not have coincided with the traditional seasonal peak of illegal border crossings.)

It gets worse. Federal Respondents' letter is *directly* contrary to positions that they have taken in this Court and elsewhere. Not even a year ago, they expressly told this Court and the D.C. Circuit: "the expiration of the [COVID-19-based] mask directives *has not rendered moot* pending challenges to TSA's statutory authority to issue the directives." Federal BIO at 18, *Corbett v. TSA*, No. 22-23 (Sept. 27, 2022), https://bit.ly/3MsiWWF (emphasis added) (citing Supp. Br. at 6-10, *Wall v. TSA*, No. 21-1220 (D.C. Cir. Sept. 12, 2022). The Solicitor General further explained that mootness was precluded because "TSA could invoke the same statutory provisions in the future if circumstances warranted." *Id.* at 18-19.[2]

That quite-correct principle, which the United States confidently advanced in *Corbett*, is controlling here. To quote the United States, changing only the agencies involved and the policy at issue: "the expiration of the [public health emergency] has not rendered moot pending challenges to [CDC's] statutory authority to issue the directives," since CDC "could invoke the same statutory provisions in the future if circumstances warranted." *Id.* at 18-19. Federal Respondents' letter makes no attempt to justify these jarring contradictions.

But the difference between the United States' seemingly irreconcilable positions is perhaps not too difficult to explain: in *Corbett*, the Executive had prevailed in the D.C. Circuit, and then further prevailed in this Court in avoiding a mootness-based dismissal and *Munsingwear* vacatur. *See Corbett v. TSA*, 143 S. Ct. 395 (2022). In contrast, Federal Respondents lost both this case in the district court (D.D.C.), J.A.8-53, and the States' challenge in the Western District of Louisiana, *Louisiana v. CDC*, 603 F.Supp.3d 406 (W.D. La. 2022)—both of which it contends are now moot.

[2] For ease of reference, a copy of the Federal Government's *Corbett* brief in opposition is attached.

The Federal Government's position thus appears to be that the expiration of emergencies does not moot challenges to its authority when it has prevailed below, but simultaneously moots all equivalent challenges in which it has lost. This "heads-I-win, tails-your-win-vanishes" approach cannot be reconciled with basic principles of the rule of law. And it is particularly dangerous when parties are not mere innocent bystanders but rather control the voluntary actions that generate purported mootness—which both the voluntary cessation exception and *Munsingwear* doctrine expressly take into account. *See*, *e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (permitting a defendant to moot a case through its own voluntary actions would "leave 'the defendant free to return to his old ways'" (cleaned up) (citation omitted)); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) ("The principal condition to which we have looked [for whether a *Munsingwear* vacatur is warranted] is whether the party seeking relief from the judgment below *caused the mootness by voluntary action*." (emphasis added)).

This Court should thus reject Federal Respondents' request for dismissal on mootness grounds since: (1) their single-sentence mootness argument is so terse and conclusory that it cannot satisfy their "heavy burden," (2) they have not yet made *any* effort to respond to the States' arguments against mootness, (3) they have offered no explanation why the voluntary cessation and capable-of-repetition/yet-evading-review exceptions do not *both* apply here, and (4) they have not explained the glaring contradictions between their position here (and in *Louisiana*) versus what they told this Court in *Corbett* about the mooting effect of expiration of COVID-19-based measures.

At a bare minimum, this Court should order supplemental briefing rather than permitting Federal Respondents to prevail based on such a perfunctory offering. Such briefing would be particularly appropriate given the tactics that Federal Respondents have employed here (and in *San Francisco*). This Court should further consider holding oral argument on both the merits and mootness, particularly since the Executive's conflicting positions powerfully demonstrate how easily manipulable the current mootness and *Munsingwear* doctrines are in the Executive's hands.

Federal Respondents are also not entitled to a *Munsingwear* vacatur. Such vacaturs are warranted only where judicial "review … was prevented through happenstance." *Munsingwear*, 340 U.S. at 39-40. The mootness here has not been produced by happenstance but rather by Respondents' own machinations and voluntary cessation of their challenged policies.

To put a finer point on it, and to quote once again the United States: "*Munsingwear* doctrine is generally available only to 'those who have been prevented from obtaining the review to which they are entitled.'" *Corbett* BIO at 19-20 (quoting *Camreta v. Greene*, 563 U.S. 692, 712 (2011)).

Here, Federal Respondents were "prevented from obtaining … review" only by their own actions. Federal Respondents sought—and obtained—indefinite abeyances of *their own appeals* in both the D.C. and Fifth Circuits, as well as a stay in the Western District of Louisiana. That is not mere "happenstance," but rather "voluntary action" by Federal Respondents that "caused the mootness" alleged. *U.S. Bancorp Mortgage*, 513 U.S. at 24.

Those concerns are particularly acute here given Federal Respondents' other conduct: while seeking to hold their appeal in abeyance, Federal Respondents eagerly attempted to exploit their defeat in the district court to achieve desired policy ends while vociferously fighting the States' efforts to obtain a stay of a judgment that the Federal Respondents themselves considered hopelessly flawed. Only this Court's actions prevented the fruition of that surrender-one's-way-to-victory scheme. *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022).

Federal Respondents similarly could have sought either a stay pending appeal or expedition in *Louisiana* if they actually desired judicial review. Instead, they sought to erase unfavorable decisions through the stroke of an administrative pen, rather than adjudication on the merits. But *Munsingwear* doctrine has limits, and Federal Respondents' actions here plainly exceed them.[3]

Sincerely,

s/ Drew C. Ensign
Drew C. Ensign
Louisiana Special Assistant Solicitor General

cc: Counsel of Record for Respondents

[3] In contrast, the States are entitled to a *Munsingwear* vacatur of the D.C. Circuit's denial of their motion to intervene if this Court concludes this action is moot. Unlike Federal Respondents, the States played no role in producing the circumstances that produced putative mootness here. Indeed, the States have, *at every stage*, vigorously sought to have their arguments decided on the merits, only to be thwarted by Federal Respondents' collusive and manipulative tactics at nearly every turn.