No. 24-6203

IN THE SUPREME COURT OF THE UNITED STATES

JESUS PEREZ-GARCIA AND JOHN THOMAS FENCL, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to vacatur of the decision below.

2. Whether courts of appeals may issue an opinion explaining an earlier order if the case becomes moot after the order but before issuance of the opinion.

ADDITIONAL RELATED PROCEEDING

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

United States v. Fencl, No. 24-1373 (pending)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A47) is reported at 96 F.4th 1166.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2023. The court of appeals denied a petition for rehearing en banc on September 4, 2024. On November 27, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 2, 2025. The petition was filed on December 20, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners John Thomas Fencl and Jesus Perez-Garcia received pretrial release subject to conditions requiring them to refrain from possessing firearms. See Pet. App. A4-A5. The court of appeals issued an order affirming those conditions, stating that an opinion explaining the order would follow. See id. at A5. Before the court could issue the opinion, Fencl was convicted after a jury trial, and Perez-Garcia's bond was revoked after he absconded, mooting the challenges to the conditions. See id. at A8. The court then issued an opinion explaining its rationale for its earlier disposition. See id. at A1-A47.

1. In June 2021, Fencl was arrested after a search of his home uncovered more than 110 guns (including three short-barreled rifles), thousands of rounds of ammunition (including armor-piercing and incendiary rounds), four silencers, and a tear-gas grenade. See Pet. App. A5. A grand jury indicted him on seven counts of possessing unlicensed short-barreled rifles or silencers, in violation of 26 U.S.C. 5681(d) and 5871. See Fencl Superseding Indictment. A magistrate judge granted Fencl pretrial release, subject (as relevant here) to the requirement that he "must not possess or attempt to possess a firearm" and "must legally transfer all firearms, as directed by Pretrial Services." Pet. App. A6; see 18 U.S.C. 3142(c)(1)(B)(viii) (authorizing the imposition of such a condition).

In June 2022, Perez-Garcia was arrested after a customs inspection at the U.S.-Mexico border. See Pet. App. A6. He was the passenger in a car containing 11 kilograms of methamphetamine and half a kilogram of fentanyl. See ibid. The government charged him with two counts of importing controlled substances into the United States, in violation of 21 U.S.C. 952 and 960. See Perez-Garcia Information 1-2. A magistrate judge granted him pretrial release, subject (as relevant here) to substantially the same condition that was imposed on Fencl. See Pet. App. A6.

After this Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022), each petitioner moved to modify the release conditions, arguing (as relevant here) that the firearm condition violated the Second Amendment. See Pet. App. A6. In each case, a magistrate judge denied the motion, and the district court affirmed. See ibid.

2. Each petitioner appealed in December 2022. See Pet. App. A7. The court of appeals consolidated the appeals and received expedited briefing. See id. at A2, A7. In January 2023, the same day that it heard argument, the court issued an order affirming the district court's decisions and stating that "[a]n opinion explaining this disposition will follow." Id. at A7.

After the court of appeals issued its order but before it issued its opinion, both cases became moot. A jury found Fencl guilty on all counts. Fencl Judgment 1-2. Perez-Garcia absconded, and the district court revoked his bond. See Pet. App. A8 & n.4.

3. In March 2024, the court of appeals issued its opinion explaining its earlier order. Pet. App. A1-A47. The court first denied petitioners' motion, filed days after Fencl's conviction, to dismiss the case as moot. See Pet. App. A7-A12. The court observed that the case was not moot when it issued its order and explained that "[i]t is not uncommon for appellate courts to resolve urgent motions by filing an expedited and summary order, later to be followed by an opinion that provides the reasoning underlying the order." Id. at A7; see id. at A9-A12.

Turning to the merits, the court of appeals explained that petitioners' pretrial-release conditions complied with the Second Amendment. See Pet. App. A14-A46. First, the court determined that "our society has traditionally subjected criminal defendants to temporary restrictions on their liberty -- including restrictions that affect their ability to keep and bear arms -- to protect public safety and to ensure defendants' attendance at trial." Id. at A27; see id. at A27-A35. Second, the court determined, in the alternative, that the pretrial-release conditions fit within the historical tradition of "disarm[ing] groups or individuals whose possession of firearms would pose an unusual danger, beyond the ordinary citizen, to themselves or others." Id. at A36; see id. at A36-A46.

4. The court of appeals denied petitioners' petition for rehearing. Pet. App. B1-B66.

Judge Sanchez (the author of the panel opinion), joined by six other judges (including the other two members of the panel), issued a concurring opinion. Pet. App. B4-B14. He stated that the panel's decision was consistent with, and "vindicated" by, this Court's intervening decision in United States v. Rahimi, 602 U.S. 680 (2025). Pet. App. B10.

Judge VanDyke dissented. Pet. App. B14-B66. He expressed the view that the panel opinion was "rife with methodological errors" and that the court of appeals should have "take[n] this * * * case en banc 'for the purpose of vacating the decision.'" Id. at B23 (brackets and citation omitted).

ARGUMENT

Petitioners ask (Pet. 9-26) this Court to grant the petition for a writ of certiorari, vacate the court of appeals' decision, and remand the case. They also contend (Pet. 26-37) that the court of appeals lacked authority to issue an opinion explaining its previous order because the case became moot during the intervening period. But petitioners lack appellate standing to seek vacatur or review of the court of appeals' opinion, and the fugitive disentitlement doctrine requires automatic dismissal of Perez-Garcia's petition. In any event, petitioners are not entitled to vacatur of the decision below. The court's issuance of an opinion explaining an earlier order comports with Article III and does not conflict with any decision of this Court or any other court of appeals. This Court should deny the petition.

1. Two threshold obstacles -- Article III standing and the fugitive disentitlement doctrine -- preclude petitioners from seeking review of the decision below.

a. Start with Article III standing. "The requirement of standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" West Virginia v. EPA, 597 U.S. 697, 718 (2022) (citation omitted). A petitioner has appellate standing only if he has suffered "an injury 'fairly traceable to the judgment below'" and "a 'favorable ruling' from the appellate court 'would redress that injury.'" Ibid. (brackets, citation, and emphasis omitted).

In some circumstances, a petitioner may have appellate standing even if the underlying suit has become moot. See Camreta v. Greene, 563 U.S. 692, 701-703, 709-710 (2011). For instance, a government official generally may seek vacatur of a decision in a moot case because the decision injures him by setting a precedent that "governs [his] behavior." Id. at 708. But this Court has explained that, where a petitioner "could not challenge an appellate decision in this Court," the Court would not "vacate that decision, even if the case later became moot." Id. at 712 n.10.

Petitioners lack standing to challenge the court of appeals' decision in this Court. Although vacatur of that decision could help other criminal defendants, petitioners have no personal stake in whether Ninth Circuit precedent allows release conditions pro-

hibiting firearm possession. Petitioners cannot establish appellate standing by speculating that they will again violate the law, be re-arrested, and be released on condition of refraining from possessing firearms. Cf. United States v. Sanchez-Gomez, 584 U.S. 381, 391-392 (2018) (litigant may not establish standing by speculating that he "will again violate the law, be apprehended, and be returned to pretrial custody"). Besides, petitioners would likely be prohibited from possessing firearms even apart from any release conditions -- Fencl as a convicted felon, see 18 U.S.C. 922(g)(1), and Perez-Garcia as a fugitive, see 18 U.S.C. 922(g)(2).

b. The fugitive disentitlement doctrine independently bars review. In general, flight "disentitles the defendant to call upon the resources of th[is] Court for determination of his claims." Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam). That rule "serves an important deterrent function and advances an interest in efficient, dignified appellate practice." Ortega-Rodriguez v. United States, 507 U.S. 234, 242 (1993). This Court has thus repeatedly dismissed certiorari petitions and appeals filed by fugitives. See, e.g., Daly v. United States, 465 U.S. 1075 (1984); Stockheimer v. United States, 429 U.S. 966 (1976); Eisler v. United States, 338 U.S. 189, 190 (1949) (per curiam); Bonahan v. Nebraska, 125 U.S. 692, 692 (1887); Smith v. United States, 94 U.S. 97, 97-98 (1876). Consistent with those precedents, this Court should, at a minimum, leave the court of appeals' decision in place as to Perez-Garcia.

2. Even putting aside those threshold problems, petitioners are not entitled to vacatur of the court of appeals' decision.

a. Petitioners argue (Pet. 10-15) that this Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case (GVR) in light of United States v. Rahimi, 602 U.S. 680 (2024). That argument is flawed on multiple levels.

First, petitioners cite no precedent for a GVR order in a moot case. See Pet. 15 (because "[t]he case is moot," it "comes to this Court in a different procedural posture" than "other recently vacated Second Amendment opinions"). A GVR order enables "judicial reconsideration of the merits" in light of an intervening legal development. Lawrence v. Chater, 516 U.S. 163, 174 (1996) (per curiam). It also "assists this Court by procuring the benefit of the lower court's insight before [this Court] rule[s] on the merits." Id. at 167. But a GVR order cannot serve those purposes in a moot case.

Second, "GVR orders are premised on matters that [this Court] ha[s] reason to believe the court below did not fully consider." Lawrence, 516 U.S. at 168. Although the court of appeals' opinion predated Rahimi, the panel fully considered Rahimi before denying the petition for panel rehearing. See Pet. App. B3 (denial of panel rehearing). All three panel members also concurred in the denial of rehearing en banc, stating that Rahimi "vindicates" their earlier analysis. Id. at B5 (Sanchez, J., concurring).

Finally, even apart from the denial of rehearing, a GVR order would be inappropriate because petitioners have not established a "reasonable probability that the decision below rests upon a premise that the lower court would reject" in light of Rahimi. Lawrence, 516 U.S. at 167. The court of appeals upheld the release conditions on two alternative grounds: (1) "criminal defendants" may be subjected to "temporary restrictions" that "affect their ability to keep and bear arms" when necessary "to protect public safety and to ensure [their] attendance at trial," Pet. App. A27, and (2) the government may disarm "groups or individuals whose possession of firearms would pose an unusual danger," id. at A36. See id. at B7 (Sanchez, J., concurring) (describing those grounds as "alternative holdings"). In explicating the second rationale, the court at one point stated that legislatures may disarm persons who are not "responsible," id. at A36 -- a formulation that Rahimi rejected, see 602 U.S. at 701-702. But the panel members later clarified that the panel's analysis "centered on dangerousness, rather than responsibility." Pet. App. B12 n.4 (Sanchez, J., concurring). In any event, even if Rahimi affects the second alternative holding, it leaves the first alternative holding untouched.

b. Petitioners also err in arguing (Pet. 15-19) that this Court should vacate the decision below under United States v. Munsingwear, Inc., 340 U.S. 36 (1950). Munsingwear explains that "[t]he established practice of the Court in dealing with a civil

case from a court in the federal system which has become moot while on its way here" is to "vacate the judgment below and remand with a direction to dismiss." Id. at 39 (emphasis added). "It is an open question, however, whether the vacatur rule of Munsingwear even applies in criminal cases." United States v. Tapia-Marquez, 361 F.3d 535, 537-538 (9th Cir. 2004); see United States v. Flute, 951 F.3d 908, 909 (8th Cir. 2020) ("not altogether clear that [Munsingwear] appl[ies] in the context of criminal cases").

Regardless, a party may seek Munsingwear vacatur only if the case would have warranted certiorari but for mootness. See, e.g., Camreta, 563 U.S. at 712-713; Pet. at 16-17, Yellen v. United States House of Representatives, 142 S. Ct. 332 (2021) (No. 20-1738); Stephen M. Shapiro et al., Supreme Court Practice § 19.4, at 19-28 to 19-29 & n.34 (11th ed. 2019). Petitioners have not shown that the underlying merits question here -- whether pretrial release conditions restricting the possession of firearms comply with the Second Amendment -- is the subject of a circuit conflict or otherwise warrants this Court's review.

A petitioner also may not seek Munsingwear vacatur if he "caused the mootness by voluntary action." U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 24 (1994). Perez-Garcia caused mootness here by absconding. It would be perverse to reward him with "the equitable remedy of vacatur." Id. at 25.

c. Finally, petitioners argue (Pet. 19-26) that this Court should vacate the court of appeals' decision so that it will not

bind future Ninth Circuit panels. But the purpose of vacatur is to "'clea[r] the path for future relitigation of the issues between the parties'" by eliminating a moot judgment's "preclusive effect" -- not to assist third parties by eliminating its precedential effect. Bonner Mall, 513 U.S. at 22 (emphases added; citation omitted). Litigants in future Ninth Circuit cases remain free to argue that the court should disregard any portions of the decision below that conflict with Rahimi. See, e.g., Kohn v. State Bar of California, 119 F.4th 693, 698 (9th Cir. 2024) (holding that an earlier Ninth Circuit case had been "overruled by intervening Supreme Court precedent"). And if the Ninth Circuit in a future case repeats the purported methodological errors that it committed in this case, see Pet. 22-26, an affected litigant could at that point seek review in this Court.

3. Petitioners separately argue (Pet. 26-37) that a court of appeals lacks the authority to issue an opinion explaining an earlier order if the case has become moot in the meantime. That contention lacks merit and does not warrant this Court's review.

Courts routinely resolve urgent motions by issuing expedited orders and by later following up with opinions explaining their decisions. See, e.g., Dellinger v. Bessent, No. 25-5052, 2025 WL 717383, at *1 (D.C. Cir. Mar. 5, 2025) (issuing a stay and stating that "[a]n opinion will follow in due course"). A court may follow that practice even if the case becomes moot by the time of the opinion, so long as the case was live when the court issued the

order. For example, in Ex parte Quirin, 317 U.S. 1 (1942), this Court issued a short per curiam order a day after oral argument and then issued a full opinion months later, even though the case had become moot in the meantime. See id. at 20; see also Pet. 32 (conceding that this Court "issued an opinion after a case mooted" in Quirin). And courts of appeals have issued opinions explaining earlier expedited orders despite claims of intervening mootness. See, e.g., Hassoun v. Searls, 976 F.3d 121, 129-130 (2d Cir. 2020); United States v. Vane, 117 F.4th 244, 249 (4th Cir. 2024); Little Rock School District v. Pulaski County Special School District No. 1, 839 F.2d 1296, 1299-1301 & n.1 (8th Cir.), cert. denied, 488 U.S. 869 (1988).

Contrary to petitioners' suggestion (Pet. 29), the decision below does not conflict with the Ninth Circuit's previous decision in Environmental Protection Information Center, Inc. v. Pacific Lumber Co., 257 F.3d 1071 (2001) (EPIC). EPIC concerned "whether [a litigant] was an 'aggrieved' party with standing to request an appellate court to vacate statements made by the lower court after it had rendered judgment in [the litigant's] favor." Pet. App. A10 n.6 (citation omitted). EPIC "said nothing about an appellate court's discretionary authority" to issue opinions explaining earlier orders. Ibid. In all events, an intra-circuit conflict within the Ninth Circuit would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Petitioners similarly err in arguing (Pet. 30-31) that the decision below conflicts with Coalition to End the Permanent Congress v. Runyon, 979 F.2d 219 (D.C. Cir. 1992). In that case, the D.C. Circuit issued an expedited order holding a federal statute unconstitutional, released "brief opinions by each member of the panel," and stated that "[e]xpanded opinions will issue at a later date." Id. at 219. But because Congress repealed the statute in the interim, the court found it "imprudent" "to issue expanded opinions." Id. at 219-220. The court recognized its "'jurisdiction' * * * to expound further," but stated that "[p]rudence" prompted it "to refrain." Id. at 220. Consistent with that decision, the court of appeals in this case recognized that a court of appeals retains the "discretion" to issue an opinion explaining an earlier order after the case has become moot. Pet. App. A8. The court simply decided to exercise that discretion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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