No. 23-154

In the Supreme Court of the United States

FRANK KENDALL, SECRETARY OF THE AIR FORCE, ET AL.,
Petitioners,

v.

HUNTER DOSTER, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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JURISDICTION

The decision denying vacatur and en banc review was entered on April 17, 2023, and on July 7, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to August 16, 2023. Petitioners filed the Petition on August 16, 2023. They invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The Petition asks the Court, under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), to grant vacatur of a decision Petitioners admit they voluntarily mooted, but only after litigating to the hilt, losing, and then forgoing multiple opportunities to seek merits review by this Court. Vacatur under *Munsingwear* is always an extraordinary request, but in the circumstances here it is untenable as it would be nothing short of a capstone to Petitioners' strategy of "heads we win, tails you get vacated." That is especially the case here because mootness of the appeal was solely caused by the voluntary actions of Petitioners themselves, who went beyond the requirements of the 2022 NDAA to cease enforcement activities for past violators of the challenged mandate, but *only* if an airman requested an accommodation.

The Court should deny the Petition.

STATEMENT OF THE CASE

A. BACKGROUND AND PROCEEDINGS BELOW.

On August 21, 2021, the Department of the Air Force ("DAF") imposed a COVID-19 vaccination mandate ("Mandate") via a directive of the Secretary of the Air Force ("SECAF") and Secretary of Defense ("SECDEF").[1] [Doc. 11-1, PageID#327; Doc. 11-2, PageID#328-329]. DAF used its regulatory process to handle religious accommodation requests ("RAR") to

[1] Citations are to the docket entry in the District Court and the PageID for the document within that Court.

the Mandate, and that process consisted of the following:

1. Members requested accommodation by documenting their sincerely held religious belief and the substantial burden the Mandate placed on that belief.

2. Members were then subjected to a thorough interview by a DAF Chaplain who made a determination as to (i) the requestor's sincerity; (ii) alternate means explored for religious accommodation; (iii) the substantial burden infringing on religious free exercise; and (iv) a recommendation to the decision authority.[2]

3. Members were then interviewed by their commander who made a recommendation as to whether the RAR could be accommodated.

4. A General Officer (in some instances this was a Colonel), usually a Major Component Commander, then made the initial decision to grant or deny the RAR.[3]

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[2] Department of Air Force Instruction 52-201, *Religious Freedom in the Department of the Air Force*, June 23, 2021, Attachment 5.

[3] Documents produced in discovery, after the entry of injunctive relief, revealed an even more insidious development: DAF withheld approval authority for RAR's from these General Officers (unless they were eligible for an administrative exception), but not denial authority. The Surgeon General was solely authorized to overturn denials for appeals (but only did so for near retirements).

5. When the RAR was denied, members could appeal that determination to the Surgeon General of the Air Force, who was the final appeal authority. *Id.*

Each of the eighteen named Plaintiffs underwent this process in their pursuit of a temporary religious exemption to the Mandate. *Id.* All timely submitted their RAR, and all had a DAF Chaplain confirm the sincerity of their beliefs and the substantial burdening of those beliefs by the Mandate. [Doc. 1, PageID#1-22; Doc. 11-1 through 11-21, PageID#324-573; Doc. 30-3 through 20, PageID#2091-2149]. No Plaintiffs received approvals. [Doc. 11-1 through 11-21, PageID#324-573; Doc. 19-1, PageID#943-947; Doc. 38-1 through 38-6, PageID#2631-2665; Doc. 60-1, PageID#4281-4359]. No Plaintiffs were eligible for, or received, an administrative or medical exemption from the Mandate. *Id.*

After denial of their final appeals, every member was subjected to an order from their commander to vaccinate or face severe consequences including the possibility of prison. [Doc. 19-1, PageID#943-947].

Plaintiffs, most of whom were stationed at Wright Patterson Air Force Base in Dayton, Ohio, filed suit in the United States District Court for the Southern District of Ohio on February 15, 2022. [Doc. 1, PageID#1-22]. Their Complaint raised two claims: one under RFRA, 42 U.S.C. 2000bb-1(c), and an analogous Free Exercise Claim under the First Amendment. *Id.* It sought declaratory and injunctive relief, and class certification under FRCP 23(b)(2). *Id.*

The handling and denial of Plaintiffs' RARs were not unique. Based on DAF's own statistics, as of March 28, 2022, DAF had granted 1,102 medical exemptions and 1,407 administrative exemptions to the Mandate, yet had only granted 25 out of 6,168 total religious accommodation requests (99.6% denial rate).[4] *Id.* Petitioners falsely claim that the RARs at issue are permanent, while medical and administrative exemptions are not. Plaintiffs made clear from the start that they sought temporary exemptions to permit the development of a morally acceptable vaccine. And Air Force Instruction 48-110 *only* allows temporary accommodations for religious and administrative exemptions. *See* https://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-110/afi48-110.pdf (at ¶ 2-6 b.(3)(a)1.) ("For the Air Force, permanent exemptions for religious reasons are not granted; the MAJCOM commander is the designated approval and revocation authority for temporary immunization exemptions.").

Of the few RARs granted, not one was granted without that member also having been eligible for an administrative exemption (i.e., being at the end of their term of service). [Doc. 30-2, PageID#2084-2090; Doc. 74-2, PageID#4527].

The evidence demonstrated that DAF adopted a *de facto* systemic policy to deny RARs other than for members at the end of their term of service, while

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[4] https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-march-2022/.

granting thousands of medical and administrative exemptions. [Doc. 1, PageID#13-14, ¶¶ 51-52, 54].

One Government witness testified that the systemic denial of RARs was due to a stated goal of accommodating even more medical exemptions. [Doc. 25-17 at ¶ 7, PageID#1430-1450]. Consequently, DAF treated medical exemptions as a protected class at the expense of an actual protected class. *Id.* Government witnesses also admitted that natural immunity was highly effective and there was no compelling need to vaccinate those with natural immunity (CDC advised that over 95% of Americans had immunity to COVID-19). *Id.* at ¶ 23.[5]

Further evidence established that temporary medical exemptions were granted for various reasons, including pregnancy, adverse reactions and allergies, yet DAF granted almost no RARs, and the few they did grant would be no different than those granted for medical or administrative reasons alone. [Doc. 25-12, PageID#1395-1403].[6]

DAF allowed members with medical exemptions to be considered medically fit for duty; yet those with, and those seeking, religious exemptions were determined to be unfit for duty. *Id.* at ¶ 7. Further, those receiving medical exemptions did not automatically lose eligibility for deployment with such

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[5] https://covid.cdc.gov/covid-data-tracker/#nationwide-blood-donor-seroprevalence.

[6] Most, but not all, of those seeking religious accommodations pursued such accommodations because the only available vaccines in America had illicit ties to abortion, either in development, manufacture, or confirmation testing.

determinations made on a case-by-case basis, yet all those with religious exemptions were determined to be non-deployable. *Id.* at ¶ 14.[7]

The case of Major Andrea Corvi [Doc. 53-1, PageID#3762-3789] brought this unconstitutional practice into sharp focus. DAF granted Major Corvi a temporary medical exemption for pregnancy, and accommodated her while keeping her job duties, assignments, and work interactions the same, including not limiting in any manner her interactions with over 75 members in her squadron. *Id.* After she delivered her child, it then denied her request for a temporary religious exemption, despite confirming the sincerity of her religious beliefs and the substantial burden on those beliefs. *Id.* The only difference was the reason for the accommodation.

Record evidence confirmed a blanket policy of granting medical exemptions for pregnant members – regardless of duty station, job assignment, or any other individual factor − despite CDC's recommendation that pregnant members be vaccinated. [Doc. 74-1, PageID#4519-4526].

The evidence established a clear, unconstitutional pattern in how DAF treated everyone it documented as having sincerely held religious beliefs substantially burdened by the Mandate. [Doc.

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[7] Administrative exemptions were also granted for a variety of reasons, *Id.* at ¶¶ 17-18, including to any member who was within six months of retirement, which could be for up to 5% of the DAF. *Id.*

46-1, PageID#3121-3124 at ¶¶ 3, 5]. DAF: (i) used the same general process for handling RARs across commands in the active-duty, reserve, and guard; (ii) utilized the same regulations for processing RARs; (iii) utilized the same criteria for processing RARs; (iv) used the same form denial letters; and (v) systemically denied every RAR unless a member also qualified for an administrative exemption. *Id.* at ¶ 4. And these systemic denials occurred regardless of (i) job duties; (ii) level of person-to-person interaction; (iii) time in service; (iv) base; (v) future assignments; (vi) likelihood of deployment; or (vii) any other individual factor. *Id.* at ¶¶ 5-9. This unconstitutional pattern was never refuted by the Government.

A Department of Defense Inspector General Report confirmed this systemic discrimination. [Doc. 91-1, PageID#5042-5045].

Processing of Lt. Doster's RAR highlighted the preordained outcome of DAF's systemically discriminatory practices. *Id.* Numerous officials pointed out that as an engineer with little contact with others, it was easy to grant his RAR because he could telework. [Doc. 36-3, PageID#2411-2412; Doc. 36-3, PageID#2417-2419]. But his RAR was denied because at some unknown point in the future the need to vaccinate may arise. [Doc. 36-3, PageID#2417-2419]. Higher-level reviews admitted there was no valid reason to deny the accommodation, with officers questioning the ability to defend the denial, yet DAF persisted in the denial. *Id.* at PageID#2419, 2476-2479.

DAF and Secretary Kendall ordered active enforcement of the Mandate with various forms of coercion, including threats of administrative and disciplinary action, adverse discharges, and even the threat of court martial. [Doc. 25-8, PageID#1130-1135; Doc. 25-14, PageID#1941, 1943-1945]. That court-martial threat included a sentence of a two-year prison sentence and a punitive discharge. *Id.* at PageID#1944-1945; 10 U.S.C. § 1092.

On March 2, 2022, Plaintiffs sought class certification under FRCP 23(b)(2), consisting of those who sought religious accommodations and were determined by the DAF Chaplains to have sincere beliefs. (Mot. Certify, Doc. 21, PageID#952-959).

On March 25, 2022, the District Court held an evidentiary hearing. [Tr., Doc. 45, 48, PageID#3064-3101, 3206-3348]. Three Plaintiffs testified as representatives of all named Plaintiffs: Lt. Doster, SRA Dills, and Lt. Colonel Stapanon. [Tr., Doc. 45, 48, PageID#3066-3100, 3210-3289]. Plaintiffs established they all had sincerely held religious beliefs that were burdened by the Mandate, and that the Government had the ability to accommodate them. *Id.* In response, the Government elected not to present a single witness to refute this testimony or to defend its systemic discrimination. *Id.*

The District Court entered its opinion on March 31, 2022, narrowly enjoining the Government from punishing Plaintiffs, but left DAF substantial discretion in discriminating against them with respect to assignments and a host of other operational

decisions. (Pet.App.135a-178a), *Doster*, 596 F. Supp. 3d 995.

Rather than immediately appealing that decision, the Government took until May 27, 2022, almost the entire sixty-day appeal period, to appeal. [Doc. 62, PageID#4362-4364]. In the meantime, DAF did not cease its discrimination and continued to pursue the separation of almost ten thousand religious believers. On May 3, 2022, with other separation actions threatened or pending, 230 other airmen moved to intervene. [Doc. 52, PageID#3415-3422].

Just over two months later, on July 14, 2022, the district court denied that intervention, granted class certification, denied the Government's motion to dismiss, and entered a robust class-wide temporary restraining order that contained a thorough analysis on the RFRA claim. (App.111a-134a), *Doster*, 615 F. Supp. 3d 741.

After affording the Government yet another opportunity to put on evidence to refute evidence of systemic discrimination, and the Government declining to do so, the district court then entered a class-wide preliminary injunction on July 27, 2022, reincorporating its prior analysis. (Pet.App.106a–110a). This time, the Government only waited until August 15, 2022, to appeal. [Doc. 82, PageID#4566-4568].

The Government sought an emergency stay against both preliminary injunctions on August 22, 2022, and the Circuit Court directed Plaintiffs to respond by August 25, 2022. On September 9, 2022, the Sixth Circuit denied the Government a stay in a

thorough, published opinion. *Doster*, 48 F.4th 608. Following that, the Government elected not to seek a stay from this Court and instead pursued its appeal in the ordinary course. The parties briefed and engaged in extended argument on both appeals, with the Sixth Circuit rendering its published decision on November 29, 2022. 54 F.4th 398.

Rather than immediately seeking review or stay from this Court, the Government elected to run the clock, by seeking and receiving a thirty-day extension to file an en banc petition, which it filed on December 15, 2022. (6th Cir. Case No. 22-3702 at Doc. 58). In that request, the Government referenced "ongoing legislative developments" and noted that "[i]f enacted, the NDAA would significantly affect this case and the scope of a potential petition for rehearing or rehearing en banc." *Id.*

Meanwhile, on December 23, 2022, Congress passed, and the President signed, the 2023 NDAA, 117 P.L. 263, section 525 of which provided:

> Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members."

The NDAA did not prevent the Government or DoD from imposing another, almost identical

mandate – it merely required rescission of the August 24, 2021 Mandate.

On January 10, 2023, the SECDEF not only rescinded the Mandate as required by the NDAA, but also *voluntarily* directed the discontinuation and rescission of certain adverse actions against *certain* vaccination objectors (those who had sought an accommodation).[8]

On February 13, 2023, the Government moved for en banc review, not as to the merits, but arguing for a mootness determination, not only of the appeal but of the entire case, and requested *Munsingwear* vacatur, as they do here. (6th Cir. Case No. 22-3702 at Doc. 60).

Demonstrating that Petitioners' actions with regard to those who requested RARs were voluntary, and not Congressionally mandated by the NDAA, on February 28, 2023, top Pentagon officials acknowledged to Congress as to those who did *not* request RARs "that the Defense Department is still reviewing for potential 'disciplinary procedures' numerous cases of active-duty troops who refused the shot while the Mandate was in force."[9] The

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[8] https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF.

[9] https://www.washingtontimes.com/news/2023/feb/28/pentagon-has-its-own-long-covid-problem-over-dropp/; Testimony available at: https://armedservices.house.gov/hearings/covid-19s-impact-dod-and-its-servicemembers.

Undersecretary of Defense for Personnel and Readiness, Gilbert Cisneros, admitted, "[t]hey're reviewing the cases because … they [disobeyed] a lawful order." *Id.* This difference in treatment between those who sought exemptions and those who did not clearly evidences the voluntary nature of DAF's treatment of Plaintiffs and class members to try and moot the case.

On April 23, 2023, the Sixth Circuit issued its opinion and decision denying en banc review and vacatur. (Pet.App.179a-183a), *Doster*, 65 F.4th 792. The panel observed that, in light of factual disputes over mootness of the case, "the district court should review this mootness question in the first instance." *Id.* at 793; *see also* 13C Charles Alan Wright et al., Federal Practice and Procedure § 3533.10.3, at 645 & n.31 (3d ed. 2008) (noting "it is common to remand for consideration of mootness by the lower court" where "the appellate court is unsure of the facts").

As to vacatur, the panel stated there was no "basis for the 'extraordinary remedy of vacatur'" *Id.* (*citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994)). The panel explained that the Government's voluntary actions in *not* pursuing past violators who had submitted exemption requests while intending to pursue other violators of the Mandate gave rise to potential mootness: "That a party chooses to comply with our decision is hardly a reason to vacate it." *Id.* Moreover, "the Air Force has not even tried to explain why it is entitled to vacatur when the putative mootness here arose from the government's own actions." *Id.* (*citing Bancorp,* 513 U.S. at 25). "All those actions, of course, occurred well

after we issued our opinions here." *Id.* "Meanwhile, '[j]udicial precedents are presumptively correct and valuable to the legal community as a whole.'" *Id.* (*citing Bancorp*, at 26). "In this case, our opinions will stand as a caution against violating the Free Exercise rights of men and women in uniform—which, by all appearances, is what the Air Force did here." *Id.*

The district court then accepted briefing and evidence on mootness. Plaintiffs adduced testimony of ongoing harm from the Mandate that requires additional relief from the district court and sought limited discovery directed at the mootness issue. [Doc. 112, PageID#5821-5881]. That ongoing harm included loss of retirement credit and pay for thousands of reservists, loss of flying gate months (i.e. credit) for impacted pilots, and ongoing tracking by DAF of every vaccine objector and class member in a military database, accessible to commanders, and resulting in future and ongoing discrimination in assignments, promotion boards, and other adverse career harms. *Id.* While the Government has no intention to correct any of that unremedied harm, and with fact issues unresolved by the district court, it instead requests *Munsingwear* vacatur from this Court.

ARGUMENT

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

The appeal is not moot. Regardless, doubts about mootness should result in the denial of the petition, given the extraordinarily high burden required for *Munsingwear* relief. *See* Part I, *infra*.

There also is little chance this Court would have granted review of the Sixth Circuit's opinion given the lack of meaningful percolation among the courts of appeals, the fact this preliminary injunction posture is not an appropriate vehicle for review, 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 voluntarily mooted this appeal 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 but chose not to do so — a choice that the Government 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.

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*.

Fourth, there is value in keeping the Sixth Circuit's decision on the books. *See* Part III.D, *infra*. It

was issued after extensive deliberation and extended oral argument and serves as a critical warning against government overreach and religious discrimination. 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.13–20. They are wrong, but the Court should deny the Petition even if there are doubts about whether this appeal is actually moot, given the high threshold for *Munsingwear* relief.

There remain ongoing negative effects covered by the injunction, namely maintenance of a database of those who did not comply, used in assignment and promotion purposes, as well as to assess potential future military justice actions. [Resp. Mot. Dismiss Mootness with Declarations, Doc. 112, PageID#5821-5881].

The "heavy burden of persua[ding]" the court that the matter is moot lies with the party asserting mootness, here, the Government. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), *quoting United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). "[A] case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U. S. 165, 172

(2013). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* If there is any additional relief that can be awarded, however, small, a case is not moot. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307-08 (2012); *Chafin*, 568 U. S. 165, 172.

Under the "collateral consequences" exception to mootness, when the plaintiff's primary injury has ceased, the case is not moot if the challenged conduct continues to cause other harm the court is capable of remedying. *Sibron v. New York*, 392 U.S. 40, 53-59 (1968). A continuing collateral consequence is one that provides the plaintiff with a "concrete interest" in the case and for which "effective relief" is available. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984). Here, this ongoing, unremedied harm (the database) is a collateral consequence that demonstrates the lack of mootness.

The appeal also falls within the voluntary cessation doctrine, under which Petitioners must demonstrate 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); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). Here, not only does the Government *not* promise to "never do it again," but in light of the Secretary's statement, no admission of wrongdoing, and Petitioners' request, there is significant reason to believe it will do it again given the opportunity. Further, Petitioners cannot meet their burden because they voluntarily ceased adverse actions and enforcement against *only* persons who sought

accommodation to the Mandate – not for those who did not. That shows their actions are voluntary and driven by litigation concerns, and not the passage of the NDAA, given the testimony of DOD officials before Congress in February. *See* Part III.C, *infra*.

Petitioners' suggestion that the Mandate in question is no more, and that it will not be reimposed, is in serious tension with their demand for *Munsingwear* vacatur, the very purpose of which (as the Government itself has told this Court) is to clear the path for future re-litigation without res judicata concerns. *See* Part III.D, *infra*.

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 1-26 v. Biden*, 72 F.4th 666, 677–78 (5th Cir. 2023) (Ho, J., dissenting) (cleaned up). Petitioners have never admitted to their wrongful behavior. 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.

Further, Petitioners' invocation of mootness in *Mayorkas v. Innovation Law Lab*, 141 S.Ct. 2842 (2021), is inapposite; there, certiorari had been granted by the Court and a new administration took

action for the Government reversing the challenged policy, all of which are not the facts present here.

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 deny the Petition.

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

Petitioners claim that, absent mootness, this Court likely would have granted their petition for a writ of certiorari challenging the underlying merits of the Sixth Circuit's decision and also would have reversed. (Pet. 20–28). Petitioners are wrong on both counts, which provides another basis for denying *Munsingwear* vacatur.

First, under Petitioners' view that COVID-19 is essentially over, and that no future vaccine requirement will be imposed, *see* Pet. 20, this appeal would have presented an especially weak candidate for certiorari. They do not explain why this Court would venture into resolving questions about RFRA, exhaustion, and other legal questions raised when (in Petitioners' telling) those matters are unlikely to arise again down the road.

Even if the foregoing issues within the decision below were framed more broadly, this Court would still likely have awaited further percolation among the lower courts – or at least final adjudication in this case – before granting review. Indeed, the Government has

prevented much of the very percolation necessary for such review by obtaining mootness determinations in several cases. Percolation is especially important here because it can change minds.

Second, the Sixth Circuit's decision, thorough analyses of RFRA and jurisdictional issues are correct. Pet. 14a-48a. That makes it unlikely the Court would have granted review, and more unlikely it would have reversed.

Third, this appeal would have come to this Court in the procedural posture of a preliminary injunction decision, with follow-on litigation to follow (and, as it turns out, follow-on litigation that is *still* pending on the merits). The ongoing harm from the maintenance of the database, as well as uncorrected relief for reserves, pilot gate months, and the like, reflect that this Court will *yet* have the opportunity to fully review this matter, but on a full record. Thus, the Government's contentions about not having the chance to litigate these claims are false.

Petitioners claim the decision below conflicts with plainly distinguishable decisions of this Court. Take *Goldman v. Weinberger*, 475 U.S. 503 (1986), which reviewed a neutral and generally applicable dress code requirement, or *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), which did not address any fundamental constitutional rights or statutory rights, or *Gilligan v. Morgan*, 413 U.S. 1 (1973), a case challenging a future hypothetical use of the national guard being non-justiciable. Unlike those cases, here, there was a Congressionally mandated right and

remedy under RFRA, which was not present in any of the cases the Government cites.

Petitioners next claim they are entitled to such a high degree of deference as to render their constitutional violations unreviewable. But the very cases the Government cites do not stand for that proposition. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008) ("military interests do not always trump other considerations"); *Parisi v. Davidson*, 405 U.S. 34, 54-55 (1972) (rejecting deference arguments and noting that "[i]f there is a statutory or constitutional reason why he should not obey the order of the Army, that agency is overreaching when it punishes him for his refusal," that "matters of the mind and spirit, rooted in the First Amendment, are not in the keeping of the military," and "[w]hen the military steps over those bounds, it leaves the area of its expertise and forsakes its domain," and thus "[t]he matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.").

In a more analogous situation involving a prison context and applying a parallel statute that "mirrors RFRA," this Court unanimously rejected a similar demand for "a degree of deference … tantamount to unquestioning acceptance." *Holt v. Hobbs*, 574 U.S. 352, 357, 364 (2014). If this is the rule pertaining to prisoners, how much more appropriate is it to reject the Government's assertions here of "unquestioning acceptance" of ongoing violations of the constitutional rights of service members who defend such rights with their lives?

Case law and legislative history of RFRA support that *Holt* provides the proper framework for resolving RFRA claims against the military. *Singh v. McHugh*, 109 F. Supp.3d 72, 89 (D.D.C. 2016). *See also* Religious Freedom Restoration Act of 1993, H.R. Rep. No. 103-88, 103rd Cong. at 8 (1993) (even in the military context, "[s]eemingly reasonable regulations" that are based on "speculation," "exaggerated fears," or "thoughtless policies" "cannot stand."). *See, also, Navy Seal 1 v. Austin*, 2022 U.S. Dist. LEXIS 31640 (M.D. Fla. Feb. 18, 2022) ("[military] officials cannot simply utter the magic words ['military readiness and health of the force'] and as a result receive unlimited deference from those of us charged with resolving the dispute", *quoting Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015)); *U.S. Navy Seals 1-26*, 27 F.4th 336, 351 (in the military context, RFRA demands more than simply deferring to military officials' say-so).

"Where the government permits other activities to proceed with precautions [as Petitioners did here], it must show that the religious exercise at issue is more dangerous than those [permitted secular] activities even when the same precautions are applied." *Tandon v. Newsome*, 141 S. Ct. 1294, 1296-97 (2021). "Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Id.* The Government's arguments to the contrary are unavailing.

The Government next argues that the district court got it wrong in declining to defer to an Air Force general's untested declaration, which asserted general interests in the Mandate, but did not address the

Government's "to the person" compelling interest requirement under RFRA. The district court did so only *after* it had held an evidentiary hearing where the Government declined to present any witnesses, failing to rebut the testimony from Plaintiffs which adduced that the Government systemically engaged in discrimination. Part of the absurdity with General Schneider's declaration was his contention that the Air Force needed personnel billets, despite data that the Air Force routinely and substantially failed to meet recruiting and retention goals.[10] The district court was well within its discretion to give that declaration only the weight it deserved, and to apply the plain language of RFRA to save the military careers of approximately 10,000 service members at a time when the military was failing to meet recruiting and retention goals.

In any event, no meaningful circuit split developed on this score. And, in the preliminary injunction context, with litigation to continue (and is ongoing), the appeal presented in its current posture is a poor vehicle for certiorari.

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[10] https://www.airforcetimes.com/news/your-air-force/2023/09/14/entire-air-force-to-miss-recruiting-goal-the-first-failure-since-1999/#:~:text=NATIONAL%20HARBOR%2C%20Md.,the%20next%20generation%20of%20troops; https://www.nbcnews.com/news/military/every-branch-us-military-struggling-meet-2022-recruiting-goals-officia-rcna35078.

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

Even assuming, *arguendo*, that the case is moot and that the Court would have granted review of the underlying merits issues, the Court should still deny the Petition because granting *Munsingwear* relief here would be unprecedented.

A. IF THE APPEAL IS MOOT, PETITIONERS VOLUNTARILY MOOTED THEIR OWN APPEAL.

Despite Petitioners' claim that *Munsingwear* vacatur is "established practice" anytime a case becomes moot on appeal, (Pet. 28), *Bancorp* rejected that 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 … 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 should be granted only in "extraordinary" cases. *Id.* at 26.

Bancorp explained that *Munsingwear* vacatur only is appropriate when appellate review is "prevented through happenstance … where a controversy … 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 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 (2023) (Jackson, J., dissenting).

Petitioners repeatedly lost below, and any suggested mootness was caused by their choice to rescind ongoing enforcement for past violators of the Mandate, but *only* for those who sought accommodations (meaning the Government was not required to do so by the NDAA and instead chose to do so voluntarily with regard to a class of individuals who were suing it). 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. Petitioners nowhere claim that the decision to discontinue such enforcement on a selective basis was not "voluntary" — that the SECDEF was coerced or confused when he did so, or even that he was required by act of Congress to withdraw past violations of the Mandate.

To deny relief here, it is not necessary to show that Petitioners were solely responsible for bringing about the mootness they claim exists (though they obviously were). In *Bancorp* itself, the respondent and

petitioner were equally responsible for the mootness because the parties 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). Petitioners undoubtedly "played a role" in rendering moot a case they repeatedly lost below, and that renders them ineligible for *Munsingwear* relief.

And that is doubly the case where Petitioners took deliberate steps to delay this Court's review at multiple junctures when they could have sought it (by seeking a stay of the injunction following the Sixth Circuit's published denial of same in September 2022, or by immediately seeking this Court's review in November or December 2022, rather than seeking an extended delay to permit themselves to take actions to attempt to moot the case).

The Court should follow its usual course where the party seeking vacatur has lost below, and then even arguably brought about mootness, and deny vacatur.[11]

It is unsurprising that Petitioners cite only a few cases in support of their unprecedented request, all of which are easily distinguishable. In both

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[11] *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).

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 was precisely what made those cases unique. *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 (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 was no intervening presidential election and the Petitioners here are the same as those who (1) issued the challenged policy; (2) lost at the district court; (3) lost (twice) at the Sixth Circuit; (3) voluntarily tried to moot the case; (4) chose not to appeal to this Court despite several opportunities to do so 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, 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*.

Moreover, in *Mayorkas*, the government 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. Here, Petitioners consciously declined to seek merits review, deliberately ran the clock, and opted to try to eliminate the precedential value of the decision below, as discussed next.[12]

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

Petitioners do not claim they were *actually* foreclosed from this Court's review, and they never address the fact nothing in the NDAA kept them from continuing to enforce past non-compliance with the Mandate while it was in force, as they continue to do against those service members who failed to comply without having sought an accommodation. Nothing, including the injunction, kept Petitioners from continuing to enforce past non-compliance with the Mandate 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.

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[12] 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.13-14, 19, 29-30, but those cases are even further afield. Both involved petitioners that had not slept on their ability to seek merits review from this Court. Further, in *Microsoft*, an intervening act of Congress changed the applicable legal regime. Here, the NDAA did not foreclose enforcement for past violations – Petitioners did that voluntarily. *See* 138 S. Ct. at 1187–88; Part III.D, *infra*. And in *Alvarez*, the petitioner had not voluntarily mooted the case in any typical sense.

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*.

Petitioners chose not to pursue any of the options they had at their disposal under the "orderly procedure" for seeking relief from this Court. Even setting aside that Petitioners could have continued enforcement for past non-compliance (as they have done with those who did not seek an accommodation), Petitioners could have (i) sought a stay from this Court after the Sixth Circuit denied stay relief in September, 2022; or (ii) filed a petition for a writ of certiorari promptly after the Sixth Circuit issued its decision in late November 2022, which was more than seven weeks before the Secretary of Defense withdrew the challenged requirement and directed discontinuation of past non-compliance (but only for those who sought an exemption).

Petitioners chose not to promptly seek certiorari on the merits, even though they have done so in many recent cases.[13] In fact, Petitioners intentionally dawdled, using a thirty-day extension to seek en banc review from the Sixth Circuit for the express and stated purpose of waiting to see what action Congress would take in December 2022 – i.e.,

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[13] *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).

deliberately running the clock to take actions to potentially moot the case. After the Sixth Circuit decision issued, Petitioners also had 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.[14] But Petitioners chose not to pursue that path for merits relief – perhaps because the *last* thing Petitioners actually wanted was a merits-based review by this Court that reached the same result as the Sixth Circuit. Plainly, Petitioners could have sought relief, emergency or otherwise, from this Court at any time after the Sixth Circuit declined to grant such relief on September 9, 2022, (Pet.App.80a) putting Petitioners' delay at more than four months.

"[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

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[14] *See Biden v. Missouri*, No. 22A240 (DOJ seeking a stay 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).

(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, 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. "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).

Hypocritically, the Government opposed *Munsingwear* vacatur in prior cases on these same grounds: "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, 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," *Bancorp*, 513 U.S. at 26.

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

Petitioners argue that this appeal is entitled to unprecedented treatment because Congress enacted legislation (at least partially in response to the Sixth Circuit's decision in this case) that required rescission of the Mandate (but that did not halt disciplinary and criminal proceedings for past non-compliance). This is both legally irrelevant and factually misleading.

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 does not matter why they chose to take that voluntary action.

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

1. Petitioners Litigated Vigorously Below and Chose to Not Enforce Past Non-Compliance Only for Those Who Sought Exemptions after Court Losses.

Petitioners waited to see whether they would prevail at the Sixth Circuit and only then decided to take remedial actions in January 2023. This presented an enticing "heads we win, tails you get vacated" proposition for Petitioners. By sidestepping merits review by this Court, Petitioners would not risk a Supreme Court decision affirming the judgment

below. Petitioners were entitled to wait to see how the Sixth Circuit ruled, but they cannot now invoke this Court's equitable power to relieve them of that unfavorable decision after the fact.

The Government suffered scathing losses outlining a discriminatory pattern and practice in several certified class actions under RFRA in three military branches: the Navy in *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022) and *Seals v. Austin*, 594 F. Supp. 3d 767 (N.D. Tex. 2022); the Marine Corps in *Colonel Fin. Mgmt. Officer v. Austin*, 622 F. Supp. 3d 1187 (M.D. Fla. 2022); and the Air and Space Force in this matter (all in accordance with the Department of Defense's Inspector General's findings confirming a pattern of discrimination). [Doc. 91-1, PageID#5042-5045].

Yet the Government did not take an about-face regarding enforcement of the mandate until after those losses and the Mandate rescission, and even since, continues enforcement measures against those who had not sought an accommodation.

After the Sixth Circuit affirmed the injunctions, Petitioners again had the option to seek relief from this Court, *see* Part III.B, *supra*, which might have affirmed the decision below or have been denied and thereby left the Sixth Circuit's decision as precedent. But *Munsingwear* presented what seemed like a win-win alternative: wait for the NDAA to be passed, withdraw past enforcement (but only for those within the class), then ask the Sixth Circuit and later this Court to erase the Sixth Circuit's decision.

Munsingwear provided an opportunity for Petitioners to be freed from a decision for which they have reserved a unique level of enmity.[15] But "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. "*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 party seeking *Munsingwear* relief played a direct, voluntary role in bringing about that supposed mootness and also declined to seek merits review from this Court.

Petitioners were entitled to wait and see whether they prevailed in the case below, and were entitled to withdraw enforcement measures for past non-compliance of the Mandate. But having voluntarily and strategically taken those steps, Petitioners cannot now invoke this Court's equity to relieve them of the natural consequences of their own

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[15] *See* Pet.20–29 (devoting four times more space to criticizing the decision below than to explaining why *Munsingwear* is equitable).

decisions and the precedential effect of the decision below.

2. No Legal Requirements Prompted Withdrawal of Past Enforcement of the Mandate.

The NDAA only required rescinding the August 2021 Mandate. We know that because Petitioners have continued enforcement against those who had not sought accommodations from it.

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.

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

Another factor favoring denial 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 Sixth Circuit's decision addresses important issues under RFRA

reached after extensive briefing and extended argument. "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 Sixth Circuit's decision remains on the books as a warning for 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 recent history, the Sixth Circuit's 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 also previously told this Court it should deny *Munsingwear* relief where the challenged policy "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 did deny vacatur, *see* 139 S. Ct. 791 (2019).

Petitioners insist the Mandate will not be re-issued, and thus these matters will not be "relitigat[ed] … between the parties," *Munsingwear*, 340 U.S. at 40. Yet, as already demonstrated, the underlying matter is not over, and Petitioners will yet have their opportunity to present their merits' arguments, with the benefit of a full record, given the additional relief that is necessary as the case is not moot.

Further reinforcing this conclusion is the fact that the Sixth Circuit's decision addresses only an interlocutory preliminary injunction.[16] "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). That represents the standard rule among the courts of appeal when facing preliminary injunctions that have allegedly become moot, because res judicata does not usually apply to such decisions. *See, e.g., id.*; *U.S. Navy SEALs*, 72 F.4th at 675 n.9;

[16] Indeed, Petitioners repeatedly argue the mootness only of the injunction appeal specifically.

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 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); *University of Texas v. Camenisch*, 451 U.S. 390 (1981). 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* relief for a preliminary ruling but, again, 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 Sixth Circuit's ruling provides yet another basis for denying *Munsingwear* relief.

CONCLUSION

The Court should deny the Petition. Granting it would set a dangerous precedent providing a windfall to parties who litigated a case to the hilt in the lower courts and — only upon receiving unfavorable decisions and declining to seek merits review from this Court, and then taking steps to moot the case — are rewarded by vacatur which erases their deliberately unreviewed loss from the books.

If the Court is considering the unprecedented step of granting vacatur here, 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).

Respectfully submitted,

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