No. 24-1221

In the Supreme Court of the United States

SUSAN NEESE AND JAMES HURLY, PETITIONERS

v.

ROBERT F. KENNEDY JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES OF AMERICA, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Solicitor General acknowledges that this case became moot when Secretary Kennedy rescinded the challenged notification on May 14, 2025. *See* Department of Health and Human Services, *Notification of HHS Documents Identified for Rescission*, 90 Fed. Reg. 20,393, 20,394 (May 14, 2025), http://bit.ly/3SGlliK [https://permacc/AFP9-7S8X] (Pet. App. 54a).

Yet the Solicitor General opposes vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), because he claims that: (1) the petition would not have otherwise warranted certiorari; and (2) the equities counsel against vacatur. Neither argument has merit.

I. A PETITIONER SEEKING MUNSINGWEAR VACATUR IS NOT REQUIRED TO SHOW THAT THE PETITION WOULD BE INDEPENDENTLY CERTWORTHY

This Court's established practice is to summarily vacate under *Munsingwear* when a challenged law or policy is rescinded after the court of appeals renders judgment, without regard to whether the underlying issues would have been certworthy in their own right. *See* Pet. at 7–9 (citing authorities); *see also Payne v. Biden*, 144 S. Ct. 480 (2023) (summarily vacating under *Munsingwear* after the president revoked a challenged executive order); *Biden v. Feds for Medical Freedom*, 144 S. Ct. 480 (2023) (same); *Kendall v. Doster*, 144 S. Ct. 481 (2023) (summarily vacating under *Munsingwear* after the Secretary of Defense rescinded his challenged order); *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (summarily vacating under *Munsingwear* after President Biden revoked the challenged use of taxpayer money to pay for a border wall); *Slatery v. Adams & Boyle, P.C.*, 141 S. Ct. 1262 (2021) (summarily vacating under *Munsingwear* after the challenged executive order expired).

The Solicitor General insists that *Munsingwear* vacatur be reserved for petitions that would have warranted this Court's review in the absence of mootness. Opp. at 5–10. But that stance is incompatible with the practice of this Court. Many of the lower-court decisions that this Court has summarily vacated under *Munsingwear* did not implicate circuit splits warranting this Court's review or present otherwise certworthy issues. *See Kendall v. Doster*, 144 S. Ct. 481 (2023) (summarily vacating under *Muns-*

ingwear despite the absence of a circuit split); *Biden v. Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220 (2021) (same); *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (same); *Beers v. Barr*, 140 S. Ct. 2758 (2020) (same); *Alabama v. Davis*, 446 U.S. 903 (1980) (same); *see also Alabama v. Alabama State Conference of NAACP*, 141 S. Ct. 2618 (2021) (summarily vacating under *Munsingwear* when an interlocutory appeal was mooted by the district court's entry of final judgment, even though the petitioner never argued that the underlying issue was independently certworthy); *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (summarily vacating under *Munsingwear* even though the petitioners had alleged only a shallow 1-1 circuit split on an issue of candidate standing); *Wells Fargo & Co. v. City of Miami*, 140 S. Ct. 1259 (2020) (summarily vacating under *Munsingwear* even though the alleged circuit split was illusory and unimportant).

The Solicitor General does not claim that all of the petitions that triggered summary vacatur under *Munsingwear* would have qualified for certiorari apart from the mootness issue. So he cannot (and does not) argue that this Court requires petitioners seeking *Munsingwear* vacatur to show that their underlying claims would have warranted this Court's review in the absence of mootness. Instead, the Solicitor General claims:

> *The United States has thus consistently taken the position that* when a case becomes moot after the court of appeals enters its judgment but before this Court acts on a petition for a writ of certiorari, *Munsingwear* vacatur is appropriate

> only if the question presented would have merited this Court's review absent the intervening mootness.

Opp. at 6 (emphasis added). That is indeed the longstanding position of the Solicitor General's office,[1] but it has never been adopted by this Court.[2] In *Beers v. Barr*, 140 S. Ct. 2758 (2020), for example, this Court summarily vacated under *Munsingwear* when the case had become moot after the court of appeals' ruling — and it did so even though the Solicitor General opposed vacatur on the ground that the underlying issues were not independently worthy of this Court's review. In his brief opposing certiorari in *Beers*, the Solicitor General wrote:

> Petitioner suggests (Pet. 26) that the Court vacate the judgment below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). As a general matter, that remedy is available to peti-

1. *See* Gov't Br. in Opp. at 4–8, *Velsicol Chemical Corp. v. United States*, 435 U.S. 942 (1978) (No. 77-900); Opp. at 6 (citing previous certiorari-stage briefs filed by the government).

2. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19–28 & n.34 (11th ed. 2019) ("In his brief in opposition to certiorari in *Velsicol Chemical Corp. v. United States*, No. 77-900, cert. denied, 435 U.S. 942 (1978), . . . the Solicitor General suggested that the Court need not consider the often-difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. *The Court has never said that it accepted the government's position in Velsicol*" (emphasis added)); *Commodity Futures Trading Comm'n v. Board of Trade of the City of Chicago*, 701 F.2d 653, 657 (7th Cir. 1983) (Posner, J.) ("[T]he Supreme Court . . . has never said it has accepted" the Solicitor General's argument in *Velsicol*).

> tioners who otherwise satisfy the usual criteria for certiorari, but who "have been prevented" by mootness "from obtaining the review to which they are entitled." *Ibid.* If, however, a petitioner is not otherwise "entitled" to review under the usual criteria for certiorari, he is not entitled to vacatur under *Munsingwear* either, and the appropriate course in such a case is simply to deny the petition. See Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4 n.34 (11th ed. 2019) (noting that the Court routinely "denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review"); see also, *e.g.*, Gov't Amicus Br. at 10, *McFarling v. Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31). And here, this case would not warrant review even apart from mootness because, as explained above, it does not involve any well-developed circuit conflict.

Brief in Opposition at 12, *Beers v. Barr* (No. 19-864), 2020 WL 1957383, at *12. Yet the Court summarily vacated under *Munsingwear*,[3] even though the underlying issues were not certworthy and even though the Solicitor General had urged the Court to deny certiorari on that basis.

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3. *See Beers v. Barr*, 140 S. Ct. 2758, 2759 (2020) ("Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).").

This Court took the same tack in *Wells Fargo & Co. v. City of Miami*, 140 S. Ct. 1259 (2020), even though the respondent in that case opposed *Munsingwear* vacatur because the petition for certiorari "would have otherwise been denied." Suggestion of Mootness at 8, *Wells Fargo & Co. v. City of Miami* (No. 19-688), 2020 WL 598606, at *8 (title-case capitalization omitted); *see also* Brief in Opposition at 8–37, *Wells Fargo & Co. v. City of Miami* (No. 19-688), 2020 WL 504787, at *8–37 (explaining why the petition was not certworthy). Here, too, the Court summarily vacated under *Munsingwear* despite the uncertworthiness of the underlying issues, while again rejecting the argument that *Munsingwear* vacatur should be reserved for petitions that would otherwise merit certiorari.

This is not to say the Court should always grant certiorari and vacate under *Munsingwear* when a petitioner claims that a case has become moot on its way to this Court. It will still be appropriate to deny certiorari if the case is not actually moot, or if the mootness argument is vigorously contested by the parties or debatable among jurists of reason. *See Military-Veterans Advocacy Inc. v. McDonough*, 143 S. Ct. 2609 (2023) (denying certiorari when the Solicitor General disputed the petitioner's mootness argument); *Idaho Dep't of Correction v. Edmo*, 141 S. Ct. 610 (2020) (denying certiorari, over the dissent of two justices, when the respondent contested the petitioners' claim that the case had become moot); Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19–28 & n.34 (11th ed. 2019) ("In *Velsicol* . . . , the Solicitor General suggested that the Court *need not consider* the *often-difficult* question of mootness at the certiorari stage when

a case is otherwise not worthy of review." (emphasis added)); *id.* (observing that this Court "will simply deny certiorari" in "*arguably* moot cases unless the petition presents an issue (other than mootness) worthy of review." (emphasis added)). But when a case becomes *indisputably* moot on its way to this Court because the challenged law or policy has been rescinded, this Court should vacate under *Munsingwear*. *See supra* at 2 (citing examples).

Finally, the Solicitor General's stance is incompatible with *Azar v. Garza*, 584 U.S. 726 (2018), which vacated the lower-court proceedings under *Munsingwear* when the case had been mooted before certiorari by the unilateral action of the party that prevailed in the court of appeals. The Court explained its decision as follows:

> When "a civil case from a court in the federal system . . . has become moot while on its way here," this Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Because this practice is rooted in equity, the decision whether to vacate turns on "the conditions and circumstances of the particular case." *United States v. Hamburg–Amerikanische Packetfahrt–Actien Gesellschaft*, 239 U.S. 466, 478 (1916). One clear example where "[v]acatur is in order" is "when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71–72

> (1997) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 23 (1994)).

Id. at 729. So while *Garza* acknowledges that *Munsingwear* vacatur is "rooted in equity" and depends on "the conditions and circumstances of the particular case," it goes on to say that vacatur will be warranted when mootness is caused by the "unilateral action of the party who prevailed in the lower court"—and it describes this is a "clear example" of where "vacatur is in order." *Id.* (citations and internal quotation marks omitted). Notably absent from *Garza* is any statement or suggestion that the Court would have granted certiorari to review the lower court's decision in the absence of mootness, or that petitioners seeking *Munsingwear* vacatur must show that the underlying issues in the case would have been independently certworthy. *See id.* at 729–31. The mere fact that the plaintiff had mooted her claim after prevailing in the court of appeals sufficed to trigger *Munsingwear* vacatur. *See id.* at 729 ("The litigation over Doe's temporary restraining order falls squarely within the Court's established practice [of *Munsingwear* vacatur]. . . . It is undisputed that Garza and her lawyers prevailed in the D.C. Circuit, took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment."). It is also hard to imagine that this Court would have granted certiorari to review the merits in *Garza* as there was no circuit split, the underlying issue involved the scope of abortion rights under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*,

505 U.S. 833 (1992), and the petition was filed at a time when this Court was bitterly divided over the issue of abortion and rarely granted certiorari in abortion-related cases.

II. THE EQUITIES SUPPORT VACATUR

The Solicitor General correctly observes that the decision to vacate under *Munsingwear* "'turns on the conditions and circumstances of the particular case.'" Opp. at 12 (quoting *Garza*, 584 U.S. at 729) (some internal quotation marks omitted). But he ignores the fact that this Court has held that "vacatur is in order . . . when mootness occurs through . . . the unilateral action of the party who prevailed in the lower court." *Garza*, 584 U.S. at 729 (some internal quotation marks omitted). This case was mooted by the government's unilateral action in rescinding the challenged notification after it prevailed in the court of appeals. Under *Garza*, that qualifies as "a clear example" for which "vacatur is in order." *Id.*

The government nonetheless claims that this Court should withhold vacatur because the withdrawal of the challenged notification was not made to "improperly frustrate[] further review," but rather to implement the policy of a new administration. Opp. at 12 ("'It is hardly improper for' agencies to follow 'the philosophy of the administration.'" (quoting *Biden v. Texas*, 597 U.S. 785, 812 (2022)). But this Court consistently vacates under *Munsingwear* when the government rescinds its challenged policy after a change in administrations, and it does not require litigants to allege or show that the new administration changed positions for the purpose of "frustrating further review." *See, e.g.*, *Yellen v. United States House of*

Representatives, 142 S. Ct. 332 (2021) (summarily vacating under *Munsingwear* after President Biden revoked the challenged use of taxpayer money to pay for a border wall); *al-Marri v. Spagone*, 555 U.S. 1220 (2009) (summarily vacating under *Munsingwear* after the Obama Administration mooted the petitioner's challenge to his enemy-combatant designation by releasing him from military custody and transferring him to the custody of the Attorney General). This Court will also vacate under *Munsingwear* when a challenged law or order expires by its own terms, even though the government did nothing "improper" by allowing its expiration and even though there was no desire or motivation to "frustrate[] further review."[4] *See Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (summarily vacating under *Munsingwear* after the challenged executive order expired); *Trump v. Hawaii*, 583 U.S. 941 (2017) (summarily vacating under *Munsingwear* after the provisions of a challenged executive order "expired by [their] own terms" (citation and internal quotation marks omitted)); *Trump v. Int'l Refugee Assistance*, 583 U.S. 912 (2017) (same); *Burke v. Barnes*, 479 U.S. 361, 363. 365 (1987) (vacating under *Munsingwear* after the challenged bill "expired by its own terms"); *Slatery v. Adams & Boyle, P.C.*, 141 S. Ct. 1262 (2021) (summarily vacating under *Munsingwear* after the challenged executive order expired). When a challenged policy is rescinded or expires before the petitioner seeks certiorari, this Court will vacate under *Munsingwear* without regard to whether the government

4. Opp. at 12.

acted "improperly" or sought to frustrate this Court's review.

The Solicitor General is also wrong to deny that vacatur will preserve a "'path for future relitigation.'" Opp. at 12 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)). The court of appeals issued a published and precedential opinion requiring litigants who bring pre-enforcement challenges to show that "an enforcement proceeding is imminent." Pet. App. 4a; *see also id.* ("[T]here is no evidence that an enforcement proceeding is imminent."). That stance is at odds with the precedent of this Court,[5] and it will hinder the ability of litigants in the Fifth Circuit to bring pre-enforcement challenges to any statute or agency rule. The Court should wipe the slate clean rather than bind future litigants in the Fifth Circuit to this dubious pronouncement.

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5. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973) (allowing abortion providers to challenge a state abortion statute "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."); *Stenberg v. Carhart*, 530 U.S. 914, 938–46 (2000) (allowing abortion providers to bring a pre-enforcement challenge to Nebraska's partial-birth abortion statute on the ground that it would prohibit the dilation and evacuation (D&E) procedure—despite the fact that the Attorney General of Nebraska had *specifically disclaimed* any intention to enforce the statute against doctors who perform D&E abortions); *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (allowing abortion providers to challenge provisions of the Texas Heartbeat Act that *could* be interpreted to allow state licensing officials to discipline medical professionals that perform or assist post-heartbeat abortions, even though the state officials that were sued vigorously contested this interpretation of the statute and denied any intention to enforce the statute against anyone).

The Solicitor General is equally wrong to assert that a *Munsingwear* vacatur "would contravene the rule that federal courts 'can address jurisdictional issues in any order [they] choose.'" Opp. at 11 (quoting *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4 (2023)). When the mootness of a case is indisputable, but the Article III standing issues are contested, it is not only permissible but sensible to dismiss the case exclusively on mootness grounds rather than leave in place a precedential holding on a disputed constitutional question. *See Acheson Hotels*, 601 U.S. at 4–5; *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."). Vacatur for mootness in these situations is consistent with the passive virtues and constitutional avoidance. Matters would be different if the mootness issue were difficult or contested, or if the lack of Article III standing were beyond cavil. But *Munsingwear* vacatur is the superior option when the mootness of a case is patently obvious while its Article III standing issues remain open to debate.

CONCLUSION

The petition for writ of certiorari should be granted. The Court should summarily vacate the court of appeals' judgment and opinion under *Munsingwear* and remand with instructions to dismiss the case.

Respectfully submitted.

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