IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-56102, 18-56105

JUDICIAL WATCH, INC., *et al*.,
Plaintiffs-Appellees,

v.

DEAN C. LOGAN, *et al*.,
Defendants,

v.

MI FAMILIA VOTA EDUCATION FUND, *et al*.,
Movants-Appellants

v.

CALIFORNIA COMMON CAUSE,
Movant-Appellant.

PLAINTIFFS-APPELLEES' RESPONSE TO MOTION TO DISMISS APPEAL AS MOOT AND VACATE UNDERLYING DECISION

On Appeal from the United States District Court
for the Central District of California
Civil No. 17-08948 SK-R

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

INTRODUCTION

Movants-Appellants Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles, joined by California Common Cause (collectively, "Movants-Appellants") have moved (1) to dismiss their own appeal as moot and (2) for the "extraordinary remedy" of vacatur of the District Court's order denying their motion to intervene. Plaintiffs-Appellees Judicial Watch, Inc., Election Integrity Project California, Inc., Wolfgang Kupka, Rhue Guyant, Jerry Griffin, and Delores M. Mars ("Plaintiffs-Appellees") respectfully request that the Court grant the motion to dismiss the appeal, but deny the motion to vacate the underlying intervention ruling.

Plaintiffs-Appellees agree that this appeal is moot. The actual terms of the newly released settlement agreement between the existing parties prove that all of Movants-Appellants' fears that the case *might* be resolved in a way that violated the rights of eligible voters—fears that Movants-Appellants claim inspired them to try to intervene in the first place—were without any factual basis. Indeed, Movants-Appellants admit as much by moving to dismiss this appeal as moot.

For this very reason, Plaintiffs-Appellees oppose the motion to vacate the District Court's ruling. As set forth below, the purpose of vacating an underlying decision when an appeal becomes mooted by "happenstance" is to ensure that parties are not precluded or estopped in a future litigation by virtue of a ruling that

they had no chance to appeal. But Movants-Appellants are not estopped from challenging anything in the future. If the wrongs they feared ever did come to pass, they could sue regarding them without risk of estoppel, precisely because those wrongs never had anything to do with this lawsuit. In addition, this case was not mooted by "happenstance." Movants-Appellants made baseless speculations in their original motion papers about what the parties intended. When those speculations were definitively proved false, this appeal became moot.

Accordingly, Plaintiffs-Appellees respectfully submit that this appeal should be dismissed as moot, and that Movants-Appellants' request to vacate the underlying ruling regarding intervention should be denied.

FACTUAL BACKGROUND

Plaintiffs-Appellees filed the complaint in this action on December 13, 2017, alleging violations of Section 8 of the National Voter Registration Act of 1993 ("NVRA") by Los Angeles County and the State of California, relating to the County's failure to remove ineligible voters from its voter rolls. 52 U.S.C. § 20507. Named as defendants in their official capacities were Dean Logan, the Registrar-Recorder/County Clerk of Los Angeles County, and Alex Padilla, California's Secretary of State ("Defendants").

On April 17, 2018 Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles filed a motion to intervene. ER-175.[1] Plaintiffs-Appellees opposed that motion by response dated May 14, 2018. ER-158. On May 14, 2018 Common Cause filed a motion to intervene. ER-159. Plaintiffs-Appellees opposed that motion by response dated May 29, 2018. ER-23.

The basis for both intervention motions was the notion that Plaintiffs-Appellees' lawsuit to remove ineligible voters from the voter rolls would lead to an outcome that would imperil eligible voters, such as "those who move frequently, students, and minorities," who "could face heightened risk of wrongful removal from the rolls." ER-169; ER-180 ("hundreds of thousands of young voters . . . are particularly vulnerable to wrongful removal from untested methods of list maintenance"). None of the declarations submitted in support of the intervention motions, however, described the "untested methods of list maintenance" Plaintiffs-Appellees allegedly sought to impose that would put eligible voters at risk. The complaint in this action simply requested a declaration that Defendants were "in violation of Section 8(a)(4) of the NVRA," a permanent injunction against such violations, and an order that Defendants "develop and implement a general program that makes a reasonable effort to remove from Los Angeles County's rolls

[1] All references to "ER" are to the excerpts of records Movants-Appellants filed in this appeal with their opening brief. *See* Dkt. Entries 29-1, 29-2.

the registrations of ineligible registrants." ER-213 (Prayer for Relief, ¶¶ a, b, and d). Although Movants-Appellants did not explain what Plaintiffs-Appellees supposedly had in mind, they were sure it was bad. Relying on adjectives rather than facts, Movants-Appellants repeatedly announced their concern over the "indiscriminate purging" of voters (ER-154, 180, 184), over purges and removals that were "wrongful" (ER-169, 170, 180, 181, 184) and "improper" (ER-169, 181, 184), and over "sweeping," "wide-ranging," and "expansive purges like those envisioned by Plaintiffs" (ER-169)—all without ever saying what was supposed to be "envisioned."

The District Court denied both motions to intervene on July 12, 2018. ER-1. The Court particularly noted the speculative nature of the motions. Movants-Appellants were found to have no legally protected interest under Fed. R. Civ. P. 24(a) because, while they did have

> a legally protected interest to ensure that eligible voters maintain their right to vote and remain on the voter rolls . . . there is no relationship between this interest and the claims at issue. Plaintiffs request that Defendants reasonably attempt to remove *ineligible* voters from the voter rolls. Removing ineligible voters from the voter rolls will not affect eligible voters' rights.

ER-2. For the same reason, the District Court determined that Movants-Appellants were not "substantially affected by the outcome of this action," as they could only "speculate that eligible voters risk wrongful removal from voter rolls." ER-3. Further, the District Court reasoned that there was no

common question of law or fact justifying permissive intervention under Rule 24(b), because "[t]here is no reason that eligible voters would be removed from voter rolls if Plaintiffs are successful. In fact, it is purely speculative that eligible voters would be injured by ordering compliance with the NVRA." ER-4.[2] Movants-Appellants filed a notice of appeal of the District Court's order on August 10, 2018. ER-17.

On August 31, 2018, Plaintiffs-Appellees and Defendants filed a Joint Notice of Settlement, seeking 120 days in which to finalize the settlement. ER-6. The settlement had been privately negotiated and it was to remain confidential until it became effective. Declaration of Robert D. Popper, ¶ 6, Dkt. Entry 21-2. In response, the District Court entered the following Order of Dismissal on September 5, 2018:

> THE COURT having been advised by the counsel for the parties that the above-entitled action has been settled;
>
> IT IS THEREFORE ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within 120 days, to reopen the action if the settlement is not consummated. IT IS FURTHER ORDERED that all dates set in this action are hereby vacated. The Court reserves its jurisdiction for the purpose of enforcing the settlement.

ER-5.

[2] The District Court also found that existing Defendants adequately represented the interests of Movants-Appellants. ER-3.

On September 10, 2018, Movants-Appellants filed an emergency motion to expedite these appeals. Dkt. Entry 12-1. Despite the fact that they had "no knowledge of the terms" of the as-yet undisclosed settlement, Movants-Appellants argued that good cause existed to expedite the appeal "to prevent irreparable harm" and "disenfranchisement." *Id.* at 4. Plaintiffs-Appellees and Defendants opposed that motion on September 14, 2018. *See* Dkt. Entries 20, 21, 22. This Court denied the emergency motion on September 19, 2018. Dkt. Entry 26.

Movants-Appellants filed a consolidated opening brief on the merits. Dkt. Entry 14-1. In that brief on appeal they identified, for the first time in this case, four particular voter list maintenance methods that they believed were flawed and that they feared the parties might agree to:

- The use of the Systematic Alien Verification for Entitlements (SAVE) database to identify ineligible voters. *Id.* at 26.
- The use of "unreliable felony conviction data," as allegedly happened in Florida in 2000. *Id.*at 27.
- The use of "faulty data" regarding deceased voters, as allegedly happened in Texas in 2012. *Id.*
- The use of the Interstate Voter Registration Crosscheck (IVRC) program to identify duplicate registrations. *Id.*

Plaintiffs-Appellees submitted its answering brief on December 13, 2018 (Dkt. Entry 36) and Movants-Appellants' reply is currently due February 4, 2019.

On January 3, 2019, Plaintiffs-Appellees and Defendants-Appellees filed a notice of final settlement with the District Court, attaching and making public the settlement agreement. *See* Popper Decl., Ex. 1 and 2. Among other things, the settlement agreement conceded that there were about 1,565,000 inactive registrations on Los Angeles County's voter rolls and committed the County to following the ordinary procedures set forth in the NVRA for their canvassing and possible removal. *Id.*, Ex. 2, ¶¶ 1, 2, 3, 5, 6. The agreement did not incorporate or even mention the SAVE database, programs like those used in Florida in 2000 for felony convictions or in Texas in 2012 for deceased voters, or the Crosscheck program. Tacitly admitting that the agreement does not contain these or any other provisions that are "indiscriminate," "wrongful," or "improper," Movants-Appellants moved a week later to dismiss the appeal as moot.

Plaintiffs-Appellees agree that the appeal should be dismissed as moot. However, as set forth below, the motion to vacate the District Court's intervention ruling should be denied. Vacatur is appropriate where a party faces the preclusive effect of a decision it could not appeal because a case was mooted by circumstances beyond the party's control. None of this is true here. Movants-Appellants are not in any way precluded from litigating the issues they claim to be

concerned about—first, because those issues were not even raised in this case, and second, because Movants-Appellants were never parties. But further, Movants-Appellants' original intervention motions relied on baseless speculation, as the District Court found when it denied those motions, and as has been subsequently confirmed by the public filing of the actual terms of the settlement agreement. In these circumstances, where mootness is due to the fact that Movants-Appellants made speculative allegations that turned out to be incorrect, they are not entitled to vacatur.

ARGUMENT

I. THE APPEAL IS MOOT.

Plaintiffs-Appellees agree that the appeal is moot. All of Movants-Appellants' fears and speculations about what the parties intended have been contradicted by the text of the actual settlement agreement, which did not contain the programs Movants-Appellants objected to, or any "improper" provision. Movants-Appellants have admitted this as a practical matter by moving to have the appeal declared moot.

Perhaps to avoid or blunt such an admission, Movants-Appellants now argue that the event that made this case moot was Plaintiffs-Appellees' January 3, 2019 notification to the District Court "that the existing parties had in fact settled," which meant that "the underlying case has now been dismissed" and "this appeal is

moot." Dkt. Entry 51 ("Mot.") at 3; *see* Popper Decl., Exs. 1 and 2. But their effort to save face requires Movants-Appellants to contradict an argument they previously made to this Court. In their reply brief on the motion to expedite, they claimed that their interest in intervention would survive "even if a settlement agreement is finalized." Dkt. Entry 23 at 4. Observing that the District Court "has indicated that it will accept [] continuing jurisdiction," they stated that "intervention may still be appropriate for purposes of any proceedings with respect to enforcement of the settlement." *Id.* Thus, they are changing positions by suggesting now that the critical factor establishing mootness was that the parties "finalized a settlement." Mot. 4.[3]

In any event, given that both Plaintiffs-Appellees and Movants-Appellants concur that the appeal is moot, it should be dismissed.

[3] Note also that the Plaintiffs-Appellees' January 3, 2019 filing was not a legally required step and does not bear the weight Movants-Appellants put on it. The District Court's September 5, 2018 Order of Dismissal provided that the action was dismissed "without prejudice to the right, upon good cause shown within 120 days, to reopen the action if the settlement is not consummated." ER-5. As long as the settlement *was* consummated, there was no need for the parties to take any other steps or to file anything else. Notifying the Court was not technically required, and was intended as a courtesy to keep the District Court informed of the parties' consummation of the settlement agreement. Popper Decl., ¶ 6.

II. IN THE CIRCUMSTANCES OF THIS CASE, MOVANTS-APPELLANTS ARE NOT ENTITLED TO VACATUR.

Vacatur of a lower court decision

> must be decreed for those judgments whose review is, in the words of [*United States v.*] *Munsingwear*, [*Inc*., 340 U.S. 36, 40 (1950)] "'prevented through happenstance"' – that is to say, where a controversy presented for review has "become moot due to circumstances unattributable to any of the parties."

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 23 (1994), quoting *Karcher v. May*, 484 U.S. 72, 82, 83 (1987). The point of this rule is to prevent "collateral estoppel" from causing "legal consequences from which a party may continue to suffer harm after a claim has been rendered moot." *Felster Publ'g v. Burrell (In re Burrell)*, 415 F.3d 994, 999 (9th Cir. 2005). The Supreme Court's jurisprudence recognizes "the unfairness of the enduring preclusive effect of an unreviewable decision in the case of a civil action that has become moot on appeal." *Id.*, citing *Munsingwear*, 340 U.S. at 39.

The facts in *Munsingwear* perfectly illustrate the concerns addressed by this rule. In that case, the United States filed two claims against a company for violating a regulation fixing the maximum price of a commodity, the first for an injunction and the second for treble damages for violating the statute. The second count was to be tried separately after the first was determined. The request for an injunction was denied, and appealed. During the course of the appeal the commodity was "decontrolled" so that obtaining an injunction was no longer

possible, and the appeal was dismissed as moot. When the United States then sought to litigate the second claim for damages, it found it was barred under classic principles of *res judicata*: "The controversy in each of the suits concerned the proper pricing formula . . . That question was in issue and determined in the injunction suit. The parties were the same both in that suit and in the suits for treble damages." *Id.* at 37-38. As a result, the United States was precluded from litigating the second claim. The Court noted that the United States could and should have preserved its rights by moving to vacate the lower court's ruling. *Id.* at 39-40.

Vacatur is "equitable relief," and a party moving for vacatur must show "equitable entitlement" to such an "extraordinary remedy." *U.S. Bancorp*, 513 U.S. at 26. Accordingly, it must be true that mootness is "unattributable to any of the parties." *Id.* at 23 (citations omitted). Thus, in *Bancorp*, the Supreme Court denied vacatur where it was sought by one of the parties to a voluntary settlement. Noting that "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action," the Court concluded that "[w]here mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy . . . thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 24, 25.

In the circumstances of this case, because Movants-Appellants are not precluded from seeking any relief in any future litigation, and because the mootness is attributable to the fact that their own extravagant speculations were wrong, vacatur should be denied.

A. Vacatur is Not Warranted Because Movants-Appellants Are Not Barred from Litigating Any Future Claims or Issues.

As the case law makes clear, the critical issue in a request for vacatur is whether the movant is faced with collateral estoppel or *res judicata* in any future litigation. Here, Movants-Appellants face no such bar. The simple fact is that Movants-Appellants' motions to intervene were so speculative that the issues about which they claimed to be concerned were never raised or litigated in this case.

To be specific, there was never *any* briefing, argument, or evidence concerning whether existing parties could or should use the SAVE database, Florida's 2000 felony-conviction protocols, Texas' 2012 deceased-voter practices, or the Crosscheck program, to conduct voter list maintenance; nor are those types of programs part of, or mentioned in, the settlement agreement. If the current parties in this case ever proposed to use, for example, the SAVE database or Crosscheck program, Movants-Appellants would not be precluded from bringing whatever claims the law allowed in response. Because there is no scenario under which Movants-Appellants would be barred from litigating on account of Judge

Real's ruling denying intervention in this case, there is no basis for vacating that ruling.

For their part, Movants-Appellants never identify any claim or issue that they would be precluded from litigating in a future action. They strongly object to the *merits* of the ruling denying intervention, arguing that it was wrongly decided. Mot. 7 ("deeply flawed reasoning"). But the merits are not before the Court on this appeal. The only issue is the possible preclusive effect of the District Court's ruling regarding intervention.

Indeed, a proposed intervenor who never became a party should not be able to move for vacatur in any circumstances. The very fact that the movant failed to become a party means that neither collateral estoppel nor *res judicata* could possibly apply to any claims it tried, but was not permitted, to make in the underlying case. *See Munsingwear*, 340 U.S. at 40 (vacatur "clears the path for future relitigation of the issues between the *parties*") (emphasis added); *Karcher*, 484 U.S. at 83 (it must be true that mootness is "due to circumstances unattributable to any of the *parties*") (emphasis added).

The cases in this Circuit cited by Movants-Appellants as authority to support vacatur involved existing parties to the litigation. *See Dilley v. Gunn*, 64 F.3d 1365, 1370-1371 (9th Cir. 1995) (request for vacatur brought by defendants); *Marshack v. Helvetica Capital Funding LLC*, 495 Fed. App'x. 808, 810 (9th Cir.

2012) (vacating a bankruptcy judgment in a case between a Chapter 7 bankruptcy trustee and debtor Defendant corporation); *GATX/Airlog Co. v. U.S. Dist. Court for N. Dist. Of California*, 192 F.3d 1304, 1308 (9th Cir. 1999) (granting vacatur after a third-party's "entrance into the pending litigation"). Movants-Appellants' sole authority for allowing frustrated non-party intervenors to move for vacatur is a district court opinion in the D.C. Circuit. Mot. 6, citing *Alfa Int'l Seafood, Inc. v. Ross*, 320 F. Supp. 3d 184 (D.D.C. 2018). Of course, that case is not controlling authority here.

Plaintiffs-Appellees also respectfully submit that it was wrongly decided. The district court in that case vacated its decision so that "in future bids to intervene, the [movants] will not have to contend with an adverse decision that they were unable to contest on appeal through no fault of their own." *Id.* at 191. But having to "contend with" a case as precedent is not the point of the rule; rather, it is to prevent a litigant from being barred by collateral estoppel or *res judicata*. *See Felster*, 415 F.3d at 999 (*Munsingwear* rule avoids "the unfairness of the enduring *preclusive* effect" of a decision) (emphasis added). The would-be intervenors here were never parties, and so were never precluded from litigating anything by the denial of intervention.

In any event, Plaintiffs-Appellees submit that they cannot find a single case in this Circuit that vacates an underlying decision denying intervention under Rule

24 as a result of mootness during appeal. Because Movants-Appellants will not be barred from litigating any claim or issue by virtue of the District Court's ruling, it should not be vacated.

B. Movants-Appellants Are Not Entitled to Vacatur Because Mootness Is Partly Attributable to the Fact That They Made Speculative Claims.

Because vacatur is equitable relief, it is only available where mootness is "unattributable to any of the parties." *Bancorp*, 513 U.S. at 23 (citations omitted).

Movants-Appellants are clearly not entitled to equitable relief in this case, because they participated in the events that mooted this appeal. In their intervention motions, they wildly over-claimed, alleging without evidence that the parties—and, implicitly, the District Court—were planning to accept "indiscriminate," "wrongful," "improper," "sweeping," and "expansive" purges and removals. They over-claimed again in their opening brief to this Court, identifying four particular programs that they opposed and that they feared the parties would agree to. None of their speculations in either the District Court or this Court turned out to be true. In these circumstances, there is no reason to vacate the underlying decision. Mootness is not due to "happenstance," but to the fact that Movants-Appellants made baseless, speculative allegations that were not borne out. Indeed, it is brazen for Movants-Appellants to seek to vacate the

District Court's ruling, when its essential finding, that their motions were based on speculation, has been fully confirmed by subsequent events.

In fact, if Movants-Appellants were allowed to obtain vacatur in these circumstances, it would encourage strategic maneuvering by others seeking intervention. Proposed intervenors would be encouraged to make outlandish claims in their motion papers. If intervention were then denied, they could try to vacate such rulings on appeal by arguing that the appeal is moot because their allegations did not pan out.

Because mootness is attributable to Movants-Appellants own actions in making baseless allegations, they are not entitled to the equitable relief of vacatur.

C. Movants-Appellants Should Not Now Be Permitted to Brief the Main Appeal.

Movants-Appellants state the following in a footnote:

> In the event the Court disagrees that the district court decision should be vacated as moot, Movants-Appellants wish to reserve their right to brief the merits of the intervention appeal.

Mot. 3 n.1. In other words, they seem to be requesting, in the event this Court does not vacate the intervention ruling, that they be granted leave (1) to withdraw their motion to have the appeal dismissed as moot, and (2) to then proceed with the main appeal.

This is a strange request, and it simply should not be granted. By this motion Movants-Appellants are representing to this Court that the appeal is moot.

Plaintiffs-Appellees agree that this is so. This appeal remains moot whether or not the District Court's intervention ruling is vacated. There are insurmountable constitutional problems under Article III, moreover, with continuing to litigate an appeal that is moot. This Court would not have jurisdiction to hear the matter.

In all events this request should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court grant Movants-Appellants' motion to dismiss the appeal as moot, and deny their motion to vacate the underlying intervention ruling.

Dated: January 22, 2019

/s/ Robert D. Popper

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response to a motion complies with the length limits permitted by Ninth Circuit Rule 27-1(1)(d) because it is 17 pages, and Fed R. App. P. 27(d)(2)(A) because it is 3,737 words, excluding the portions exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2016.

Dated: January 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed the foregoing 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 who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 22, 2019

By: */s/ Robert D. Popper*

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