No. 20-55279

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTIAN DOE, et al.,

Petitioners-Appellees,

v.

CHAD F. WOLF,
Acting Secretary of Homeland Security, et al.,

Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of California

RESPONSE TO COURT ORDER FOR SUPPLEMENTAL BRIEF

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On June 22, 2021, the Court ordered the parties simultaneously to brief "whether the court should remand this case to the district court with instructions to vacate the January 14, 2020 preliminary injunction as moot in light of the Supreme Court's disposition of [*Mayorkas v.*] *Innovation Law Lab*." ECF No. 53. *Innovation Law Lab* involved a preliminary injunction that had enjoined the Department of Homeland Security ("DHS") from implementing the Migrant Protection Protocols ("MPP"). *Id*. This case, too, is an appeal of a preliminary injunction related to MPP. After DHS terminated MPP, on June 21, 2021, the Supreme Court ordered in *Innovation Law Lab* that "[t]he judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)." The government respectfully submits that this Court should now follow the same course in this case: the Court should remand the case to the district court with instructions to vacate as moot the district court's January 14, 2020 order granting a preliminary injunction.

This appeal—indeed, this case as a whole—is now moot for the same reasons that the Supreme Court found the appeal in *Innovation Law Lab* moot: the Secretary of Homeland Security has ended MPP and announced that he has "no intention to resume MPP in any manner similar to the program." Memo. from Alejandro N. Mayorkas regarding Termination of the Migrant Protection Protocols Program 7

(June 1, 2021), *available at* https://go.usa.gov/x6s7E. This appeal challenged the district court's preliminary injunction based on its finding that the Administrative Procedure Act's right-to-counsel provision, 5 U.S.C. § 555(b), applied to nonrefoulement interviews conducted as part of MPP. But following the June 1 termination of MPP, there will be no additional nonrefoulement interviews conducted as part of MPP because no one will be to returned to Mexico under MPP. As a result, Plaintiffs no longer have any interest in defending the district court's preliminary injunction, and there is no live dispute for this Court to resolve. This case accordingly no longer presents a justiciable case or controversy under Article III.

Because the government was prevented from obtaining this Court's appellate review of the district court's injunction, this Court should remand with instructions to vacate the order granting the preliminary injunction, just as the Supreme Court ordered vacatur of the district-court order in *Innovation Law Lab*. The familiar "*Munsingwear* rule" holds that "[w]hen a case becomes moot" while on direct appeal, "the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)); *see also Munsingwear, Inc.*, 340 U.S. at 39 (noting the "established practice of the Court in dealing with a civil case" that becomes moot "pending [a] decision on the merits is to reverse or vacate the judgment below and

remand with a direction to dismiss"). Of particular relevance here, the Supreme Court has recognized that vacatur is appropriate where the government has sought review of a lower-court decision but intervening changes in the law have rendered the case moot. *See United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam). Indeed, *Munsingwear* itself involved a case that "became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 n.3 (1994), and the Court indicated that vacatur could have been appropriate if the United States had sought that remedy. *Munsingwear*, 340 U.S. at 40 (observing that the United States "did not avail itself of the remedy it had to preserve its rights"); *see U.S. Bancorp Mortgage*, 513 U.S. at 25 n.3 (expressing no view on "*Munsingwear's* implicit conclusion that repeal of administration regulations" may provide a basis for vacating a lower court's decision even when that decision was adverse to the Executive Branch).

The Supreme Court's decision in *Board of Regents of the University of Texas System v. New Left Education Project*, 414 U.S. 807 (1973) (per curiam), is likewise instructive. *See* 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10.1 (3d ed. 2016 & Supp. 2021). In that case, a state university's appeal of an injunction against the enforcement of two university rules became moot after the university repealed the challenged rules. *See New Left Education Project v. Board*

of Regents of the University of Texas, 472 F.2d 218, 219-220 (5th Cir.), *rev'd*, 414 U.S. 218 (1973). The court of appeals refused to vacate the district court's judgment because the case had "become moot … through action of the appellant," *id.* at 221, but the Supreme Court summarily reversed, directing vacatur of the judgment. *See* 414 U.S. at 218. As one leading treatise has explained, vacatur was necessary to ensure that the government would not be "deterred" from taking "good faith" actions that would moot a case by "the prospect that," if it did so, "an erroneous district court decision may have untoward consequences in the unforeseen future." *Federal Practice & Procedure* § 3533.10.1. And that consideration is particularly important when "[a] change in administration brought about by the people casting their votes" occurs, which provides "a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1043 (D.C. Cir. 2012). A new administration should not be precluded from promulgating new policies or revising old ones out of concern that doing so would require leaving in place an injunction against the government that was not reviewed on appeal.

The determination whether to vacate a lower-court decision in light of mootness "is an equitable one," *U.S. Bancorp Mortgage*, 513 U.S. at 29, that depends on what disposition would be "'most consonant to justice' … in view of the nature and character of the conditions which have caused the case to become moot," *id.* at 24

(quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). Here, as the Supreme Court determined in *Innovation Law Lab*, those equitable considerations support vacatur. In no sense does "justice … require" that DHS continue to utilize MPP—a discretionary immigration authority—merely to allow this appeal to proceed in order to avoid the potential future legal consequences of the district court's decision at the preliminary injunction stage. *Id.* at 21 (citation omitted). Although MPP has been terminated, the district court's injunction ordering the government to apply the APA's right-to-counsel provision in certain immigration proceedings could, without vacatur, potentially impact other litigation or other applications of federal immigration law. And vacatur is especially appropriate given that the district court's legal conclusion has been rejected by other courts. *See United States v. Guzman*, 998 F.3d 562, 570-71 (4th Cir. 2021) (rejecting argument that APA's right-to-counsel provision applied to proceeding under 8 U.S.C. § 1225(b), and explaining that the "INA is a self-contained, comprehensive, and reticulated administrative process that displaced wholesale the provisions of the APA that had theretofore been applicable"); *Las Americas Immigrant Advoc. Ctr. v. Wolf*, No. 19-CV-3640 (KBJ), 2020 WL 7039516, at *16 (D.D.C. Nov. 30, 2020).

In short, this Court should follow the lead of the Supreme Court's order in *Innovation Law Lab*, and remand this case to the district court with instructions to vacate the January 14, 2020 preliminary injunction order as moot.

Respectfully submitted,

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July 6, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Brian C. Ward
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