No. 23-60

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
FEDS FOR MEDICAL FREEDOM, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should take the unprecedented step of granting vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), of an *en banc* court of appeals decision that Petitioners themselves claim to have voluntarily mooted after they chose not to seek merits review from this Court.

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The opinion of the *en banc* Fifth Circuit (Pet.App.1a–102a) is reported at 63 F.4th 366 (5th Cir. 2023). The vacated Fifth Circuit panel opinion (Pet.App.103a–23a) is reported at 30 F.4th 503 (5th Cir. 2022). The Fifth Circuit's earlier order declining to grant Petitioners' request for a stay pending appeal (Pet.App.124a–37a) is reported at 25 F.4th 354 (5th Cir. 2022). The opinion of the Southern District of Texas granting a preliminary injunction (Pet.App.140a–57a) is reported at 581 F. Supp. 3d 826 (S.D. Tex. 2022).

JURISDICTION

The *en banc* Fifth Circuit's judgment was entered on March 23, 2023, and on June 9, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to July 21, 2023. Petitioners filed the Petition on July 21, 2023. They invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The Petition asks the Court to grant vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), of an *en banc* decision that Petitioners themselves claim to have voluntarily mooted after forgoing the opportunity to seek merits review by this Court. Vacatur under *Munsingwear* is always an

extraordinary request, but in the circumstances here it is untenable.

Petitioners ask this Court to endorse a "heads we win, tails you get vacated" version of *Munsingwear*, where they can litigate to the hilt in both district and circuit court and—only if they lose—then decline to seek substantive review from this Court and instead moot the case and ask this Court to erase the circuit court loss from the books.

The Court should deny the Petition.

STATEMENT OF THE CASE

A. Background and Proceedings Below.

On September 9, 2021, President Biden issued Executive Order 14,043, which stated that "it is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law." 86 Fed. Reg. 50,989 (Sept. 14, 2021). On September 13, 2021, the Safer Federal Workforce Task Force issued a guidance document, recommending a deadline of November 22, 2021, for all federal employees to be fully vaccinated. Task Force, *COVID-19 Workplace Safety: Agency Model Safety Principles* 2 (Sept. 13, 2021), ROA.788.[1]

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[1] Cites to "ROA" are to the electronic Record on Appeal at the Fifth Circuit. *See Feds for Medical Freedom v. Biden*, No. 22-40043 (5th Cir. Feb. 10, 2022), ECF No. 49.

Lead Respondent (plaintiff in the proceedings below) Feds for Medical Freedom has over 6,000 registered members, who are spread across every State and in many foreign countries, and who also work for almost every federal agency. Pet.App.41a. Respondent Local 918 is also a membership group representing certain DHS employees. Pet.App.2a; ROA.74–75. Dozens of individual federal employees are also named as Respondents. Pet.App.2a.

On December 21, 2021, Respondents filed suit in the U.S. District Court for the Southern District of Texas and moved for a preliminary injunction the next day, arguing the vaccine mandate is ultra vires and that Petitioners' implementation of it is arbitrary and capricious under the Administrative Procedure Act. Petitioners repeatedly stated that they "do not challenge any individual employment decision in this suit" and do not seek employment relief. ROA.118; ROA.138.

On January 21, 2022, the District Court enjoined enforcement and implementation of E.O. 14043 because it is ultra vires. Pet.App.140a. The court rejected Petitioners' argument that the Civil Service Reform Act precluded review. Pet.App.143a–45a.

The government appealed to the Fifth Circuit and sought emergency relief, but on February 9, 2022, a divided motions panel of that court ordered the government's stay motion to be carried with the case. Pet.App.124a–37a. A merits panel heard oral argument in March 2022 and issued a divided opinion in April 2022, with the majority holding that

Respondents' claims are precluded by the CSRA. Pet.App.103a. Judge Barksdale dissented and argued that the CSRA does not preclude a pre-enforcement challenge to a government-wide mandate. Pet.App.119a (Barksdale, J., dissenting).

Respondents sought rehearing *en banc*, which the Fifth Circuit granted. Pet.App.158a. The *en banc* court heard arguments in September 2022 and issued its decision on March 23, 2023. Pet.App.1a.

By a vote of 13-4, the court rejected Petitioners' argument that the CSRA precludes jurisdiction here. *See* Pet.App.3a–39a (majority op.); Pet.App.53a (Haynes, J., concurring in the judgment in part and dissenting in part); Pet.App.61a–88a (Higginson, J., concurring in part and dissenting in part). Eleven of those judges held that the vaccine mandate was not a "personnel action" as defined by the CSRA and thus a challenge to the mandate fell within the district court's general 28 U.S.C. § 1331 jurisdiction. Pet.App.11a. Those judges also rejected the government's argument that the possibility of future personnel actions precluded the court from exercising jurisdiction now. Pet.App.18a–21a. The majority further cited a long string of cases from numerous courts of appeals finding jurisdiction in analogous cases. Pet.App.21a–23a.

Even though statutory text, purpose, and structure, as well as precedent, all demonstrated that jurisdiction existed, the majority proceeded to address the "*Thunder Basin* factors" this Court has sometimes invoked when analyzing claims of implied

preclusion. The majority found that those factors "only confirm that the CSRA left intact the district court's jurisdiction over this suit." Pet.App.23a–28a.

By a vote of 11-6, the court also held that the President had exceeded his authority by mandating that millions of civilian employees be subjected to a medical procedure. Pet.App.40a (majority op.); Pet.App.53a (Haynes, J., concurring in the judgment in part and dissenting in part). The government expressly waived any argument that the CSRA is unconstitutional, which precluded the President from arguing he possessed any relevant inherent Article II authority beyond the power granted in the CSRA itself. Pet.App.45a–52a (Ho, J., concurring).

By a vote of 9-8, the court held the district court had not abused its discretion by issuing nationwide relief in the preliminary injunction. Pet.App.40a–41a. The majority noted several unusual factors warranting such relief. For example, the lead plaintiff Feds for Medical Freedom has over 6,000 members spread across every state and nearly every agency, making it extraordinarily difficult to tailor a remedy that would apply to just those individuals without a serious risk of covered employees falling through the cracks. Pet.App.41. In fact, there were "multiple instances" where "the Government wrongfully targeted unvaccinated federal employees who sought exemptions—despite assurances from the Government that it would not do so." *Id.*

Judge Haynes, joined by Judge Willett in relevant part, agreed with the majority's jurisdictional and

merits analysis but would have narrowed the scope of the injunction. Pet.App.53a (Haynes, J., concurring in the judgment in part and dissenting in part).

Concurring in part and dissenting in part, Judges Higginson and Southwick agreed there was jurisdiction and explained at length why "plaintiffs' separation-of-powers claim is the rare type of pre-enforcement challenge that Congress did not intend to preclude in the CSRA." Pet.App.62a–88a. Notably, Judge Higginson had previously voted at the emergency-motion stage to find that the court lacked jurisdiction. Pet.App.127a–28a. In his *en banc* opinion, however, he admirably acknowledged he had changed his mind after further consideration. Pet.App.62a n.2.

B. Petitioners Decline to Seek Merits Review from This Court and Instead Withdraw the Mandate.

After the Fifth Circuit's *en banc* decision issued on March 23, 2023, Petitioners chose not to seek emergency relief from this Court, nor did they promptly file a petition for a writ of certiorari seeking merits review, even though they have repeatedly sought those expedited forms of relief from this Court in recent times. *See* Part III.B, *infra*.

Instead, nearly six weeks later on May 1, 2023, lead Petitioner President Biden announced that he

planned to withdraw the employee vaccine mandate, effective at the end of the day on May 11, 2023.[2]

The employee vaccine mandate was one of, if not the very last of the major COVID-19 related policies to be rescinded by the federal government. In September 2022, "President Biden stated that 'the pandemic is over.'" *Biden v. Nebraska*, 143 S. Ct. 2355, 2364 (2023). And withdrawals of most vestiges of the COVID-19 response were announced in the following months. On October 19, 2022, the government had completely stopped enforcing the contractor vaccine mandate despite successfully narrowing a nationwide injunction against it.[3] On January 10, 2023, the government withdrew the military vaccine mandate.[4] And on January 30, 2023, the White House announced that it planned to end the national emergency over COVID-19,[5] which

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[2] The White House, *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities* (May 1, 2023), https://tinyurl.com/wv6767t4.

[3] Memorandum Regarding the Implementation of Executive Order 14042, Office of Management and Budget (Oct. 19, 2022), https://tinyurl.com/3tvsjezd.

[4] Lloyd J. Austin III, Secretary of Defense, *Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces* (Jan. 10, 2023), https://tinyurl.com/3ehaxck7.

[5] Statement of Administration Policy on H.R. 382 and H.J. Res. 7, Office of Management and Budget, Executive Office of the President (Jan. 30, 2023), https://tinyurl.com/3ms7ekya.

would also end the Title 42 order regarding COVID-19 protocols at the border.[6]

Yet for the employee mandate, Petitioners remained silent, with no announcement of withdrawal. Rather, only after they lost at the *en banc* Fifth Circuit on March 23, 2023, and then declined to seek any form of merits relief from this Court did Petitioners announce on May 1, 2023, that they would withdraw the employee vaccine mandate later that month.

Several months after that announcement, Petitioners filed the Petition asking this Court to vacate the decisions below, arguing the case is moot and that Petitioners are entitled to equitable relief from their own deliberate actions.

ARGUMENT

The Court should deny the Petition. Granting *Munsingwear* relief in these circumstances would be unprecedented and inequitable.

Vacatur should be denied for the simple reason that this case is not moot. The government still has numerous civilian job postings online that require compliance with the employee vaccine mandate, and there are also ongoing negative effects from before

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[6] Cong. Rsch. Srv., LSB10874, *COVID-Related Restrictions on Entry into the United States Under Title 42: Litigation and Legal Considerations* 5 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10874.

the mandate was enjoined. *See* Part I, *infra*. If the Court even has *doubts* about mootness, it should simply deny the Petition, given the extraordinarily high burden required for *Munsingwear* relief.

There also is little chance this Court would have granted review of the Fifth Circuit's opinion, given the lopsided 13-4 vote on the jurisdictional question, the lack of meaningful percolation among the courts of appeals, and Petitioners' self-acknowledgment that COVID-19 is waning. *See* Part II, *infra*.

In any event, Petitioners still do not remotely qualify for the extraordinary relief of *Munsingwear* vacatur.

First, Petitioners themselves claim to have voluntarily mooted this case after they lost below, and that precludes them from receiving *Munsingwear* vacatur under this Court's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). *See* Part III.A, *infra*.

Second, Petitioners had time to seek merits review from this Court of the underlying issues in this case but simply chose not to do so—a choice that the government itself has previously said renders a party undeserving of *Munsingwear* relief. *See* Part III.B, *infra*. The underlying merits are therefore "not unreviewable, but simply unreviewed *by [Petitioners'] own choice*." *Bancorp*, 513 U.S. at 25 (emphasis added).

Third, Petitioners appear to have engaged in precisely the kind of "heads we win, tails you get vacated" stratagem that this Court has held renders a party undeserving of equitable relief. *See* Part III.C, *infra*. Beginning in Fall 2022 and continuing into early 2023, Petitioners dismantled other parts of their COVID-19 response regime yet conspicuously declined to withdraw the mandate for employees. Petitioners were waiting to see whether they would prevail below, and only after receiving a sharp rebuke from the *en banc* Fifth Circuit did they decide to withdraw the employee mandate, forgo seeking further merits review, and instead try to get the Fifth Circuit's precedential decision vacated.

Fourth, there is value in keeping the Fifth Circuit's decision on the books. *See* Part III.D, *infra*. It was issued after extensive deliberation by seventeen circuit judges. And the opinion serves as a critical warning against government overreach during times of emergency. The Court should decline Petitioners' request to send this entire episode down the memory hole.

For all these reasons and those below, the Court should deny the Petition.

I. ANY DOUBTS ABOUT MOOTNESS SHOULD BE RESOLVED IN FAVOR OF DENYING THE PETITION.

Petitioners argue this appeal is moot. Pet.13–16. That is wrong, but in any event the Court should deny the Petition if there are even *doubts* about

whether this case is actually moot, given the high threshold for *Munsingwear* relief.

Petitioners tell this Court that the employee vaccine mandate has been withdrawn, but they neglect to mention that the government still has plenty of federal civilian job postings online that expressly require compliance with E.O. 14043, ranging from maintenance mechanics to financial and IT specialists to consular fellows.[7] These were all posted well after the district court's injunction issued. Because at least some parts of the government are apparently still enforcing the mandate, this case is not moot.

Even setting those aside, there remain ongoing negative effects from the period before the mandate was enjoined, e.g., discipline and warning letters

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[7] *See, e.g., Surface Maintenance Mechanic*, USA JOBS, https://www.usajobs.gov/job/680608900 (last visited Aug. 18, 2023) ("As required by Executive Order 14043, employees are required to be fully vaccinated against COVID-19 regardless of the employee's duty location or work arrangement…."); *IT Specialist*, USA JOBS, https://www.usajobs.gov/job/696881600 (last visited Aug. 18, 2023) (same); *Financial Specialist*, USA JOBS, https://www.usajobs.gov/job/692676800 (last visited Aug. 18, 2023) (same); *Consular Fellow*, USA JOBS, https://www.usajobs.gov/job/681075600 (last visited Aug. 18, 2023) ("Must be certified as compliant with E.O. 14043 on COVID Vaccination."). Undersigned counsel inquired of DOJ about such postings in early April 2023 because the mandate was enjoined, yet never received an explanation.

that remain in employees' files.[8] The Fifth Circuit has recognized that such collateral consequences from a vaccine mandate mean a challenge is not moot even after the mandate has been rescinded. *See Abbott v. Biden*, 70 F.4th 817, 825 (5th Cir. 2023). By contrast, the Fifth Circuit held that the appeal of an injunction against a Navy vaccine mandate was moot where it had been rescinded *and* the Navy had gone "above and beyond" by issuing new policies that affirmatively "require removing past adverse actions." *U.S. Navy SEALs 1–26 v. Biden*, 72 F.4th 666, 669, 673 (5th Cir. 2023). But no such policies have been issued regarding the employee vaccine mandate at issue here. The Navy was further complying with new legislation that directed the Secretary to rescind the mandate, *id.* at 671, which again has not occurred for the employee mandate.

This case also falls within the voluntary cessation doctrine, under which Petitioners have the burden of demonstrating that "it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). But Petitioners cannot make that strong showing because their decision to withdraw the employee mandate was due more to losing below than any sudden or unique change in COVID-19 itself. *See* Part III.C, *infra*. Petitioners claim it is

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[8] *See Feds for Medical Freedom v. Biden*, No. 3:21-cv-356 (S.D. Tex.), ECF Nos. 49, 53, 54. On February 21, 2022, the district court stayed proceedings pending appeal, ECF No. 45, and recently declined to lift the stay, ECF No. 55.

unlikely they will issue new mandates, Pet.16, but that is in serious tension with their demand for *Munsingwear* vacatur, the very purpose of which (as the government itself has previously told this Court) is to clear the path for future relitigation without *res judicata* concerns. *See* Part III.D, *infra*.[9]

Moreover, the government's "record on these issues does not inspire trust. We should be suspicious of officials who try to avoid judicial review by voluntarily mooting a case—especially in the absence of an admission of illegality or credible assurance of future compliance." *U.S. Navy SEALs*, 72 F.4th at 677–78 (Ho, J., dissenting) (cleaned up). The last time the government represented to this Court that it was ending a pandemic-era policy in clear excess of its statutory authority, it reimposed it anyway. *See, e.g.*, Josh Boak et al., *CDC Issues New Eviction Ban for Most of US Through Oct. 3*, Associated Press (Aug. 4, 2021), https://tinyurl.com/yc53kwxp.[10]

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[9] Petitioners' invocation of mootness in *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023), is off base because in that case Congress itself ordered the end of the relevant underlying matter, meaning there was no concern that the executive branch may reimpose the same policy in the future.

[10] Petitioners claim they are unlikely to reimpose a mandate because so many employees were already forced to be vaccinated, Pet.16, but that is irrelevant because "vaccinations … may not last forever or even for the entire term of employment," Pet.App.72a (Higginson, J., concurring in part and dissenting in part).

Mootness is a precondition for *Munsingwear*, and given the extraordinarily high burden to obtain such relief, *see Bancorp*, 513 U.S. at 26, the Court should grant it only when it is clearly the proper outcome. Because there are at least doubts about mootness here, the Court should simply deny the Petition.

II. THE COURT WAS UNLIKELY TO GRANT REVIEW OR REVERSE.

Petitioners next claim that, absent mootness, this Court likely would have granted their petition for a writ of certiorari challenging the underlying merits of the Fifth Circuit's decision and also would have reversed. Pet.17–25. Petitioners are wrong on both counts, which provides another basis for denying *Munsingwear* vacatur. Pet.16–17.

First, under Petitioners' view that COVID-19 is essentially over, *see* Pet.15–16, this case would have presented an especially weak candidate for certiorari. They do not explain why this Court would venture into resolving complex questions about CSRA preclusion or the President's power to mandate vaccines for millions of civilian employees when (in Petitioners' telling) those matters are unlikely to arise again down the road.

Even if the CSRA portion of the decision below were framed more broadly, this Court would still likely have awaited further percolation among the lower courts before granting review. The Fourth Circuit's opinion on the CSRA issue is nonprecedential, issued without even the benefit of

oral argument. *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249 (4th Cir. Apr. 19, 2022). And the D.C. Circuit's opinion was issued just two days before the Fifth Circuit's *en banc* decision, meaning neither court had a meaningful chance to engage with the other. *Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023).

Percolation is especially important here because it changes minds. Judge Higginson originally voted as part of a motions panel below to dismiss this case for lack of jurisdiction under the CSRA, but after *en banc* briefing and argument, he became so convinced of jurisdiction over Petitioners' ultra vires claim that he not only reversed his prior position but contributed an *additional* basis for finding jurisdiction apart from those listed in the majority opinion. Pet.App.80a–88a (Higginson, J., concurring in part and dissenting in part).

Second, the *en banc* Fifth Circuit's decision on the CSRA jurisdictional issue is correct. That makes it unlikely the Court would have granted review, and even more unlikely it would have reversed. The *en banc* vote in favor of jurisdiction was an overwhelming 13-4. In fact, there were so many bases for finding jurisdiction that the judges couldn't settle on just one. *Compare* Pet.App.3a–39a (majority op.), *with* Pet.App.80a–88a (Higginson, J., concurring in part and dissenting in part).

Petitioners' tiresome complaints about the CSRA ruling should be taken with a rather sizable grain of salt, considering the source. They lost their last two implied preclusion cases at this Court by a vote of

9-0. *See Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 900 (2023) (consolidated opinion). And it is difficult to believe Petitioners would have fared better this time around. *Axon* unanimously affirmed the Fifth Circuit's *en banc* decision in *Cochran v. SEC*, 20 F.4th 194, 236 (5th Cir. 2021), where the vote in favor of jurisdiction had been 9-7 among the Fifth Circuit judges, but here it was 13-4.

Petitioners claim the decision below conflicts with this Court's decision in *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). Pet.20–21. But *Elgin* addressed only employees who had received statutorily defined adverse actions, which do not exist here. Pet.App.8a, 23a. The Solicitor General's own merits brief in *Elgin* acknowledged there could be "an employment-related action that would not be judicially reviewable under the CSRA and yet would rise to the level of constitutional significance" warranting immediate judicial review. Resp.Br.17–18, *Elgin*, No. 11-45 (Jan. 17, 2012). That describes this case. The Solicitor General was right then—and wrong now.

Notably, Petitioners have never disputed that, under their newfound view of the CSRA, no employee could bring an immediate challenge in district court if the President, for example, issued an executive order instituting for every civilian employee a one-child-only policy, mandated that all employees vote for his reelection, or required them to forfeit all

personal firearms.[11] The Fifth Circuit's construction of the CSRA avoids that procedural absurdity. Moreover, thirteen judges had no trouble rejecting the possibility, advanced by Petitioners, that the All Writs Act could fill the void. Pet.App.25a; Pet.App.81a–82a (Higginson, J., concurring in part and dissenting in part). Petitioners' ready embrace of the All Writs Act was itself an admission that the CSRA does not preclude all judicial review. Given all this, there is little reason to think this Court would have disagreed with the Fifth Circuit at all, let alone strongly enough to grant review and reverse.

Petitioners also invoke then-Judge Roberts's statement that "what you get under the CSRA is what you get," as evidence of the supposedly broad preclusive effect of the CSRA. *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005); Pet.21. Petitioners neglect to mention that the "CSRA" in that case was not the Civil Service Reform Act at issue here but instead the Civil Service *Retirement* Act, which deals with the entirely different subject of "payment of annuities to retired federal employees and their surviving spouses." 416 F.3d at 64.

Rather than cite a case about a different CSRA, Respondents would point the Court to the D.C. Circuit opinions written or joined by Ruth Bader Ginsburg, Antonin Scalia, Robert Bork, and Harry Edwards, who uniformly labeled Petitioners' broad

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[11] *See, e.g.*, Pet. for Reh'g En Banc 3, *Feds for Medical Freedom v. Biden*, No. 22-40043 (5th Cir. May 21, 2022), ECF No. 141.

interpretation of Civil Service Reform Act preclusion as "meritless," "discredited," and "completely baseless." *NFFE v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984).

Third, there is no circuit split at all on the merits question of the President's authority to issue the employee vaccine mandate. Pet.App.42a (noting lack of a split). The decision below is the only circuit opinion to address that point, which it did squarely but briefly. There is no reason to believe this Court would have granted review of that complex legal issue with no split, in an interlocutory posture, and with only a short discussion of the matter in the circuit court decision below.

Denial of certiorari on that issue was even more likely given Petitioners' express and repeated waiver of any argument that the CSRA itself unconstitutionally restricts the President. Pet.App.45a–52a (Ho, J., concurring). Petitioners therefore would have had to base their arguments exclusively within the CSRA framework, and the district court's order explained at length why the employee vaccine mandate falls outside that framework. Pet.App.149a–52a. In short, when Congress wants to mandate vaccines, even in areas where the President enjoys significant Article II authority, it knows how to do so, *see, e.g.*, 8 U.S.C. § 1182(a)(1)(A)(ii) (mandating vaccines in immigration context), but the CSRA omits any reference to vaccines or similar medical procedures.

Fourth, Petitioners complain that the Fifth Circuit found no abuse of discretion in the nationwide injunction issued here. Pet.25. This case would have made an exceptionally poor vehicle for this Court to consider the vitality of such injunctions. The lead Respondent is comprised of over 6,000 members spread across every state and almost every agency, ensuring that any limited injunction would inevitably result in protected employees falling through the cracks, meaning only a broad injunction would protect them. Pet.App.41a. Petitioners themselves proved the point by repeatedly and "wrongfully target[ing] unvaccinated federal employees [who are members of the lead Respondent] … despite assurances from the Government that it would not do so." *Id.* Even now, Petitioners claim E.O. 14043 has been revoked, yet continue to require it in certain job listings. *See* Part I, *supra*.

Moreover, the government itself publicly insisted that it wanted "'consistency across government in enforcement of this government-wide vaccine policy.'" Pet.App.41a (quoting Petitioners' Task Force). Petitioners got exactly what they asked for. That is an excellent reason to deny review, not grant it.

III. THE EQUITIES STRONGLY FAVOR DENYING *MUNSINGWEAR* VACATUR.

Even assuming the case is moot and that the Court would have granted review of the underlying merits issues, the Court should still deny the

Petition. Granting *Munsingwear* relief here would be unprecedented.

A. PETITIONERS VOLUNTARILY MOOTED THEIR OWN APPEAL.

Petitioners claim it is "ordinary practice" for this Court to grant *Munsingwear* when a case becomes moot on appeal, Pet.12, but *Bancorp* rejected that framing and made clear that automatic vacatur is far from the "ordinary" course. 513 U.S. at 23–24; *see Mahoney v. Babbitt*, 113 F.3d 219, 221 (D.C. Cir. 1997) ("[T]he vacatur question is now controlled, not by the language from *Munsingwear*, but by *U.S. Bancorp*, which has displaced *Munsingwear* as the Supreme Court's latest word on vacatur.").

Bancorp held that from "the beginning we have disposed of moot cases in the manner 'most consonant to justice' … in view of the nature and character of the conditions which have caused the case to become moot." 513 U.S. at 23–24 (citations omitted). Vacatur would be granted only in "extraordinary" cases. *Id.* at 26.

Bancorp accordingly explained that *Munsingwear* vacatur is appropriate when appellate review is "prevented through happenstance—that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties," or when review was prevented by "the unilateral action of the party who prevailed in the lower court." *Bancorp*, 513 U.S. at 23 (cleaned up).

By contrast, vacatur is not appropriate when "the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. As Justice Jackson has explained, this Court has "long recognized that the equities generally do not favor *Munsingwear* vacatur when the party requesting such relief played a role in rendering the case moot." *Chapman v. Doe by Rothert*, 143 S. Ct. 857, 857 (2023) (Jackson, J., dissenting).

Petitioners lost below, and it is undisputed that any mootness in this case was caused by their voluntary choice to rescind the challenged employee vaccine mandate. Petitioners expressly concede as much. Pet.26 ("The case became moot because the President revoked EO 14,043[.]"). This fits squarely within *Bancorp*'s holding that "the party seeking relief from the judgment below caused the mootness by voluntary action," and therefore *Munsingwear* is unavailable. *Bancorp*, 513 U.S. at 24. And just to be sure, Petitioners nowhere claim that the decision to withdraw the mandate was *not* "voluntary"—e.g., that the President was coerced or confused when he did so, or even that he was required by act of Congress to withdraw the mandate.

To deny relief here, it is not necessary to show that Petitioners were solely responsible for bringing about mootness (although they obviously were). In *Bancorp* itself, the respondent and petitioner were equally responsible for the mootness because the parties had settled the case, but the Court still refused to grant vacatur. 513 U.S. at 26 (even "equivalent responsibility for the mootness" is

insufficient to justify vacatur). Or, as Justice Jackson has explained, *Munsingwear* is unavailable to a party that "*played a role* in rendering the case moot." *Chapman*, 143 S. Ct. at 857 (Jackson, J., dissenting) (emphasis added). Petitioners undoubtedly "played a role" in rendering moot a case they lost below, and that renders them ineligible for *Munsingwear* relief.

The Court should follow its usual course in cases where the party seeking vacatur had lost below and then even arguably brought about mootness—and deny vacatur.[12]

Given the unprecedented nature of their request, it is unsurprising that Petitioners cite only a handful of cases, and they are all easily distinguishable. Pet.12, 28. In both *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021), and *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021), this Court issued summary orders granting *Munsingwear* relief after a change in presidential administrations had resulted in mootness of the underlying policy. The government argued that the change in presidencies—the result of a nationwide election by the people—was precisely what made those cases unique. *See* Pet.31, *Yellen*, No. 20-1738 (June 11, 2021) ("[M]ootness here is, at bottom, the result of a change in Administration following an election."); Pets. Suggestion of Mootness, *Mayorkas*, No. 19-1212

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[12] *See, e.g.*, *Arizona v. Mecinas*, 143 S. Ct. 525 (2022); *Berninger v. FCC*, 139 S. Ct. 453 (2018); *AT&T Inc. v. FCC*, 139 S. Ct. 454 (2018).

(June 1, 2021). Moreover, the change in administrations meant that the parties seeking vacatur arguably were *not* the same ones who had issued the original policy, lost at the court of appeals, or sought this Court's review in the first instance.

But here, there has been no intervening presidential election or even an act of Congress, meaning the same Petitioners (1) issued the challenged policy, (2) lost at the district court, (3) lost at the Fifth Circuit, (3) voluntarily mooted the case, (4) chose not to appeal to this Court while the policy was in place, and (5) now ask this Court to bail them out with vacatur. Petitioners simply want relief from their own actions, deliberately taken at every step in this case, over Respondents' opposition. The *Munsingwear* inquiry is an equitable one, and there is a drastic difference in equities between this case and the circumstances presented by *Yellen* and *Mayorkas*.

Petitioners themselves seem to acknowledge that this Court's brief order in *Trump v. International Refugee Assistance Project*, 138 S. Ct. 353 (2017), is not on-point, *see* Pet.28 (using a "*Cf.*" signal), because it involved a challenge to a policy that had expired by its own terms. That meant it was not voluntarily mooted at all, let alone *after* the government had lost at the circuit court, as occurred here. There was also already subsequent litigation on the new program, *see Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017), which is a factor favoring vacatur, *see* Part III.D, *infra*.

Moreover, in both *Mayorkas* and *Trump*, the government had sought certiorari on the merits and obtained a grant *before* the case became moot, meaning the government had not squandered its opportunity for merits review before later seeking vacatur. But Petitioners here consciously declined to seek merits review at all and instead opted to try to eliminate the precedential value of the decision below, as discussed next.[13]

B. PETITIONERS HAD NUMEROUS ROUTES AVAILABLE FOR MERITS REVIEW BUT CHOSE NOT TO PURSUE ANY OF THEM.

Petitioners argue that it would have been inequitable to maintain the employee vaccine mandate just to ensure they could seek this Court's review of the underlying issues. Pet.26. This

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[13] Petitioners also invoke *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018), and *Alvarez v. Smith*, 558 U.S. 87, 89 (2009); *see* Pet.27, but those cases are even further afield. Both involved petitioners that had not slept on their ability to seek merits review from this Court, as Petitioners chose to do here. Further, in *Microsoft*, an intervening act of Congress had changed the applicable legal regime, meaning the party that had lost below did not moot the case at all, and there was already relitigation between the parties under the new statutory regime. *See* 138 S. Ct. at 1187–88; Part III.D, *infra*. And in *Alvarez*, which addressed state-court procedures for returning seized property, the dispute became moot when the underlying property was returned as part of the "ordinary course of [the] state proceedings," 558 U.S. at 96, meaning the petitioner had not voluntarily mooted the case in any typical sense, but the posture was instead like *Trump*.

argument borders on the absurd. Because the mandate has been enjoined nationwide for over eighteen months, there would have been no burden or inequity whatsoever in "maintaining" that mandate on paper while Petitioners sought merits review from this Court. If anything, that route would have taken less effort than Petitioners' current strategy of trying to moot this case and then seeking vacatur.

Bancorp made clear that *Munsingwear* vacatur is available only when the "'orderly procedure'" of seeking Supreme Court review "cannot be honored." *Bancorp*, 513 U.S. at 27. In other words, only when the party seeking vacatur had no other mechanism for relief from an adverse decision below.

But Petitioners chose not to pursue any of the numerous options they had at their disposal under the "orderly procedure" for seeking relief from this Court. Even setting aside the possibility of "maintaining" the enjoined mandate while seeking review, Petitioners could have filed a petition for a writ of certiorari promptly after the Fifth Circuit issued its *en banc* decision, which was more than five weeks before the President announced he would withdraw the mandate and even longer before he actually withdrew it.

But Petitioners chose not to promptly seek certiorari on the merits, even though they have certainly been willing to do so in numerous other

recent cases.[14] In fact, Petitioners intentionally dawdled, using a 30-day extension on top of the 90-day statutory timeline.

After the *en banc* decision issued, Petitioners also had more than ample time to seek emergency relief from this Court. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23. They have not been shy about seeking such relief within days of lower court rulings, including repeatedly in the context of federal vaccine mandates.[15] But Petitioners chose not to pursue that path for merits relief, either. In fact, Petitioners could have sought relief, emergency or otherwise, from this Court at any time after the Fifth Circuit declined to grant such relief on February 9, 2022, Pet.App.124a, putting Petitioners' delay at seventeen months by that measure.

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[14] *See, e.g., United States v. Rahimi*, No. 22-915 (DOJ filing a petition for a writ of certiorari just 15 days after Fifth Circuit decision); *CFPB v. Community Fin. Servs. Ass'n of Am.*, No. 22-448 (26 days after Fifth Circuit decision).

[15] *See Biden v. Missouri*, No. 22A240 (DOJ seeking a stay just three days after Eighth Circuit decision on CMS vaccine mandate); *Austin v. U.S. Navy Seals 1–26*, No. 21A477 (seven days after Fifth Circuit decision on military vaccine mandate); *see also, e.g.*, *Garland v. Vanderstok*, No. 23A82 (three days after Fifth Circuit decision about "ghost gun" regulation); *Dep't of Education v. Brown*, No. 22A489 (two days after Fifth Circuit decision on loan forgiveness); *United States v. Texas*, No. 22A17 (two days after Fifth Circuit decision on immigration); *United States v. Texas*, No. 21A85 (four days after Fifth Circuit decision on abortion).

"[E]stablished procedure provides for application to the Supreme Court for a stay of our emergency order. They could have addressed the Circuit Justice for such a stay. They chose not to do so. Thus, 'this controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party declined to pursue its appeal.'" *Mahoney*, 113 F.3d at 222 (cleaned up). In such a case, "the *Munsingwear* procedure is inapplicable." *Karcher v. May*, 484 U.S. 72, 83 (1987).

To be sure, Petitioners were not required to seek merits relief from this Court, but having chosen not to do so, they forfeited any equitable claim to vacatur. As *Bancorp* put it, the decision below was "not unreviewable, but simply unreviewed *by [Petitioners'] own choice*." *Bancorp*, 513 U.S. at 25 (emphasis added). "The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation." *Munsingwear*, 340 U.S. at 41 (denying vacatur).

In prior cases, the government has opposed *Munsingwear* on this very same basis: "Had petitioner acted with greater dispatch, it might have had an opportunity to seek this Court's review of an adverse decision before this case became moot." Br. for Resp'ts in Opp. 19, *Electronic Privacy Info. Ctr. v. Dep't of Commerce*, No. 19-777 (Mar. 19, 2020). The government should be held to its own standard.

Moreover, given that prior position, Petitioners were surely aware of the consequences of not seeking merits review from this Court during the lengthy period available to do so.

Because Petitioners "did not avail [themselves] of the remedy [they] had to preserve [their] rights," *Munsingwear*, 340 U.S. at 40, they have no equitable claim to the "extraordinary remedy of vacatur," U.S. *Bancorp*, 513 U.S. at 26.

C. PETITIONERS CHOSE TO WAIT AND SEE WHETHER THEY WOULD PREVAIL AT THE FIFTH CIRCUIT.

Petitioners seem to argue that this case is entitled to unprecedented treatment because the President allegedly withdrew the mandate because of changes in the pandemic. This is both legally irrelevant and factually misleading, to say the least.

It is irrelevant because under *Bancorp*, the question is whether Petitioners "caused the mootness [of their own loss] by voluntary action," *Bancorp*, 513 U.S. at 24, which they admittedly did, *see* Part III.A, *supra*. It doesn't matter *why* they chose to take that voluntary action.[16]

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[16] Petitioners vaguely suggest this case is different than typical *Munsingwear* cases because the President "exercise[d] … authority and discretion vested in [him] by the Constitution and statutes," Pet.27, but (1) that is no distinction at all because the President always claims to be acting pursuant to

And Petitioners' argument about the reasons for withdrawing the mandate is unsupported by the facts, as explained next.

1. Petitioners Litigated Vigorously Below and Abandoned the Mandate Only After Losing.

The timeline reveals that Petitioners waited to see whether they would prevail at the Fifth Circuit and only then decided whether to withdraw the mandate. This presented an enticing "heads we win, tails you get vacated" proposition for Petitioners. And by sidestepping merits review by this Court, Petitioners would not even risk a Supreme Court decision affirming the judgment below. Petitioners were entitled to wait to see how the Fifth Circuit ruled, but they cannot now invoke this Court's equitable power to relieve them of that unfavorable decision after the fact.

The employee vaccine mandate was the last of the major COVID-19 related policies to be rescinded by the federal government. In September 2022, "President Biden stated that 'the pandemic is over.'" *Biden*, 143 S. Ct. at 2364. In October 2022, the

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constitutional or statutory authority (he has no other source of power, after all); (2) the Fifth Circuit and district court held the President had *exceeded* any constitutional and statutory powers; and (3) Petitioners chose not to present that issue for this Court's review.

government had stopped enforcing the contractor vaccine mandate despite successfully narrowing a nationwide injunction against it.[17] On January 10, 2023, the government withdrew the military vaccine mandate.[18] And on January 30, 2023, the White House announced that it planned to end the COVID-19 national emergency,[19] which would also end the Title 42 order regarding COVID-19 protocols at the border.[20]

But throughout that period, the government said nothing about the prospect of lifting the employee vaccine mandate. In fact, Petitioners did not address the employee mandate until May 1, 2023, when—after losing the decision below—the White House finally announced it would end the employee and contractor mandates later that month.[21]

The obvious explanation is that Petitioners wanted to see whether they would prevail in the case below, which had been argued in September 2022.

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[17] Memorandum Regarding the Implementation of Executive Order 14042, *supra* note 3.

[18] Lloyd J. Austin III, *Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements*, *supra* note 4.

[19] Statement of Administration Policy on H.R. 382 and H.J. Res. 7, *supra* note 5.

[20] Cong. Rsch. Srv., *COVID-Related Restrictions on Entry into the United States Under Title 42, supra* note 6, at 5.

[21] The White House, *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements*, *supra* note 2.

Indeed, long after the government had withdrawn the military vaccine mandate and had announced the COVID-19 national emergency would be ending, and as late as two days before the *en banc* Fifth Circuit ruled on March 23, 2023, Petitioners were still furiously filing Rule 28(j) supplemental authority letters with that Court, urging it to rule in Petitioners' favor on the CSRA issue at the heart of the case.[22]

Petitioners weren't arguing that the case was moot because of changes in COVID-19, or that it might soon become moot, or even that the government was considering withdrawing the employee mandate. Far from it. Petitioners were insisting, until the very last moment before they lost, that they should prevail on the merits. It was only after they lost that they changed their tune—and their litigation strategy.

After the *en banc* Fifth Circuit affirmed the nationwide injunction, Petitioners had the option to seek relief from this Court, *see* Part III.B, *supra*, which might affirm the decision below or deny review altogether and thereby leave the Fifth Circuit's decision as precedent. But *Munsingwear* presented what seemed like a win-win alternative: withdraw the mandate, which had been enjoined for over a year anyway and was among the last COVID-19 related policies left on the books, and then ask this

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[22] *Feds for Medical Freedom*, No. 22-40043 (5th Cir.), ECF Nos. 298 (Mar. 20, 2023), 300 (Mar. 21, 2023).

Court to erase the Fifth Circuit's decision. As explained above, withdrawing the mandate had never been floated before the Fifth Circuit ruled, but afterwards it became the obvious route.

Munsingwear thus provided an opportunity for Petitioners to be freed from a decision for which they have reserved a unique level of enmity.[23] But as Justice Jackson has explained, "mere disagreement with the decision that one seeks to have vacated cannot suffice to warrant equitable relief under *Munsingwear*." *Chapman*, 143 S. Ct. at 858 (Jackson, J., dissenting).

This is precisely why *Bancorp* warned that freely granting vacatur would encourage litigants "to roll the dice" by litigating vigorously in the courts below and then seeking vacatur "if, but only if, an unfavorable outcome" resulted. *Bancorp*, 513 U.S. at 28. Justice Jackson has likewise warned that "*Munsingwear* vacatur can also incentivize gamesmanship" where a party, "if unsuccessful on the merits" below will instead "argue mootness on appeal to eliminate the adverse decision through vacatur." *Chapman*, 143 S. Ct. at 858 (Jackson, J., dissenting). That gamesmanship is all the more apparent when, as here, the parties seeking *Munsingwear* played a direct and voluntary role in

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[23] *See* Pet.16–28 (devoting three times more space to criticizing the decision below than to explaining why *Munsingwear* is equitable here).

bringing about that supposed mootness and also declined to seek merits review from this Court.

Petitioners were entitled to wait and see whether they would prevail in the case below, and they were also entitled to withdraw the mandate. But having taken those steps, Petitioners cannot now invoke this Court's equity to relieve them of the natural consequences of their own decisions and the precedential effect of the decision below.

2. No Sudden or Significant Change in COVID-19 Prompted Withdrawal of the Mandate.

Petitioners' theory that President Biden withdrew the vaccine mandate because of changes in COVID-19 in May 2023 is also undercut by the science. Petitioners maintained the mandate long after COVID-19 fatality figures had dropped dramatically and stayed low, while the rest of the country had long since moved away from such draconian measures. There was nothing magical about the May 2023 rescission date, except that it occurred after the *en banc* Fifth Circuit handed Petitioners a stinging loss.

When the vaccine mandate was first imposed in September 2021, weekly death totals were just shy of 15,500 and had reached over 25,000 per week earlier

in the pandemic.[24] But by April 2022 those totals had dropped by almost 95%, and they have remained far below the prior peaks ever since.[25] At no point during that lengthy stretch—until they lost at the Fifth Circuit, that is—did Petitioners even suggest it might be time to withdraw the mandate. If Petitioners were following the science, they would have rescinded the mandate well before May 2023.

To be sure, COVID-19 casualties have generally dropped over time, but there is no direct connection between those figures and when COVID-19 emergency measures have been rescinded. For example, COVID-19 figures were *higher* when the White House announced the end of the COVID-19 national emergency (in February 2023) than when "President Biden stated that 'the pandemic is over'" (in September 2022), *Biden*, 143 S. Ct. at 2364. And the week when the military vaccine mandate was withdrawn in January 2023 shows the *highest* COVID-19 death totals in nearly a year.[26]

* * *

Petitioners' invocation of *Munsingwear* is not based on any consistent principle regarding COVID-

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[24] *COVID Data Tracker: Daily and Total Trends*, Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00 (last visited Aug. 18, 2023).

[25] *Id.*

[26] *Id.* (week of January 7, 2023).

19. If it were, they would have sought vacatur of the various decisions ruling President Biden's *contractor* vaccine mandate was illegal. *See, e.g., Biden v. Kentucky*, No. 22A859 (extending to June 9, 2023, the deadline to file a petition for a writ of certiorari). Instead, they are strategically using *Munsingwear* solely to rid themselves of the precedential value of an *en banc* decision with which they strongly disagree and as an alternative to avoid another stinging rebuke from this Court.

The government has previously argued that where a "petitioner abandoned its effort to obtain further relief and fully committed to the strategy of solely seeking to eliminate the court of appeals' decision as precedent," such "tactics counsel against rewarding petitioner with an equitable windfall" under *Munsingwear*. Br. for Resp'ts in Opp. 17–18, *Electronic Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 18-267 (Nov. 30, 2018). The Court denied vacatur in that case. *See* 139 S. Ct. 791 (2019). The Court should hold the government to its own standard and deny relief here, too.[27]

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[27] If this case is moot, the Court *should* consider granting vacatur in *Payne v. Biden*, No. 22-1225, because the petitioner there lost his challenge to the employee mandate at the D.C. Circuit but was prevented from seeking review from this Court because of Petitioners' intervening decision to withdraw the employee mandate. Payne is therefore a more typical recipient of *Munsingwear* relief. Petitioners here are the furthest from it.

D. THE FIFTH CIRCUIT'S DECISION IS VALUABLE AND PRESENTS NO *RES JUDICATA* CONCERNS.

Another factor favoring rejecting of *Munsingwear* is the Court's recognition that judicial precedents "are not merely the property of private litigants," but also belong to the public and "legal community as a whole." *Bancorp*, 513 U.S. at 21, 26–27. The Fifth Circuit's *en banc* decision addresses an important issue of jurisdiction and implied preclusion of certain claims under the CSRA, reached after extensive briefing and full argument involving seventeen circuit judges. This was no mere advisory opinion. "So long as the court believed that it was deciding a live controversy, its opinion was forged and tested in the same crucible as all opinions." *Mahoney*, 113 F.3d at 222 (internal quotation marks omitted).

If nothing else, it is especially important that the Fifth Circuit's decision remain on the books as a warning to the future. "Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale," including the mandate at issue here. *Mayorkas*, 143 S. Ct. at 1314 (statement of Gorsuch, J.). The judiciary stood as the one restraint on the political branches' relentless march during that period. *See id.* at 1316.

Given this, the Fifth Circuit's *en banc* decision should not so readily be sent down the memory hole,

least of all at the request of the parties whose illegal actions prompted that decision in the first place.

The Court has recognized vacatur may be of value for "clear[ing] the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40. This is particularly true where there has been a change in the legal framework that favors relitigation free from *res judicata* concerns. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990).

In fact, the government has previously gone so far as to say that clearing a path for relitigation between the parties is "[t]he purpose of the vacatur remedy." Br. for Fed. Resp't 25, *Comcast Corp. v. Int'l Trade Comm'n*, No. 19-1173 (May 26, 2020). The government has also previously told this Court it should deny *Munsingwear* relief where the challenged policy or entity "no longer exists and it is purely speculative whether it (or anything like it) will ever exist again," Br. for Resp'ts in Opp. 17, *Electronic Privacy Info. Ctr.*, No. 18-267 (Nov. 30, 2018), and the Court indeed denied vacatur in that case, *see* 139 S. Ct. 791 (2019).

By Petitioners' assertions here, there will be no future relitigation between the parties, and thus no need for *Munsingwear*. Petitioners insist the mandate is exceedingly unlikely to be reissued, Pet.16, and thus these matters will not be "relitigat[ed] … between the parties," *Munsingwear*, 340 U.S. at 40. Although Respondents have their

doubts, Petitioners cannot now disclaim this statement in the hopes of wiping the Fifth Circuit's opinion from the books.

Further reinforcing this conclusion is the fact that the Fifth Circuit's decision addresses only an interlocutory preliminary injunction. Pet.App.43a.[28] "In the case of interlocutory appeals ... 'the usual practice is just to dismiss the appeal as moot and *not vacate the order appealed from*.'" *In re Tax Refund Litig.*, 915 F.2d 58, 59 (2d Cir. 1990) (emphasis added). That represents the standard rule among the courts of appeals when facing preliminary injunctions that have allegedly become moot. *See, e.g., id.*; *U.S. Navy SEALs*, 72 F.4th at 675 n.9; *Ramsek v. Beshear*, 989 F.3d 494, 501 (6th Cir. 2021); *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020); *Fleming v. Gutierrez*, 785 F.3d 442, 449 (10th Cir. 2015) (Tymkovich, Gorsuch, Holmes, JJ.); *McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 524 n.6 (1st Cir. 1993).

The explanation is that the primary "consideration for invocation of the *Munsingwear* doctrine is the *res judicata* effect of the order in question," but such concerns are minimized in the context of preliminary rulings, which typically have little-to-no "res judicata significance." *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977);

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[28] Indeed, Petitioners repeatedly argue the mootness only of the injunction appeal specifically. Pet.12, 13.

see Hassoun v. Searls, 976 F.3d 121, 134 (2d Cir. 2020) (Menashi, J.).

Thus, "*Munsingwear* orders vacating the underlying order should not typically issue with respect to preliminary injunctions that become moot on appeal." *Orion Sales, Inc. v. Emerson Radio Corp.*, 148 F.3d 840, 843 (7th Cir. 1998). Petitioners cite *Mayorkas*, where this Court granted *Munsingwear* for a preliminary ruling, but as discussed above that case is easily distinguishable because mootness occurred only after a switch in administrations where the government had not squandered its opportunity for merits review, *see Mayorkas*, 141 S. Ct. 2842, neither of which is true here, *see* Parts III.A–B, *supra*. The Court has otherwise denied *Munsingwear* relief where the challenged decision was not a final judgment. *See, e.g., Mecinas*, 143 S. Ct. 525.

The limited *res judicata* effect of the Fifth Circuit's ruling accordingly provides yet another basis for denying *Munsingwear* relief.

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The Court should deny the Petition. It would set a dangerous precedent to provide such a windfall to parties who litigated the case to the hilt in the lower courts in hopes of winning and then—only upon receiving an unfavorable decision—declined to seek merits review from this Court despite having time to do so and instead took steps to moot the case and ask this Court to erase that deliberately unreviewed loss

from the books. The Court should not "permit[] [its] docket to be manipulated in [this] way." *N.Y. State Rifle*, 140 S. Ct. at 1527 (Alito, J., dissenting).[29]

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[29] If the Court is considering the unprecedented step of granting vacatur in these circumstances, Respondents request that the Court set the case for merits briefing and argument. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 511 U.S. 1002 (1994) (setting *Munsingwear* issue for merits briefing and oral argument).

CONCLUSION

The petition for a writ of certiorari should be denied.

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