No. 24-6203

IN THE SUPREME COURT OF THE UNITED STATES

JESUS PEREZ-GARCIA, JOHN FENCL,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO A WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit issued the sweeping Second Amendment opinion below after this case mooted, but before *United States v. Rahimi*, 602 U.S. 680 (2024), clarified the proper mode of analysis. The panel's opinion recognized legislatures' "power to disarm those who are not law-abiding, responsible citizens," as well as those accused of "serious" crimes, "deemed dangerous or unwilling to follow the law," or "unlikely to respect the sovereign's authority." Pet. App. A28-A47. The government concedes that *Rahimi* squarely rejected any "responsib[ility]"-based tradition as too "vague." 602 U.S. at 701. That criticism applies equally to the other traditions the Ninth Circuit identified. Yet the government barely defends the opinion's merits, pointing only to conclusory assertions in the panel's post-*Rahimi* concurrence in denial of rehearing. Instead, to avoid review, the government invokes standing to appeal, fugitive disentitlement, and standards governing remand for merits reconsideration. None of those doctrines affect this Court's discretion to grant certiorari.

First, standing to appeal is not required. This Court has "refute[d]" the notion that vacatur authority disappears when "the requirements of Article III no longer are (or indeed never were) met." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994). Accordingly, "that the relevant claim here became moot before certiorari does not limit this Court's discretion" to vacate. *Azar v. Garza*, 584 U.S. 726, 729 (2018). Likewise, "[e]ven if [this Court] were to rule definitively that [the petitioners] lack[ed] standing," this Court could still review "the authority of the lower courts to proceed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73

(1997). Second, fugitive disentitlement "does not strip [a] case of its character as an adjudicable case or controversy." *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970). Applying this discretionary doctrine here makes little sense because its animating principles are inapplicable. Third, this now-moot case cannot receive merits reconsideration, so standards governing such remands are irrelevant. This Court should reject these arguments and grant this petition.

REASONS FOR GRANTING THE PETITION

I. The government's threshold objections lack merit.

The government's standing and fugitive disentitlement objections do not withstand scrutiny. Opp. 6-7.

A. Standing to appeal is not required, either for equitable vacatur or to challenge lower courts' jurisdiction.

As an initial matter, this Court can grant equitable vacatur and review lower courts' jurisdiction, even when petitioners lack standing.

Begin with equitable vacatur. True, this case became moot, and petitioners lost their stake in the outcome, before filing the petition. But "that the relevant claim here became moot before certiorari does not limit this Court's discretion" to equitably vacate. *Azar*, 584 U.S. at 729. This Court regularly orders equitable vacatur, even when the case becomes nonjusticiable before certiorari is sought or granted. *Id.* at 730–31 (collecting cases, including *Eisai Co. v. Teva Pharmaceuticals USA, Inc.*, 564 U.S. 1001 (2011)).

That is because vacatur does not require a justiciable Article III controversy. *Bancorp*, 513 U.S. at 21. Indeed, *Munsingwear* exists to vacate opinions in cases

that become moot—and therefore, nonjusticiable—on appeal. *See id*. at 22 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). That poses no constitutional problem. Courts may not "decide the merits of a legal question not posed in an Article III case or controversy." *Id*. at 21. But they still "may make such disposition of the whole case as justice may require," including by vacating prior decisions. *Id*. (cleaned up). That power exists when "the requirements of Article III no longer are" satisfied, but also when they "never were met" to begin with. *Id*. (punctuation altered). It continues whether the case becomes nonjusticiable "pending [this Court's] decision on the merits," or "moot[s] while on its way here." *Id*. at 22 (cleaned up).

By claiming that standing, rather than mootness, precludes this result, the government merely repackages the argument rejected in *Bancorp*. With exceptions not relevant here, mootness is just "standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (cleaned up). If mootness does not affect vacatur authority, standing cannot either.

Accordingly, petitioners seeking vacatur need not show that the opinion itself will cause future injury. *Contra* Opp. 6. The respondent in *Eisai*, for instance, opposed certiorari solely on standing grounds. Opposition to Petition for Writ of Certiorari, *Eisai*, 564 U.S. 1001 (No. 10-1070). Rather than claim concrete future harm, the petitioner argued almost exclusively that standing was unnecessary for

Munsingwear vacatur.[1] Reply in Support of Petition for Writ of Certiorari, *Eisai*, 564 U.S. 1001. This Court sided with the petitioner by vacating under *Munsingwear*, without adjudicating standing. *Eisai*, 564 U.S. 1001.

The government reaches the opposite conclusion by misreading *Camreta v. Greene*, especially footnote 10. 563 U.S. 692, 712 n.10 (2011). Opp. 6. Though part of *Camreta* does discuss standing, it addresses only whether *prevailing parties* have standing to appeal the *merits*. *Id*. at 701–03. It says nothing about *losing parties*' standing to seek *vacatur*.

Footnote 10, however, is not about standing at all. Instead, it implicates the principle that prevailing parties ordinarily cannot appeal, *id*. at 712 n.10 (citing "*supra* at [131 S.Ct.] 2032," about prevailing parties)—a prudential limitation that *Camreta* distinguished from standing, *id*. at 702. *Camreta* created an exception to that principle, holding that 18 U.S.C. § 1983 defendants may appeal adverse constitutional rulings even after winning qualified immunity. *Id*. at 706–09. But because the *Camreta* case coincidentally mooted, the underlying constitutional ruling was vacated under *Munsingwear*. *Id*. at 710–14. Footnote 10 merely clarified that this Court "would choose not to exercise [that] equitable authority" for most prevailing parties. *Id*. That is because vacatur is meant to "expunge[] an adverse decision that would be reviewable had th[e] case not become moot." *Id*. at 712 n.10.

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[1] The petitioner devoted a few sentences to asserting that the pharmaceutical-company litigants would inevitably have future disputes, while reiterating that standing was "irrelevant," and "power to vacate" was "independent of [this Court's] Article III jurisdiction." *Id*. 7-8

But usually, "mootness d[oes] not deprive [prevailing] part[ies] of any review to which [they] w[ere] entitled," as they cannot appeal even live cases. *Id.*

Here, petitioners did not prevail. The opinion below therefore would be "reviewable had this case not become moot." *Id.* Because *Camreta*'s standing analysis addresses merits appeals, not vacatur; footnote 10 implicates "equitable authority," *id.*, not Article III; and *Camreta* concerns prevailing parties, not losing parties, it is irrelevant here.

Secondly, this Court may consider the Ninth Circuit's authority to issue a post-mootness opinion, regardless of whether petitioners have "standing under Article III to pursue appellate review." *Arizonans*, 520 U.S. at 66. That is because the question presented goes to "Article III jurisdiction," "not to the merits of the case." *Id.* at 67. "Even if [the Court] were to rule definitively that [petitioners] lack[ed] standing," then, the Court could still "consider . . . the authority of the lower courts to proceed." *Id.* at 73. That is all the Court needs to take up the second question presented.

B. Fugitive disentitlement is discretionary, and its animating policies have no application here.

This Court may also grant the petition even though Mr. Perez-Garcia absconded. Fugitive status "does not strip [a] case of its character as an adjudicable case or controversy." *Molinaro*, 396 U.S. at 366. Whether to dismiss falls "within

[courts'] discretion." *Degen v. United States*, 517 U.S. 820, 824 (1996) (cleaned up); *accord Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 n.11 (1993).

This Court should not dismiss here, as fugitive disentitlement's justifications are inapplicable. First, the doctrine lets courts avoid issuing judgments that "may be impossible to enforce." *Degen*, 517 U.S. at 824. But because petitioners seek vacatur, enforcement is not an issue. Second, the doctrine disentitles defendants from using court resources when evading its jurisdiction, thereby disincentivizing escape and protecting courts' dignity. *Id*. But because Mr. Perez-Garcia's release was revoked, vacating this opinion would not benefit him, incentivize escape, or implicate dignity.

Additionally, fugitive disentitlement arguably does not apply in this Court, as Mr. Perez-Garcia was rearrested in June 2024. *See* Case No. 24-MJ-3801-DUTY, Dkt. No. 3 (C.D. Cal. Jun. 26, 2024). Thus, when the petition was filed, Mr. Perez-Garcia was no longer at large. Ordinarily, enforceability concerns arise only when the defendant is on escape status, while efficiency and dignity concerns affect only "the court before which the case is pending at the time of escape." *Ortega-Rodriguez*, 507 U.S. at 244–47. Here, that court was the Ninth Circuit. Yet rather than dismissing, the court—at the government's urging—denied petitioners' dismissal motion. Pet. App. A8. Then, far from conserving resources, it issued an unnecessarily broad opinion based on independent research. Pet. 21-26. There is no principled reason to reverse course now.

II. This Court should equitably vacate the decision below.

This Court therefore has discretion to vacate the opinion below. Because vacatur "is rooted in equity," the vacatur decision "turns on the conditions and circumstances of the particular case." *Azar*, 584 U.S. at 729 (cleaned up). The relevant circumstances here include the public interest in correcting and reconsidering *Perez-Garcia*'s merits, the interests captured in *Munsingwear*, and the Ninth Circuit's overreach.

A. Because petitioners do not seek merits reconsideration, they need not show that a hypothetical remand would change the outcome.

First, vacatur would eliminate *Perez-Garcia*'s inconsistencies with *Rahimi*, while letting the Ninth Circuit implement *Rahimi*'s methodological clarifications. Pet. 10-15. The government acknowledges that *Perez-Garcia* did not incorporate *Rahimi*'s guidance, as it predated *Rahimi*. Opp. 8. The government concedes that *Perez-Garcia* adopted a "vague" tradition allowing legislatures to disarm the "[ir]responsible," directly contradicting *Rahimi*, 602 U.S. at 701; Opp. 9. And the government does not deny that this Court has issued 19 orders granting, vacating, and remanding ("GVR") in diverse Second Amendment cases, instructing courts to implement *Rahimi*'s clarifications. Pet. 9-10.

As the government correctly observes, however, mootness prevents this Court from following suit here by ordering merits reconsideration. Opp. 8. That is why petitioners requested equitable vacatur and dismissal, Pet. 3, 9, 15, not an ordinary GVR order, *contra* Opp. 8. But despite agreeing that reconsideration is impossible, the government says that petitioners must meet the standards applicable to GVR

orders, including by showing that *Rahimi* would have caused the panel to rule for petitioners. Opp. 8-9.

That prerequisite makes sense when a petitioner requests remand for reconsideration. When the lower court already considered all factors affecting the outcome, reconsideration is pointless. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Here, however, no court will reevaluate *Perez-Garcia*'s outcome. But absent vacatur, its reasoning—developed without *Rahimi*'s benefit—will impact all future circuit cases. Instead of asking what would happen during a hypothetical merits reconsideration, then, this Court must weigh the actual options: (1) maintain an opinion issued without *Rahimi*'s guidance, which reached a holding contradicting *Rahimi*, or (2) vacate it, so future panels can implement *Rahimi* on a clean slate. The latter "dispos[ition]" is "most consonant to justice," the only criterion for equitable vacatur. *Bancorp*, 513 U.S. at 24 (cleaned up).

Because the goal of vacatur here is clearing the path for future litigation—not changing the outcome of this now-moot case—it makes little difference that the Ninth Circuit panel reaffirmed its opinion when concurring in denial of en banc rehearing. *Contra* Opp. 8-9. True, panel members claimed that *Rahimi* "vindicate[d]" *Perez-Garcia*'s methodology and denied adopting a responsibility standard. Pet. App. B6, B13. But the government does not dispute that the now-vacated opinion in *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023), used very similar methods to produce very similar traditions. Pet. 14-15. If *Jackson*'s methodology warranted a second look, there is no principled reason to place *Perez-*

Garcia's beyond question. And the government concedes that the *Perez-Garcia* opinion did, in fact, allow legislatures to disarm the irresponsible. Opp. 9. This concededly erroneous conclusion calls into question the broader methodology from which it derives, while casting doubt on the other vague historical principles *Perez-Garcia* embraced. Pet. 12-13.

Finally, future panels cannot merely follow *Rahimi* instead of *Perez-Garcia*. *Contra* Opp. 11. The Ninth Circuit follows circuit precedent unless it is "clearly irreconcilable" with intervening precedent. *Bird v. Oregon Comm'n for the Blind*, 22 F.4th 809, 814 (9th Cir. 2022) (cleaned up). Neither "tension" nor "doubt," but only "clear[] inconsisten[cy]" will meet that standard. *Id.* (cleaned up). Thus, only vacatur will allow future panels to implement their best readings of *Rahimi*, without privileging *Perez-Garcia*.

B. The petition anticipated and rebutted the government's objections to *Munsingwear* relief.

Petitioners also satisfied the criteria for *Munsingwear* vacatur. Pet. 16-19. The government opposes vacatur because *Munsingwear* does not apply in criminal cases; Mr. Perez-Garcia's voluntary action (absconding) caused mootness; and this Court would not grant certiorari if the case were live. Opp. 9-10. The petition already rebutted these points, with no response from the government.

To briefly review, first, this Court has never decided how *Munsingwear* applies in criminal cases. Pet. 16 n.2. But though lower courts hesitate to vacate criminal convictions under *Munsingwear*, Charles A. Wright & Arthur R. Miller, Cases Moot on Appeal, 13C Fed. Prac. & Proc. Juris. § 3533.10 (3d ed.), they have

vacated opinions involving collateral issues, *see United States v. Tapia-Marquez*, 361 F.3d 535, 538 n.2 (9th Cir. 2004), including pretrial release, *In re Ghandtchi*, 705 F.2d 1315 (11th Cir. 1983). *Perez-Garcia* is a collateral pretrial release opinion, albeit one whose unnecessarily broad reasoning will impact future criminal convictions. The government offers no principled objection to vacating it.

Second, "conduct that is voluntary in the sense of being non-accidental, but which is entirely unrelated to the lawsuit, should not preclude" *Munsingwear* relief. *Russman v. Bd. of Educ.*, 260 F.3d 114, 122 (2d Cir. 2001); *see also* Pet. 17-19 (collecting cases). That is because "if the presence of this federal case played no role in causing" the mootness-inducing act, then "there is not present here the kind of 'voluntary forfeit[ture]' of a legal remedy that" counsels against vacatur. *Alvarez v. Smith*, 558 U.S. 87, 97 (2009). Here, it is uncontested that Mr. Perez-Garcia's appeal did not cause him to flee, as absconding to moot pretrial release issues could not benefit him. Pet. 19.

Third, certiorari very likely would have been granted absent mootness. Post-*Rahimi*, this Court granted certiorari in Second Amendment cases of all kinds, Pet. 9-10, and this appeal is no different. Furthermore, the opinion below directly conflicts with *Rahimi*'s responsibility holding. It adopts a dangerousness tradition that has split the circuits. *See Range v. Att'y Gen.*, 124 F.4th 218, 230 (3d Cir. 2024) (describing the Third, Sixth, and Eighth Circuits' differing approaches to dangerousness); Pet. App. A47 (identifying a tradition of disarming anyone "deemed dangerous or unwilling to follow the law"). And it involves a statute used daily to

impose firearms regulations. As *Rahimi* itself illustrates, such sweeping and methodologically significant opinions can merit certiorari, even absent a circuit split.

C. The government does not defend the Ninth Circuit's overreach, and legally consequential decisions merit vacatur even when future litigation will affect different parties.

Finally, the balance of equities favors vacatur. The government does not deny or defend the Ninth Circuit's overreach. Pet. 21-26. And contrary to the government's claims, Opp. 11, the public interest sometimes favors "clear[ing] the path for future relitigation," even litigation that will involve different parties. *Camreta*, 563 U.S. at 713 (cleaned up). In *Camreta*, for instance, the plaintiff moved out of state, eliminating the prospect of relitigation with the same state officials. *Id.* at 698. But the equitable balance nevertheless favored vacatur to "prevent an unreviewable decision from spawning any legal consequences." *Id.* (cleaned up).

The same is true in these unusual circumstances. On the one hand, this Court's GVR practice signals a strong desire to clear the board. Pet. 9-10. On the other, the Ninth Circuit's overreach significantly contributed to mootness, the opinion's unnecessarily broad scope, and its inconsistency with *Rahimi*. Pet. 21-26. As in *Camreta*, the balance favors vacatur.

III. This Court should review whether courts can issue a judicial opinion after a case moots.

Alternatively, this Court should grant certiorari to consider courts' Article III power to issue merits opinions after a case moots.

Though the government opposes review, it does not try to square the Ninth Circuit's procedure with this Court's precedents. Pet. 33-37. Precedents from *Marbury v. Madison*, 1 Cranch 137 (1803), to the present point to the same conclusion: "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006). Expounding the law in a merits opinion in a moot case violates that principle. And inconsistency with this Court's cases is reason enough to grant certiorari. Sup. Ct. R. 10(c).

The government's remaining points are unpersuasive. First, because *Ex parte Quirin*, 317 U.S. 1 (1942), did not consider the Article III question presented here, it does not "constitute precedent[]" on that issue. *Cooper Indus., Inc. v. Aviall Servs., Inc.,* 543 U.S. 157, 170 (2004) (cleaned up). Second, the government's interpretation of *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071 (9th Cir. 2001), merely repeats the panel's reading, Opp. 12, which the petition debunked. Pet. 29-30 & n.4. Third, the majority in *Coalition to End Permanent Congress v. Runyon*, 979 F.2d 219 (D.C. Cir. 1992), did not make a case-specific discretionary decision to withhold a merits opinion. *Contra* Opp. 13. Instead, *Runyon* explained why, as a general matter, it is "imprudent" to issue post-mootness opinions, 979 F.2d at 219–20—terminology that invokes self-imposed prudential limits on judicial decisionmaking, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

CONCLUSION

The Court should therefore grant the petition for a writ of *certiorari*.

Respectfully submitted,

s/ Katie Hurrelbrink

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