No. 25-2120
(assigned to Judges Wardlaw, Mendoza, and Johnstone)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL TPS ALLIANCE, et al.,
Appellees,

v.

KRISTI NOEM, et al.,
Appellants.

On Appeal from the United States District Court
for the Northern District of California
District Court Case No. 3:25-cv-1766

DEFENDANTS' REPLY IN SUPPORT OF THE GOVERNMENT'S MOTION TO VACATE THE AUGUST 29, 2025 PANEL OPINION

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ARGUMENT

Plaintiffs do not contest that this appeal, on important issues, became moot before the conclusion of the appellate process, cutting off the government's ability to seek en banc review or certiorari of the panel's decision. And they seek to use the panel's decision to control the appeal from the district court's partial final judgment. That would be inequitable and unorderly, and it is a straightforward case for vacatur under *United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

Despite Plaintiffs' protests, the Court has been clear that *Munsingwear* vacatur is an appropriate remedy to when, as here, "an appeal becomes moot after the issuance of a three-judge panel decision." *Redd v. Guerrero*, 122 F.4th 1203, 1205 (9th Cir. 2024). Further, all of the equitable factors relevant to equitable vacatur favor the government. The government did not *cause* mootness: the district court did so through its partial final judgment despite the government's extensive efforts to prevent that from happening. Further, the public interest favors vacatur because mootness deprived the government of the opportunity to seek further review and it is prejudiced by the existence of an opinion it cannot challenge that addresses issues implicated in ongoing litigation, including the government's appeal in *Nat'l TPS Alliance v. Noem*, No. 25-5724 (9th Cir.). Plaintiffs fail to identify any meaningful countervailing equities. Resp. at 5-11. Accordingly, this Court should vacate its August 29 opinion.

I. *MUNSINGWEAR* VACATUR IS AN APPROPRIATE REMEDY

Plaintiffs do not contest that this appeal became moot on September 5, 2025, when the district court entered partial final judgment on Plaintiffs' Administrative Procedure Act challenges. Resp. at 1-11. That is plainly correct. *See, e.g.*, *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016) (holding that an interlocutory appeal becomes moot when final judgment is entered so that "a court can no longer grant any effective relief sough in the injunction request.").

Plaintiffs' argument (Resp. at 3-5) that *Munsingwear* vacatur becomes "inapplicable" once a panel issues an opinion is incorrect. *Redd* discussed the considerations for *Munsingwear* vacatur when "an appeal becomes moot after the issuance of a three-judge panel decision"—just the situation here. 122 F.4th at 1205. Other decisions likewise hold that the Court can vacate opinions when the appellate process is prematurely cut off after the panel issues its opinion but before the losing party can continue to seek relief. *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc) ("The decision whether to vacate a filed opinion based on post hoc mootness is within our discretion based on equity.") (citation and quotation omitted); *In re Pattullo*, 271 F.3d 898, 900-01 (9th Cir. 2001) ("if [this Court] has not yet issued its mandate and the case becomes moot, the court will vacate its decision and dismiss the appeal as moot."); Resp. at 3-5; *see* Mot. at 3.

None of the authorities Plaintiffs rely on forecloses *Munsingwear* vacatur here. Vacatur remains available when a case was justiciable when the panel's opinion issued

if later mootness forecloses further review. Resp. at 4; *see Dickens*, 744 F.3d at 1148; *In re Pattullo*, 271 F.3d at 900-01. In the decades since *Armster v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 806 F.2d 1347 (9th Cir. 1986) (cited at Resp. 3-4), this Court has vacated decisions based on post-hoc mootness. *See Teter*, 125 F.4th at 1309 (vacating district court judgment where the issues became moot on appeal); *In re Pattullo*, 271 F.3d at 900-01; *Farmer v. McDaniel*, 692 F.3d 1052 (9th Cir. 2012) (vacating opinion based on death-related post hoc mootness). And although the timing of the mandate may not undermine an opinion's Article III validity, Resp. at 4, it is relevant to the *Munsingwear* analysis because voluntarily conduct *after* the mandate issues may be attributable to a party rather than to happenstance. *See United States v. Payton*, 593 F.3d 881, 885 (9th Cir. 2010).

Finally, the fact that this Court's August 29 interlocutory opinion did not foreclose the district court from proceeding to final judgment does not foreclose the availability of *Munsingwear* vacatur. Resp. at 4-5. Plaintiffs' reliance on *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017), and related authorities is misplaced because that opinion dismissed a pending preliminary injunction appeal as moot in the same opinion that before addressed the consolidated merits appeal. If anything, *Owen* underscores that vacatur is in the public interest because this Court will

address the underlying merits in No. 25-5724 at argument on January 14, 2026.[1] In short, because *Munsingwear* vacatur is available to prevent prejudice arising from post-hoc mootness, this Court must address the equitable factors. *See Redd*, 122 F.4th at 1205.

II. THE EQUITABLE FACTORS FAVOR VACATUR

Plaintiffs' response underscores that the equitable factors relevant to *Munsingwear* vacatur all favor the government. *See NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007) (en banc) (discussing equitable factors); Resp. at 5-11.

A. The Government's Conduct Did Not Cause the District Court to Moot Its Interlocutory Appeal

Equity favors vacatur when the losing party did not cause the mootness. Most often, courts concluding that conduct like settling the litigation or voluntarily altering a challenged policy that would otherwise have remained in effect can cut against vacatur. *See, e.g.*, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (settlement agreement); *Dilley v. Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995) (voluntary party action).

Here, the government did not cause the district court to moot the appeal by entering judgment *against the government* just three business days after the panel opinion

[1] Plaintiffs' authorities also undermine their contention that the government should have sought en banc review of a moot interlocutory appeal where the merits of the same case were already presented to this Court in No. 25-5724. *Compare* Resp. at 4-5, *with* Resp. at 10-11.

issued. Resp. at 6-7; *see* Mot. at 4-7. To state the obvious, the government did not ask for that result at all. Nor did it ask the district court to cut off its opportunity to seek further review of the panel's adverse decision by entering judgment before the government could seek en banc or Supreme Court review. *Cf. See Teter*, 125 F.4th at 1309 (vacating judgment where Executive official did "not cause this case to become moot; the Hawaii Legislature did.").

Plaintiffs suggest this timing is the government's doing, apparently on the view that the government should have more effectively convinced the district court to wait longer before ruling against the government. But the government made no shortage of requests for the district court to wait for appellate proceedings to unfold. After the district court's interim relief order, the government promptly moved to stay *all proceedings*, including discovery and summary judgment pleadings—which the district court denied, Dkt. 129 at 1-2, Order Denying Admin. Stay (May 2, 2025)—four days before the parties jointly proposed a schedule to brief their respective summary judgment motions pursuant to the district court's case management order. Dkt. 115 at 1-4, Gov. Admin. Stay Mot. (Apr. 25, 2025); *see* Dkt. 124, Order on Stipulated Briefing Schedule (Apr. 30, 2025); Dkt. 119, Stipulation Regarding Briefing Schedule (Apr. 29, 2025). In doing so, the government warned that "if the district court

proceedings continue[d] until final judgment," it would "render[] the postponement order under 5 U.S.C. § 705 moot[.]" Dkt. 115 at 1.

Following the Supreme Court's stay order, the government argued that "all District Court proceedings—including Defendants' answer or other dispositive pleadings, discovery and all other pending deadlines … should be stayed pending the disposition of the Ninth Circuit Appeal." Dkt. 150, Joint Status Report at 4-5 (May 23, 2025). The government reiterated that a stay of proceedings was warranted in supplemental briefing following the parties' summary judgment argument, warning that "entry of final judgment would moot [the] pending appeal to which the parties and the Ninth Circuit have devoted substantial resources[.]" Dkt. 271, Gov. Supp. Stay Br. at 1 (Aug. 7, 2025). The government also emphasized that the Supreme Court's stay encompassed the deadline to seek certiorari and reiterated that "[a] decision entering final judgment would moot the preliminary-relief appeal the Ninth Circuit is considering, wasting the resources already spent on the appeal." *Id.* at 3; *see Noem v. Nat'l TPS Alliance*, 145 S. Ct. 2728, 2728-29 (2025). Thus—although not required to demonstrate equitable entitlement to vacatur, *see NASD Disp. Resol., Inc.*, 488 F.3d at 1069—the government repeatedly and correctly warned the district court that proceeding to judgment would moot the pending interlocutory appeal and asked it to stay proceedings. *See Akina*, 835 F.3d at 1010. The government did not ask the district

court to rule against it or to cut off the government's opportunity to seek further appellate review after the panel ruled.

Plaintiffs' related assertion (Resp. at 7-8, 10-11) that the government should have filed an en banc petition or petition for a writ of certiorari in the three business days between this Court's opinion and the district court's final judgment overlooks that only the Solicitor General can authorize further review, 8 C.F.R. § 0.20(b), fails to acknowledge the Supreme Court's stay, *Noem*, 145 S. Ct. at 2728-29, and ignores Fed. R. App. P. 40(d)(1). Plaintiffs also fail to recognize that even if the government had obtained authorization, drafted, and filed an en banc or certiorari petition in that short time, this Court or the Supreme Court would not have even voted on whether to hear it, much less ordered a response from Plaintiffs, before the district court mooted further appellate proceedings. *See* 9th Cir. General Order 5.4. In all events, there is no requirement that a party seek en banc or Supreme Court review far ahead of schedule to obtain vacatur under *Munsingwear*. *See NASD Disp. Resol., Inc.*, 488 F.3d at 1069; *cf. Dickens*, 744 F.3d at 1148 (declining to vacate opinion where en banc review had already happened); Resp. 11 (acknowledging that the government should have had until *last week* to seek en banc review).

If the government had its way, proceedings in the district court would have been stayed in their entirety *before* expedited discovery and summary judgment briefing. Dkt. 115 at 1-4, Gov. Admin. Stay Mot. (Apr. 25, 2025). Because the government did all it could to protect itself against the mootness from the district court's partial final

judgment, the government is equitably entitled to vacatur. *See NASD Disp. Resol., Inc.*, 488 F.3d at 1069.

B. The Public Interest Favors Vacating the August 29 Opinion, Which Will Permit Orderly Appellate Proceedings and Will Not Alter the Status Quo

The public interest favors vacatur because "the public interest is best served by granting [vacatur] relief when the demands of orderly procedure cannot be honored." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 27 (cleaned up). The district court disrupted orderly appellate proceedings by mooting the appeal before the government had the opportunity to seek further review, indicating that the public interest favors vacatur.

Plaintiffs respond that the public interest favors them because *NTPSA I* provides guidance for other cases. Resp. at 9. That underscores that the equitable factors *favor* the government, because it was unable to seek any further review of that now-moot opinion. *See U.S. Bancorp Mortg. Co.*, 513 U.S. at 27; *Redd*, 122 F.4th at 1205 (indicating that courts should vacate precedent where it serves the public interest). That is especially true because the Court will soon decide the same legal issues in the final-judgment appeal, so there is no risk that the public will be deprived of the Court's guidance on these important issues. Vacatur of the August 29 will not create a vacuum of guidance for lower courts. Instead, it will allow the relevant legal issues to be fully addressed in the ongoing merits appeal. Resp. at 11.

Plaintiffs identify no case where this Court declined to vacate where the Supreme Court twice granted the government a stay in contradiction to this Court's conclusions.

Resp. at 8-9. And their reliance on *Armster*, 806 F.2d at 1355, is misplaced. Here, unlike in that case, vacating the panel's opinion in the interlocutory appeal will have no effect on the interim status quo because the Supreme Court determined that the challenged vacatur and termination of the 2023 TPS designation for Venezuela should be effective during this litigation. *See Noem*, 145 S. Ct. at 2728-29. Thus, the public interest factor also favors vacatur.

C. The Government Is Prejudiced By A Published Opinion That Mootness Prevented It From Challenging.

Finally, Plaintiffs' claim that the government was not prejudiced when it was prevented from seeking further review of an adverse decision by happenstance is meritless. *See Donovan v. Vance*, 70 F.4th 1167, 1173 (9th Cir. 2023) (happenstance alone provides sufficient basis for vacatur); Pl. Opp. 10. "Congress has prescribed a primary route, by appeal as of right and certiorari, thorough which parties may seek relief from the legal consequences of judicial judgments." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 27. To avoid that rationale, Plaintiffs misconstrue *Dickens*, which declined vacatur where "[b]oth parties' claims have been subjected to en banc review." 744 F.3d at 1148; Resp. at 10. Thus, while it did not have a *right* to further appellate review, the government was entitled to *seek* it and is prejudiced because it was prevented from doing so here because of circumstances entirely outside of its control. *Id.*; *see Dickens*, 744 F.3d

at 1148; *Farmer*, 692 F.3d at 1052 (vacating where "Farmer did not have the opportunity to exhaust the entire appellate process"); Resp. at 10.

That is all the more plain in this case, where (1) this Court has previously concluded that challenges to TPS terminations warrant en banc consideration, (2) the Supreme Court has twice indicated that it views this very case as a likely candidate for its review, and (3) Plaintiffs expressly argue that the August 29 opinion forecloses the merits of the government's appeal from the district court's judgment. *See Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020), *vacated upon reh'g en banc* 59 F.4th 1010 (9th Cir. 2023) (en banc review of a previous challenge to a TPS termination); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) ("To obtain a stay … an applicant must show … a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"); ACMS No. 40 at 2, *National TPS Alliance v. Noem*, No. 25-5724 (Nov. 5, 2025) ("*NTPSA I* therefore controls the outcome of this appeal: the Secretary had no authority to vacate either country's TPS extension; both must therefore remain in place."). Thus, because all the equitable factors favor vacatur, this Court should vacate its August 29 opinion. *See NASD Disp. Resol., Inc.*, 488 F.3d at 1069; Mot. at 1-7.

CONCLUSION

This Court should vacate its August 29, 2025 opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(1), I certify that the text of this reply is in double-spaced, proportionally spaced 14-point Garamond type, and the motion contains 2,476 words in compliance with Ninth Circuit Rule 27-1(d).

/s/ Jeffrey M. Hartman
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2025, counsel for Appellants electronically filed this reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS system and that service will be accomplished through the ACMS system.

/s/ Jeffrey M. Hartman
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