No.

IN THE

Supreme Court of the United States

PATRICIA GUERRERO, CHIEF JUSTICE OF CALIFORNIA, AND KIMBERLY MENNINGER, JUDGE OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Petitioners,

v.

STEPHEN MORELAND REDD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), a court of appeals' decision should be vacated because the appeal became moot by happenstance while a petition for rehearing was pending, as the D.C., Fourth, Eighth, and Eleventh Circuits hold, or instead can be left in place because further review is discretionary, as the Second, Third, Ninth, and Tenth Circuits hold.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Redd v. *Cantil-Sakauye*
No. 16-cv-1540 (Mar. 31, 2021)

United States Court of Appeals (9th Cir.):

Redd v. *Guerrero*
No. 21-55464 (Oct. 20, 2023)

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Chief Justice Guerrero and Judge Menninger respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals dismissing the appeal as moot, declining to vacate the panel opinion, and denying rehearing (App., *infra*, 3a-4a) is reported at 122 F.4th 1203. Judge Berzon's six-judge statement respecting the denial of rehearing en banc (App., *infra*, 4a-19a) and Judge Bennett's seven-judge dissent from the denial of rehearing en banc (*id.* at 20a-44a)

are also reported at 122 F.4th 1203. The panel opinion (App., *infra*, 45a-93a) is reported at 84 F.4th 874. The order of the district court granting petitioners' motion to dismiss (App., *infra*, 94a-117a) is not published in the Federal Supplement but is available at 2021 WL 1803211.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2023. A petition for rehearing was denied on December 11, 2024 (App., *infra*, 3a-4a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Vacatur under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), ensures that appeals proceed through fair, even-handed rules. Under Article III, a case or controversy must exist at every moment of a federal-court action. Mootness, whenever it strikes, stops the merits adjudication wherever it stands—whether the plaintiff or defendant is ahead at the moment, and whether the case is in the district court or on appeal. In such a case, saddling either party with an adverse, unreviewable decision by pure chance would be inequitable. That is why this Court has long relied on the equitable remedy of vacatur to "clea[r] the path for future relitigation of the issues" when "happenstance" brings a premature end to the dispute. *Id.* at 40.

This case met that fate. Respondent was a capital inmate who brought a putative class action under 42 U.S.C. § 1983 against petitioners, the Chief Justice of California and the supervising judge of his sentencing court. Although the Constitution does not require appointment of counsel for postconviction proceedings,

California law provides for appointed capital habeas counsel. But legislative underfunding and the absence of qualified, willing counsel have prevented appointments for hundreds on California's death row. Respondent claimed that petitioners had deprived him of property (appointed counsel) without due process of law. Shortly after the Ninth Circuit endorsed that theory and reversed the dismissal of the complaint, respondent died of natural causes in prison while a rehearing petition was pending. Petitioners accordingly sought vacatur of the panel decision.

Under a conventional application of *Munsingwear*, vacatur would have been the unquestioned next step. Petitioners were continuing along the "primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 27 (1994). This Court has held that "mootness by happenstance provides sufficient reason to vacate." *Id.* at 25 n.3. In the D.C., Fourth, Eighth, and Eleventh Circuits, the additional happenstance that the death followed rather than preceded the panel's issuance of its opinion would have made no difference. The panel would have vacated its own decision, just as courts of appeals vacate the district court's judgment when mootness arises during the appeal.

This case, however, happened to be in the Ninth Circuit. Like the Second, Third, and Tenth Circuits, the Ninth Circuit has recognized an exception to *Munsingwear* when an appeal becomes moot after the panel issues its decision but before the mandate issues. Those circuits all elevate the "valu[e]" in establishing legal precedent for the public over the unfairness to the litigant who cannot seek further review of

an adverse opinion. App., *infra*, 7a. And those circuits justify taking a harder line against vacatur on the theory that rehearing and certiorari are "discretionary forms of appellate review." *Id.* at 8a.

This Court should resolve the circuit confusion and in so doing reject the Ninth Circuit's approach to *Munsingwear* as unsound. Concerns about "fairness" do not vanish once a panel has reached a decision. *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (citation omitted). To the contrary, their "adverse ruling[s]" have more, not less, ability to saddle parties with ongoing legal consequences. *Ibid.* (citation omitted). This Court accordingly has routinely vacated courts of appeals' decisions, including when mootness occurs after the decision but before a grant of certiorari. *Azar* v. *Garza*, 584 U.S. 726, 729-730 (2018) (per curiam); see, *e.g.*, *Turtle Mountain Band of Chippewa Indians* v. *North Dakota Legislative Assembly*, 144 S. Ct. 2709 (2024).

Although the Ninth Circuit discounts en banc rehearing and certiorari as discretionary, this Court has recognized that an appeal "contemplates more than a consideration of the case by the Circuit Court of Appeals alone." *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944). This case shows that panels are denying vacatur on the ground that their opinions are important in precisely the same cases that would have received serious consideration for certiorari. Disregarding such review allows a panel to sit in judgment of its own decision. But a panel should not become "infallible" simply because mootness short-circuited the rest of the appeal. Cf. *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). Until this Court makes that clear, the courts of appeals on the Ninth Circuit's side of the split will continue to

shift routine *Munsingwear* requests onto the Court's certiorari docket.

Vacatur would be warranted even if petitioners were required to show that the case was worthy of further review before becoming moot. The Court has already granted review of an Article III circuit split that includes the very opinion in this case as to whether a plaintiff can demonstrate redressability in an action against state officials when different state officials are the ultimate cause of any injury. *Gutierrez* v. *Saenz*, No. 23-7809 (Oct. 4, 2024). The Ninth Circuit's treatment of the procedural right to appointed counsel as a "property" interest supporting suits against state judges under the Due Process Clause also conflicts with decisions of this Court and of other courts of appeals, as well as "centuries-old principles of federalism." App., *infra*, 39a (Bennett, J., dissenting from denial of rehearing en banc). And the decision, if left on the books, will provide a roadmap for hundreds of similarly situated inmates to bring claims that federal judges should commandeer California's limited resources to cover legislative shortfalls of more than $100 million in pay for appointed counsel.

This Court should grant the petition and vacate the decision under *Munsingwear* simply because happenstance deprived petitioners of their ability to seek further review of the decision below. But because, absent mootness, the case would have been certworthy, this case is an especially strong candidate for vacatur.

STATEMENT

1. The Constitution does not require States to appoint counsel for state postconviction proceedings. *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989). California has opted to go above the constitutional floor.

More than five decades ago, the California Supreme Court first announced a practice of appointing counsel for "indigent defendants in capital cases" for state habeas proceedings. *In re Anderson*, 69 Cal. 2d 613, 633 (1968).

The California Legislature later codified the procedural requirement that the California Supreme Court "shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings." Ch. 869, § 3, 1997 Cal. Stat. 6237. The Legislature also established the Habeas Corpus Resource Center to employ attorneys to represent capital inmates in postconviction proceedings and to assist in recruiting private attorneys to accept such representations. *Id.* at 6236. In 2016, California voters approved Proposition 66, which shifted the appointment of counsel to the trial court that entered the capital sentence. Cal. Gov't Code § 68662; see Cal. Penal Code § 1509(b).

The California Supreme Court recognizes that "the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death." *In re Morgan*, 50 Cal. 4th 932, 937 (2010). There is, however, a "serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case." *Id.* at 937-938. Few attorneys have the necessary qualifications to begin with, and budgetary constraints limit the California judiciary's ability to attract even those attorneys who are qualified. *Id.* at 938. Given those constraints, 363 prisoners on death row had not been appointed state-funded postconviction counsel as of 2019. App., *infra*, 54a.

The California Supreme Court has a "practice of deferring consideration of cursory habeas corpus petitions

filed by unrepresented petitioners." *Morgan*, 50 Cal. 4th at 941 n.7. As a result, capital inmates have a ready avenue to secure the protection of statutory tolling for federal habeas petitions while they wait for appointed counsel. App., *infra*, 52a. California law generally sets a one-year deadline for capital petitions for postconviction relief upon appointment of counsel. Cal. Penal Code § 1509(c). Capital inmates also may "rejec[t] the offer to appoint counsel" and proceed directly to state habeas, just like the Constitution permits for other prisoners around the country. Cal. Gov't Code § 68662(b).

2. Respondent Stephen Moreland Redd was a capital inmate in California. A former sheriff's deputy, he became a serial armed robber who killed one man at point-blank range and attempted to kill two others in the course of his crime spree. *People* v. *Redd*, 48 Cal. 4th 691, 698-703 (2010). In 1997, a jury convicted him of first-degree murder, two counts of attempted murder, two counts of second-degree robbery, and two counts of second-degree commercial burglary, and also returned a verdict of death. *Id.* at 697. The evidence of his guilt was "overwhelming," as the California Supreme Court found in upholding his death sentence on direct review. *Id.* at 740.

Respondent requested appointment of counsel for state postconviction proceedings once he was sentenced to death and again after the California Supreme Court upheld his convictions and sentence. App., *infra*, 53a-54a. No qualified counsel accepted appointment. *Id.* at 54a. While his shell petition remained pending with the California Supreme Court, respondent filed a federal habeas petition, which the district court dismissed for failure to exhaust state-law remedies. *Id.* at 56a. This Court denied review of

the Ninth Circuit's refusal to grant a certificate of appealability. *Redd* v. *Chappell*, 574 U.S. 1041 (2014). In a statement respecting the denial, Justice Sotomayor, joined by Justice Breyer, suggested that respondent may be able to "bring a 42 U.S.C. § 1983 suit contending that the State's failure to provide him with the counsel to which he is entitled [under state law] violates the Due Process Clause." *Id.* at 1042.

3. Respondent then filed a § 1983 action against petitioners, the Chief Justice of California and the supervising judge in the trial court that sentenced him to death. App., *infra*, 94a. Respondent claimed that petitioners were violating the Due Process Clause because of the lack of "timely appointment of counsel" for state postconviction proceedings. *Id.* at 101a (citation omitted). He also sought to represent a class of all other capital inmates who were awaiting appointment of such counsel. *Id.* at 101a-102a.

The district court dismissed respondent's complaint with prejudice. App., *infra*, 94a-117a. The court upheld respondent's standing and refused to abstain from deciding the case. *Id.* at 103a-110a. But the court held that California's provisions governing appointment of habeas counsel created only a "procedural righ[t]" to facilitate state postconviction proceedings, not a substantive right that qualified as "liberty" under the Due Process Clause. *Id.* at 114a-116a. While "decrying" the delays in California's capital system, the court observed that "[t]his is an issue that should be addressed as a matter of public policy by the State Legislature in collaboration with the state courts." *Id.* at 117a.

4. In an opinion by Judge Berzon, the Ninth Circuit reversed the complaint's dismissal. App., *infra*, 48a-93a.

The court of appeals first held that respondent had Article III standing. App., *infra*, 59a-63a. Petitioners had argued that respondent's asserted injury (the lack of appointed counsel) was not traceable to their conduct or redressable by a declaration against them because that injury was "caused by 'underfunding' for which [petitioners] are not responsible and have no power to change." *Id.* at 103a-104a. But relying on *Reed* v. *Goertz*, 598 U.S. 230 (2023), the court reasoned that the injury was traceable to petitioners' inability to attract enough counsel and redressable on the theory that the California Supreme Court could reallocate money from its budget to the Habeas Corpus Resource Center and relax the qualifications for capital counsel. App., *infra*, 60a-63a.

The court of appeals next rejected petitioners' request for abstention under *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). App., *infra*, 64a-75a. There, this Court held that federal courts should refuse requests to perform "ongoing federal audit[s] of state criminal proceedings." 414 U.S. at 500. Petitioners argued that *O'Shea* supported abstention because respondent had brought a class action seeking intrusive restructuring of how the California judiciary appoints counsel and allocates its limited budget. App., *infra*, 67a. While recognizing that petitioners' "federalism and comity concerns are surely significant," *id.* at 64a, the court declined to abstain after limiting its analysis to the individual declaratory relief that respondent sought while excluding the sweeping class relief, *id.* at 67a-72a. The court, however, expressed "trepidation" about its decision to permit respondent's claim to go forward. *Id.* at 74a (citation omitted).

The court of appeals then held that respondent had plausibly pleaded a violation of the Due Process

Clause. App., *infra*, 75a-88a. The court endorsed respondent's argument, made for the first time on appeal, that he had a "state-created *property* interest" in the appointment of counsel because "representation by counsel has an 'ascertainable monetary value.'" *Id.* at 76a, 79a (emphasis added) (quoting *Castle Rock* v. *Gonzales*, 545 U.S. 748, 766-767 (2005)). The court determined that, although California law does not set a "specific deadline," respondent was entitled to appointed counsel "within a reasonable time." *Id.* at 79a-84a. The court also concluded that the complaint plausibly alleged that petitioners had not taken sufficient steps to prevent undue delay in the appointment of counsel under the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). App., *infra*, 84a-88a.

Separately, the court of appeals rejected respondent's theory that petitioners' inability to appoint counsel had deprived him of a "liberty" interest in petitioning for state habeas relief. App., *infra*, 88a-93a. The court noted that respondent had not alleged any attempt to withdraw his request for appointed counsel and to proceed *pro se*. *Id.* at 91a-92a.

5. About two months later, after petitioners had sought panel rehearing and rehearing en banc, respondent died of natural causes. C.A. Doc. No. 61, at 1 (Dec. 26, 2023). Respondent's counsel moved to substitute respondent's daughter as plaintiff-appellant. C.A. Doc. No. 65, at 1-2 (Jan. 26, 2024). Petitioners opposed that substitution because respondent's daughter lacked standing to seek prospective relief and could not seek retrospective relief under the limited exception in *Ex parte Young*, 209 U.S. 123 (1908), to state sovereign immunity. C.A. Doc. No. 66, at 2-3 (Feb. 5, 2024). Petitioners also requested that the

court of appeals vacate the panel opinion because the case became moot before the appellate process had concluded. C.A. Doc. No. 73, at 8-12 (Mar. 15, 2024).

The court of appeals denied the motion to substitute respondent's daughter as plaintiff, dismissed the appeal as moot, denied the petition for rehearing as moot, and denied petitioners' request to vacate the panel opinion. App., *infra*, 3a-4a.

a. Judge Berzon, joined by five judges, filed an opinion respecting the denial of rehearing en banc. App., *infra*, 4a-19a. She explained that the Ninth Circuit had adopted a three-factor test for deciding whether to vacate a panel opinion when the case becomes moot while the appeal remains pending: "(1) whether the opinion is 'valuable to the legal community as a whole,'" *id.* at 6a-7a (quoting *Dickens* v. *Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc)); "(2) whether letting the opinion stand would result in prejudice to the parties," *id.* at 7a (citing *Dickens*, 744 F.3d at 1148); and "(3) whether mootness arose due to the voluntary conduct of the parties," *ibid.* (citing *Washington* v. *Trump*, 858 F.3d 1168, 1168 (9th Cir. 2017)).

Judge Berzon explained why "[t]he panel, in its discretion, declined to vacate its opinion" under those three factors. App., *infra*, 4a. First, she considered her opinion to be "valuable to the legal community" because it would "provide a decisional framework" for hundreds of other "capital prisoners who, like [respondent], have waited many years for habeas counsel to be appointed." *Id.* at 7a. Second, she asserted that leaving the panel's opinion in place would not substantially prejudice petitioners because they "are not entitled to rehearing or certiorari, both of which are discretionary forms of appellate review." *Id.* at 8a.

She also suggested that petitioners could seek en banc review or certiorari in a later case filed against them. *Ibid.* Third, she acknowledged that the mootness here arose from the "happenstance" of respondent's death. *Ibid.* (quoting *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994)). But she asserted that vacatur "is neither mandatory nor commonplace" even when the losing party is not at fault for losing the ability to seek further review. *Id.* at 9a.

b. Judge Bennett, joined by six judges, dissented from the denial of rehearing en banc. App., *infra*, 20a-46a. In his view, the court of appeals "should have taken this case en banc to vacate the panel's opinion." *Id.* at 20a.

Judge Bennett identified "deleterious practical effects" from the panel's decision. App., *infra*, 22a. For example, respondent alleged that the cost of litigating a successful habeas petition in 2004 was $328,000, which would amount to $118 million when multiplied across the 362 prisoners awaiting counsel—even before accounting for inflation. *Id.* at 22a n.4. He also explained that it would be "impossible for California courts to guarantee appointment of habeas counsel within a certain time frame" given the lack of qualified and willing attorneys. *Id.* at 35a. For that reason, he would have interpreted California law to require prompt appointment only "if it was possible to do so." *Ibid.* (emphasis omitted).

Judge Bennett also criticized the logic of the panel decision. Although the Constitution does not require appointment of postconviction counsel, he noted that, "because the State has *elected* to do so, this federal court is somehow empowered to mandate how the Chief Justice of the California Supreme Court and the other [state judges] must interpret *state law*, implement *state*

law, and administer and allocate *state judicial resources*." App., *infra*, 38a-39a. He considered that "dramatic overreach" to be "[a]n affront to centuries-old principles of federalism." *Id.* at 39a.

Judge Bennett then took issue with the panel's refusal to vacate its decision. While the panel emphasized the perceived value of its opinion, Judge Bennett identified a "strong countervailing public interest" in "'granting relief when the demands of "orderly procedure" cannot be honored.'" App., *infra*, 42a (quoting *Bancorp*, 513 U.S. at 26-27, in turn quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950)). He deemed the prejudice to petitioners to be "substantial" because they had been deprived of the ability to seek further review of a decision that "sets forth a blueprint for all of California's 362 indigent capital prisoners to follow if the State does not appoint counsel 'expeditiously.'" *Id.* at 43a. Because happenstance (respondent's death) had mooted the appeal, Judge Bennett concluded that "the equitable considerations compel vacatur." *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), has established the ground rules for vacatur upon mootness in the federal courts for the last seven decades. When a party diligently protects her rights and is not to blame for mootness, *Munsingwear* vacatur "clears the path for future relitigation of the issues" in an action that remains a case or controversy through the entire appeal. *Id.* at 40. This equitable remedy promises that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

Nevertheless, the courts of appeals have divided four to four as to whether an exception to that longstanding equitable rule exists for their *own* decisions. The D.C., Fourth, Eighth, and Eleventh Circuits vacate their own decisions when a case becomes moot by happenstance after the panel issues its opinion but before the mandate issues. In contrast, the Ninth Circuit, joined by the Second, Third, and Tenth Circuits, refuses to vacate opinions in cases that become moot. Those courts reason that, because rehearing and certiorari are discretionary forms of review, the panel's interest in establishing law for the public outweighs the losing party's interest in not being saddled with an adverse ruling that mootness shields from further review.

Allowing the happenstance of mootness to immunize panel opinions from further review undermines the "orderly operation of the federal judicial system." *Bancorp*, 513 U.S. at 27. Panel rehearing, en banc rehearing, and certiorari all play a critical role in correcting errors and ensuring that important issues receive full consideration on appeal beyond the three judges who happen to be drawn for the panel. Those circuits that disregard such further review as discretionary either overlook even those cases in which discretionary review was likely or improperly assume the position of deciding whether their own decisions warrant further review.

The Ninth Circuit's recognition of an exception to *Munsingwear* for panel opinions conflicts with this Court's decisions. Even before *Munsingwear*, the Court recognized that an appeal "contemplates more than a consideration of the case by the Circuit Court

of Appeals alone." *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944). The Court therefore routinely vacates the court of appeals' decision when a case becomes moot before a party can seek certiorari. *Azar* v. *Garza*, 584 U.S. 726, 729-730 (2018) (per curiam) (collecting cases).

Because the appeal became moot by the happenstance of respondent's death, and because the court of appeals' decision expanding Article III standing and intruding upon bedrock principles of federalism would have warranted further review in any event, this Court should grant the petition and vacate the court of appeals' decision under *Munsingwear*.

I. CIRCUITS DISAGREE ABOUT THE STANDARD FOR VACATUR WHEN AN APPEAL BECOMES MOOT AFTER A PANEL ISSUES ITS OPINION

A. Four circuits apply the ordinary *Munsingwear* standard when an appeal becomes moot by happenstance after the panel issues its decision.

The D.C. Circuit has adopted that approach. In *United States* v. *Schaffer*, 240 F.3d 35 (D.C. Cir. 2001) (per curiam), the court explained that, "[w]hen a case becomes moot on appeal, whether it be during initial review *or* in connection with consideration of a petition for rehearing or rehearing *en banc*, th[e] court generally vacates the District Court's judgment, vacates any outstanding panel decisions, and remands to the District Court with direction to dismiss." *Id.* at 38 (emphasis added). The court vacated its earlier panel opinion because the case had become moot by happenstance—"the unpredictable grace of a presidential pardon"—rather than "from any voluntary acts of settlement or withdrawal" by the party seeking vacatur. *Ibid.*; see also *Clarke* v. *United States*, 915

F.2d 699, 706 (D.C. Cir. 1990) (en banc) (describing the "standard practice of both the Supreme Court and the courts of appeals" as "automatic vacatur" when a case becomes moot after a panel opinion before the mandate's issuance).

The Fourth Circuit also follows the traditional *Munsingwear* standard when an appeal becomes moot after a panel opinion. In *Hirschfeld* v. *Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322 (4th Cir. 2021), a panel vacated its own decision because the case had become moot by happenstance after the plaintiff aged out of her challenge to federal laws regulating young adults' access to firearms. *Id.* at 327. The panel acknowledged that "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole,'" but it determined that "the public interest still favor[ed] vacating [its] opinions" because that practice "promotes the 'orderly operation of the federal judicial system'" and allows relitigation of the issues. *Ibid.* (quoting *Bancorp*, 513 U.S. at 26-27).

The Eighth and Eleventh Circuits likewise vacate their own decisions when a case subsequently becomes moot. *E.g.*, *South Dakota* v. *Hazen*, 914 F.2d 147, 151 (8th Cir. 1990). The Eighth Circuit has even recalled its mandate to vacate a panel opinion when a case became moot "during the time available to seek certiorari." *Brewer* v. *Swinson*, 837 F.2d 802, 806 (8th Cir. 1988); see also *United States* v. *Flute*, 951 F.3d 908, 909-910 (8th Cir. 2020) (noting that "courts are far from unanimous" in this context and declining to vacate the panel opinion in part because the mootness "did not result from 'happenstance'"). And the Eleventh Circuit holds that "vacation for mootness is appropriate" when "mootness occur[s] after an appellate

court ha[s] issued a decision but before the losing party could seek en banc reconsideration and before the mandate ha[s] issued." *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983) (per curiam); see, *e.g.*, *Key Enterprises of Delaware, Inc.* v. *Venice Hospital*, 9 F.3d 893, 899-900 (11th Cir. 1993) (en banc) (per curiam).

B. In contrast to those four circuits, four other circuits (including the Ninth Circuit) disfavor vacating their own opinions when a case later becomes moot while the appeal remains pending.

The Third Circuit has recognized such an exception to *Munsingwear*. In *Humphreys* v. *DEA*, 105 F.3d 112 (3d Cir. 1996), the plaintiff died after prevailing in the panel opinion but before the court of appeals issued its mandate. *Id.* at 113. The panel denied the government's vacatur request, reasoning that *Munsingwear* "is not universally applicable to all cases which seemingly become moot anytime during the appellate process." *Id.* at 114. Stressing that the government's "remaining avenues of further review" (panel rehearing, en banc rehearing, and certiorari) were all "discretionary," the panel asserted that the loss of such review did not require vacatur of its "carefully analyzed" opinion because the government "had a full and fair opportunity to present its case and convince" the panel. *Id.* at 115-116.

The Second and Tenth Circuits have adopted the same exception to *Munsingwear* for appeals that become moot after the panel issues its opinion but before the mandate's issuance. *In re Grand Jury Investigation*, 399 F.3d 527, 528 n.1 (2d Cir. 2005); *Bastien* v. *Office of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1235 (10th Cir. 2005) (per curiam). For example, the Second Circuit has agreed with the Third Circuit that a panel "generally ha[s] discretion * * * to

leave [its] order intact where the circumstances leading to mootness occur after [it] file[s] [its] decision but before the mandate has issued." *Grand Jury Investigation*, 399 F.3d at 528 n.1.

The Ninth Circuit is firmly in the same camp. In *Armster* v. *U.S. District Court for Central District of California*, 806 F.2d 1347 (9th Cir. 1986), the court denied the government's request to vacate a panel decision when the case became moot before the mandate issued. *Id.* at 1355. The court reasoned that "[t]here is a significant difference between a request to dismiss a case or proceeding for mootness prior to the time an appellate court has rendered its decision on the merits and a request made after that time." *Ibid.* The court expressed concern that vacatur would deprive the winning party "of the benefit of an appellate court decision." *Ibid.* And even though the time to seek rehearing had not elapsed, the court stated that it "ha[d] already exercised its constitutional power" when issuing the panel opinion. *Ibid.* n.9. The court lastly suggested that litigants who desire vacatur of panel opinions should file petitions with this Court. *Id.* at 1356 n.12.

The Ninth Circuit since *Armster* has repeatedly refused to vacate its own decisions when mootness deprives parties of further review. See, *e.g.*, *Crespin* v. *Ryan*, 51 F.4th 819, 820 (9th Cir. 2022); *Black Mesa Water Coalition* v. *Jewell*, 797 F.3d 1185, 1185 (9th Cir. 2015).

In *Dickens* v. *Ryan*, 744 F.3d 1147 (9th Cir. 2014) (en banc), for instance, the court declined to vacate a habeas decision that fractured across five opinions, *Dickens* v. *Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), on the theory that the State seeking vacatur was not "*entitled* to additional appellate review" because

certiorari is "discretionary." 744 F.3d at 1148. That opinion remained in place even though the court recognized that its decision would "undoubtedly affect cases now pending" against the State, *ibid.*, and even though the dissent protested that this Court "would have provided necessary guidance," had the case not become moot, *ibid.* (opinion of Callahan, J.).

Another example is *United States* v. *Perez-Garcia*, 96 F.4th 1166 (9th Cir. 2024), pet. for cert. filed, No. 24-6203 (Dec. 20, 2024). There, the panel issued an expedited summary order affirming a magistrate judge's ability to release defendants on bail subject to a bar on possessing firearms pending trial. *Id.* at 1172. The panel then issued its reasoned opinion rejecting the defendants' Second Amendment claim *after* the case had become moot following the panel's earlier order. *Id.* at 1173-1174. The court next denied rehearing en banc over a dissent that advocated vacatur to "clear the path for the [constitutional] issue to be cleanly litigated by a host of other parties in non-moot cases." *United States* v. *Perez-Garcia*, 115 F.4th 1002, 1032-1033 (9th Cir. 2024) (opinion of VanDyke, J.).

The decision in this case showcases the Ninth Circuit's slant against vacating its own decisions. The panel asserted that vacating an opinion "due to post-decisional mootness is an 'extraordinary remedy.'" App., *infra*, 6a (quoting *Dickens*, 744 F.3d at 1148). It gave great weight to the "valu[e]" of its own opinion to the "legal community." *Id.* at 7a. It gave little (if any) weight to the potential for rehearing or certiorari by writing them off as "discretionary forms of appellate review." *Id.* at 8a. And it deemed the "happenstance" of mootness insufficient to justify vacatur in this case. *Ibid.* (citation omitted).

In the D.C., Fourth, Eighth, and Eleventh Circuits, the panel opinion would already have been vacated. See pp. 15-17, *supra*. But the Ninth Circuit's contrary approach to *Munsingwear* has forced petitioners to call on this Court to do for the court of appeals what it will not do for itself.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

This Court's resolution of the question presented is critical to maintaining "orderly procedure" consistent with time-honored principles of equity. *Munsingwear*, 340 U.S. at 41. Exempting panel opinions from the ordinary application of *Munsingwear* distorts the appellate process. Each stage—including panel rehearing, rehearing en banc, and review in this Court by writ of certiorari—helps ensure sound decision-making, including through external checks on the panel. But across a range of decisions, the Ninth Circuit and the courts of appeals that share its approach have sought to freeze panel opinions in place even as mootness by happenstance strips losing parties of their ability to seek further review of errors.

A. The Ninth Circuit puts a thumb on the scale against vacatur when an appeal becomes moot after the panel issues its opinion on the theory that rehearing and certiorari are "discretionary." *Dickens*, 744 F.3d at 1148. That view downplays the importance of discretionary review in the federal appellate system.

The availability of panel rehearing reflects the fact that a judge "may change his or her position" not only "up to the very moment when a decision is released," *Yovino* v. *Rizo*, 586 U.S. 181, 184 (2019) (per curiam), but also for as long as the court retains jurisdiction over

the case—typically until the mandate issues, see Fed. R. App. P. 41(b). After a decision's hand-down, a party can bring to the judges' attention "each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(b)(1)(A). This procedure is "a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested." *Bell* v. *Thompson*, 545 U.S. 794, 806 (2005).

The Ninth Circuit's approach systematically shields those errors from correction. Because Article III demands that a concrete controversy "be extant at all stages of review," mootness deprives the panel of jurisdiction to address the merits. *United States* v. *Sanchez-Gomez*, 584 U.S. 381, 385 (2018) (citation omitted). A panel thus cannot fix its own errors—however glaring—when an appeal becomes moot after the panel has issued its decision. See App., *infra*, 3a (denying rehearing petition as moot).

The Ninth Circuit's assertion that the "valu[e]" that a panel places on its own opinion for "the legal community" justifies denying vacatur also wrongly supplants the en banc process. App., *infra*, 6a-7a (opinion of Berzon, J.) (citation omitted); see *id.* at 42a-43a (opinion of Bennett, J.). Rehearing en banc is warranted for "questions of exceptional importance," as well as when a panel decision conflicts with decisions of this Court or of other courts of appeals. Fed. R. App. P. 40(b)(2) (former Fed. R. App. P. 35(a)). And this Court has recognized that the en banc process is the surest check on errant panel decisions because the courts of appeals effectively "are the courts of last resort in the run of ordinary cases." *United States* v.

American-Foreign Steamship Corp., 363 U.S. 685, 689 (1960) (citation omitted).

The Ninth Circuit's approach to vacatur in this context turns the en banc process on its head by transforming a decision's importance from a factor favoring further review into a reason to give the panel the final say, despite a party's inability to seek such review by "happenstance." App., *infra*, 8a (opinion of Berzon, J.) (citation omitted). After all, the panel refused to vacate its decision on the theory that it would provide a "valuable" framework for deciding claims by hundreds of other capital prisoners against the California judiciary. *Id.* at 7a. That sweeping scope, however, is precisely why this case "raises [an] exceptionally important question" that did not deserve a truncated appeal. *Id.* at 42a (opinion of Bennett, J.).

The availability of review by certiorari is also part of the "primary route" that "Congress has prescribed" for parties to "seek relief from the legal consequences of judicial judgments." *Bancorp*, 513 U.S. at 27. Typically, this Court exercises its discretion to hear a case when the decision below conflicts with other decisions or resolved "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10. The Court does not grant all or even many petitions. But a party's ability to seek such review ensures that the Court does not become a "supreme Court" in name only. U.S. Const. Art. III, § 1.

The Ninth Circuit's assertion that the "discretionary" nature of certiorari cuts against vacatur of its decisions in moot cases has untenable implications. *Dickens*, 744 F.3d at 1148. If the court of appeals writes off the prospect of certiorari while touting its

opinion's importance to other pending cases, see *ibid.*, then it will deny vacatur in precisely those cases that would have received serious consideration for certiorari. If the court of appeals instead makes its own assessment whether further review is likely, then its decision would hinge on a certworthiness determination that invades this Court's province under Rule 10. And the consequence, either way, is that parties must draw on this Court's time and resources to secure vacatur that could readily be accomplished by the court that had (and lost) jurisdiction over the appeal when the case became moot.

In short, the Ninth Circuit's decision to prioritize the perceived value of a panel opinion over the circumstances that caused the mootness allows a three-judge panel to withhold all review of its own decision, displacing the ordinary appellate system of rehearing and certiorari. That exception for post-opinion mootness will skew *Munsingwear* in predictable ways. Here, for example, the panel issued its 50-page opinion 17 months after argument. App., *infra*, 45a. Small wonder that after devoting such time and effort the panel deemed its own opinion to be "valuable to the legal community"—and the absence of further review by rehearing or certiorari to be insignificant prejudice to petitioners. *Id.* at 7a-8a (opinion of Berzon, J.). But if "no man can be a judge in his own case," *In re Murchison*, 349 U.S. 133, 136 (1955), a panel should not have *more* discretion to force a party "to acquiesce in the judgment" just because the "adverse ruling" happens to be the panel's own, *Bancorp*, 513 U.S. at 25.

B. The question presented is also recurring, as reflected by the deep four-to-four circuit conflict and flurry of Ninth Circuit decisions. See pp. 15-19, *supra*. The opinions in moot appeals (and subsequent

certiorari petitions) will continue to pile up until this Court provides a conclusive answer to the question presented.

III. THE DECISION BELOW SHOULD BE VACATED

Because the court of appeals erroneously declined to vacate its own decision, the question now is whether this Court should vacate the decision. The Court does not directly review the court of appeals' decision to deny vacatur but instead exercises its own power to "vacate * * * any judgment, decree, or order of a court lawfully brought before it for review." 28 U.S.C. § 2106; see *Bancorp*, 513 U.S. at 21. This Court should vacate the court of appeals' decision, both because the same *Munsingwear* standard governs when an appeal becomes moot after the panel issues its opinion and because the decision in this case would have warranted further discretionary review in any event.

A. *Munsingwear* is shorthand for an "equitable tradition of vacatur" with deep roots in this Court's precedents. *Bancorp*, 513 U.S. at 25. When a case has become moot, the Court has long exercised discretion to craft relief that is "most consonant to justice." *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300, 302 (1892) (emphasis omitted). But "[d]iscretion is not whim." *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 103 (2016) (citation omitted). The sound legal principles that emerge from decades of precedent establish that "mootness by happenstance provides sufficient reason to vacate," while a party who is at fault for the mootness generally is not entitled to vacatur. *Bancorp*, 513 U.S. at 25 n.3; see, *e.g.*, *Camreta* v. *Greene*, 563 U.S. 692, 712 & n.10 (2011); *Alvarez* v. *Smith*, 558 U.S. 87,

94-95 (2009); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997).

The mootness-by-happenstance justification for vacatur applies equally when an appeal becomes moot after a panel has issued its decision. In *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944), for example, a district court entered judgment for the government in a case under the Fair Labor Standards Act, the Fifth Circuit reversed the judgment, and this Court granted certiorari at the government's request. *Id.* at 672. The respondent corporation subsequently dissolved itself and moved to dismiss the writ of certiorari. *Id.* at 672-673. This Court agreed that the case could not proceed without any proper respondent, *id.* at 675-676, but exercised its "supervisory appellate power" to vacate the Fifth Circuit's decision, *id.* at 676-678. As the Court explained, "review of a judgment of the District Court contemplates more than a consideration of the case by the Circuit Court of Appeals alone," because a losing party "may secure further review here upon certiorari, if he so desires and if this Court, in its discretion, grants the writ." *Id.* at 677. Vacatur of the court of appeals' decision was appropriate because the court of appeals' decision was "not final" and "appellate review of the judgment of the District Court had not been completed when respondent was dissolved." *Ibid.*

The Court has since reaffirmed the equitable principle from *Walling* that deprivation of further review in this Court by happenstance warrants vacatur of the court of appeals' decision. In *Munsingwear* itself, the Court identified vacatur as the "*established practice* * * * in dealing with a civil case from a court in the federal system which has become moot *while on its way here* or pending our decision on the merits." 340

U.S. at 39 (emphases added); see *id.* at 41 (citing *Walling*, 321 U.S. at 676-677). And in *Bancorp*, the Court reaffirmed the principle that a party who "is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment," cited *Walling*, and added that vacatur becomes inequitable when a party abandons "the ordinary processes of appeal *or certiorari*." 513 U.S. at 25 (emphasis added).

The Court has repeatedly vacated the court of appeals' decision when a case becomes moot by happenstance or by the respondent's action after a grant of certiorari. See, *e.g.*, *Acheson Hotels, LLC* v. *Laufer*, 601 U.S. 1, 5 (2023) (respondent voluntarily dismissed her claims); *United States* v. *Microsoft Corp.*, 584 U.S. 236, 240 (2018) (per curiam) (Congress amended law authorizing warrant); *Alvarez*, 558 U.S. at 97 (respondents received relief through other forum); *Claiborne* v. *United States*, 551 U.S. 87, 87 (2007) (per curiam) (petitioner's death); *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988) (respondents sought to withdraw complaint). A *Munsingwear* vacatur "deprives" the court of appeals' "opinion of precedential effect." *Los Angeles County* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) (citation omitted). As a result, wiping a published appellate precedent off the books "prevent[s] an unreviewable decision 'from spawning any legal consequences.'" *Camreta*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 41).

The same *Munsingwear* rule applies when a case has become moot before this Court grants certiorari. In *Azar* v. *Garza*, 584 U.S. 726 (2018) (per curiam), the Court explained that "the fact that the relevant claim [there] became moot before certiorari does not limit th[e] Court's discretion" to vacate a decision under *Munsingwear*. *Id.* at 729. The Court collected examples

in which a case became moot after the court of appeals' decision but before a grant of certiorari. *Id.* at 729-730; see *LG Electronics, Inc.* v. *InterDigital Communications, LLC*, 572 U.S. 1056 (2014); *United States* v. *Samish Indian Nation*, 568 U.S. 936 (2012); *Eisai Co.* v. *Teva Pharmaceuticals USA, Inc.*, 564 U.S. 1001 (2009); *Indiana State Police Pension Trust* v. *Chrysler LLC*, 558 U.S. 1087 (2009); see also, *e.g.*, *Turtle Mountain Band of Chippewa Indians* v. *North Dakota Legislative Assembly*, 144 S. Ct. 2709 (2024); *Chapman* v. *Doe*, 143 S. Ct. 857 (2023); *Mayorkas* v. *Innovation Law Lab*, 141 S. Ct. 2842 (2021).

The Ninth Circuit has relied on the statement in *Bancorp* that "judicial precedents 'are not merely the property of private litigants,' but are 'valuable to the legal community as a whole'" as a justification for denying vacatur of its own opinions even for mootness by happenstance. *Dickens*, 744 F.3d at 1148 (quoting 513 U.S. at 26); see App., *infra*, 7a (opinion of Berzon, J.). But in the very same passage of *Bancorp*, this Court explained "the public interest is best served by granting relief when the demands of 'orderly procedure' cannot be honored." 513 U.S. at 27 (quoting *Munsingwear*, 340 U.S. at 41). The Court has reiterated that the "normal rule" of vacatur applies even—perhaps especially—to "legally consequential decision[s]." *Camreta*, 563 U.S. at 713. And other courts have recognized that allowing "the precedential value of a decision alone" to defeat vacatur "would swallow *Munsingwear*." *Panera, LLC* v. *Dobson*, 999 F.3d 1154, 1159 (8th Cir. 2021) (quoting *American Family Life Assurance Co. of Columbus* v. *FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997)); accord, *e.g.*, *League of Women Voters of Florida Inc.* v. *Florida Secretary of State*, 66 F.4th 905, 951 (11th Cir. 2023).

The Ninth Circuit's assertion that vacatur "force[s] future courts to duplicate a panel's efforts by re-deciding issues it has already resolved" also does not withstand scrutiny. App., *infra*, 7a (opinion of Berzon, J.) (brackets omitted) (quoting *Dickens*, 744 F.3d at 1148). A "panel opinion even if vacated" does not vanish into thin air but instead remains available online to the public, including future litigants and judges. *Hirschfeld*, 14 F.4th at 328; see *ibid.* (Wynn, J., concurring in the result). If the decision is correct, then the vacated opinion marks the shortest path back to the same result. But if a decision is wrong, the court of appeals could reach the right answer through independent judgment in a future case. And the losing party, no matter the outcome, will have an opportunity to request this Court's review. What the Ninth Circuit's approach seeks, then, is not a chance to persuade, but the unreviewable power to bind even when a decision in a moot case is unpersuasive.

Vacatur of the panel decision in this case is thus warranted. Petitioners never stepped off the "primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments." *Bancorp*, 513 U.S. at 27. Accordingly, the importance of the legal issues cuts in favor of, not against, vacating a published decision that would otherwise bind petitioners even when they are deprived of a full appellate process. *Camreta*, 563 U.S. at 713. And the prejudice is even more plain here when respondent's counsel has represented that "several other" members of the putative class of death-row inmates were "ready and willing to intervene in the action to pursue the same claims" and, if substitution were denied, "will proceed with a new suit in district court," C.A. Doc. No. 69, at 34 n.6, 39 (Feb. 16, 2024), as the panel itself anticipated in

preserving its "decisional framework" for future litigants, App., *infra*, 7a. The Court should "clea[r] the path for future relitigation of the issues" in a non-moot case. *Munsingwear*, 340 U.S. at 40.

B. Even under a more stringent approach to *Munsingwear*, vacatur would still be appropriate in this case. This Court has never endorsed the proposition, sometimes advanced by the Solicitor General, that a petition seeking vacatur under *Munsingwear* should be denied "when a case is otherwise not worthy of review." Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019). Of course, if a party does not file a petition, then the Court has no obligation to roam in search of moot appeals. But requiring a determination whether certiorari would have been granted in a counterfactual non-moot case whenever a party seeks vacatur under *Munsingwear* would only *increase* this Court's workload. And this case in any event would have been a prime candidate for further review, had respondent's death not mooted the appeal.

To start, the clearest sign that this case was worthy of further review is the fact that the Court has granted review of the mirror-image decision on Article III standing in *Gutierrez* v. *Saenz*, No. 23-7809 (Oct. 4, 2024). The petitioner there argued that the Fifth Circuit's rejection of standing under *Reed* v. *Goertz*, 598 U.S. 230 (2023), conflicts with the Ninth Circuit's decision in this case upholding standing under *Reed*. Pet. at 13-14, *Gutierrez*, *supra* (June 25, 2024); see App., *infra*, 59a-63a. And this Court is also poised to provide further guidance by the end of this Term on the redressability analysis in *Reed*. At a minimum, there was a strong possibility that, had this case not become moot, the Court would have held a

petition and later decided whether to grant it, vacate the judgment, and remand for further proceedings consistent with the forthcoming decision in *Gutierrez*.

The case's merits were also worthy of further review. For one thing, the Ninth Circuit held that a state-law guarantee of appointed habeas counsel creates a "property" interest because an inmate might otherwise have to pay money to secure legal representation. App., *infra*, 78a-79a. That decision conflicts with the Sixth Circuit's treatment of "appointed counsel" as a "*procedural* righ[t]," rather than a substantive entitlement protected by the Due Process Clause. *Experimental Holdings, Inc.* v. *Farris*, 503 F.3d 514, 520 (6th Cir. 2007). The decision also cannot be squared with *Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005), because appointed counsel is not "some new species of government benefit or service" but instead a procedure to facilitate fair adjudication in the criminal process. *Id.* at 766-767; see *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). This Court has always treated appointed counsel as a procedural right that safeguards life and liberty—not as a substantive end unto itself—including for the parallel federal statutory right to appointed counsel for certain federal habeas petitioners. *McFarland* v. *Scott*, 512 U.S. 849, 859 (1994); see 18 U.S.C. § 3599(a)(2).

For another, the Ninth Circuit decided whether respondent had been deprived of appointed habeas counsel without due process of law by applying the three-factor balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). App., *infra*, 84a-88a. The court noted respondent's backup argument that the delay violated due process under *Barker* v. *Wingo*, 407 U.S. 514 (1972), and bypassed petitioners' submission that *Medina* v. *California*, 505 U.S. 437 (1992),

supplied the appropriate and more demanding framework. App., *infra*, 85a n.14; see Pet. C.A. Br. 23-24. Its resort to *Mathews* conflicts with numerous decisions applying *Medina* to postconviction procedures. *E.g.*, *Tevlin* v. *Spencer*, 621 F.3d 59, 70 (1st Cir. 2010); *Cunningham* v. *District Attorney's Office for Escambia County*, 592 F.3d 1237, 1256 n.12, 1260-1261 (11th Cir. 2010). This Court routinely grants review to clarify the appropriate standard in cases like this one. See *District Attorney's Office for Third Judicial District* v. *Osborne*, 557 U.S. 52, 69 (2009) (holding that *Medina* governs procedures in state postconviction proceedings); see also *Culley* v. *Marshall*, 601 U.S. 377, 388 (2024) (holding that *Barker* rather than *Mathews* governs timing of hearing in civil forfeiture proceeding); *Nelson* v. *Colorado*, 581 U.S. 128, 135 (2017) (holding that *Mathews* rather than *Medina* governs when "no further criminal process is implicated").

The issues that the Ninth Circuit decided also strike at the heart of the Constitution's allocation of authority between the federal and state sovereigns. Any federal case brought against state judges implicates weighty "principles of equity, comity, and federalism." *Mitchum* v. *Foster*, 407 U.S. 225, 243 (1972). The panel thus was "mindful that this case does implicate the delicate balance 'between federal equitable power and State administration of its own law.'" App., *infra*, 67a (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 500 (1974)). And despite its professed caution, the panel's analysis drew a strong rebuke from the dissent as "an affront to the principles of federalism." *Id.* at 20a (opinion of Bennett, J.).

Unlike for a one-off dispute, the panel decision (unless vacated) has the potential to unleash a barrage

of actions under the panel's "decisional framework" for the hundreds of other capital inmates awaiting appointed counsel. App., *infra*, 7a. Those actions would allow the federal courts to attempt to commandeer more than $100 million of California's limited resources when the California Legislature has not appropriated funds sufficient to attract enough qualified capital habeas attorneys. *Id.* at 22a n.4 (opinion of Bennett, J.). And the decision below could turn every adverse funding decision by federal courts under § 3599 into a springboard for a due-process claim about the deprivation of funding. Cf. *Ayestas* v. *Davis*, 584 U.S. 28, 43-44 (2018). Those profound consequences, if nothing else, confirm that this case would have warranted this Court's review absent mootness.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the Ninth Circuit's decision under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), and remand with instructions to direct the district court to dismiss the case as moot.

Respectfully submitted.

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