Appeal No. 18-56102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDICIAL WATCH, INC., *et al.*,

Plaintiffs-Appellees,

v.

DEAN C. LOGAN, *et al.*,

Defendants-Appellees,

v.

MI FAMILIA VOTA EDUCATION FUND, et al.,

Movants-Appellants.

On appeal from the United States District Court
for the Central District of California
No. 2:17-cv-08948-R-SK
The Honorable Manuel L. Real

MOVANTS-APPELLANTS' REPLY IN FURTHER SUPPPORT OF MOTION TO DISMISS APPEAL AS MOOT AND VACATE UNDERLYING DECISION

Dēmos
Chiraag Bains
740 6th Street NW, 2nd Floor
Washington, DC 20001
Telephone: (202) 864-2746
Admitted only in Massachusetts;
Practice limited pursuant to
D.C. App. R. 49(c)(3)

Brenda Wright
80 Broad Street, 4th Floor
New York, NY 10004
Telephone: (646) 948-1621

Dechert LLP
Neil Steiner
1095 Avenue of the Americas
New York, NY 10036
Telephone: (212) 698-3822

Anna Do
633 West 5th Street, Suite 4900
Los Angeles, CA 90071-2032
Telephone: (213) 808-5700

Attorneys for Movants-Appellants
Mi Familia Vota Education Fund,
Rock the Vote, and League of Women
Voters of Los Angeles

I. *MUNSINGWEAR* REQUIRES VACATUR OF THE DECISION BELOW.

This Court should vacate the decision of the U.S. District Court for the Central District of California denying Movants-Appellants' motion to intervene in this matter because the appeal from that decision has become moot for reasons entirely outside of Movants-Appellants' control. It is undisputed that Movants-Appellants had no role in the settlement agreement which the parties filed with the court below on January 19, 2019. Under these circumstances, *United States v. Munsingwear, Inc*., 340 U.S. 36 (1950), and its progeny require vacatur of the decision below, to ensure fairness to a litigant that is unable, through no fault of its own, to secure appellate review of an adverse decision. Plaintiffs-Appellees' arguments seeking to avoid the straightforward application of *Munsingwear* in this case are extraordinarily weak. The Court should reject them.

II. PLAINTIFFS-APPELLEES' EFFORT TO BLAME MOVANTS-APPELLANTS FOR THE MOOTNESS OF THIS APPEAL IS SPECIOUS.

Plaintiffs-Appellees claim that the *Munsingwear* doctrine is inapplicable because Movants-Appellants are somehow responsible for the mootness of the appeal. Their argument is meritless. The appeal of the district court's decision denying intervention has become moot because, in the wake of the parties' settlement, the case in which the Movants-Appellants sought to intervene has ended. Movants-Appellants had no role in the settlement between the parties, and

therefore have no responsibility for the appeal becoming moot. *Dilley v. Gunn*, 64 F.3d 1370, 1371 (9th Cir. 1995).

Plaintiffs-Appellees attempt to circumvent this unavoidable conclusion by asserting that the Movants-Appellants "participated in the events that mooted this appeal." *See* Plaintiffs-Appellees Response to Motion to Dismiss Appeal As Moot and Vacate Underlying Decision, at 12. To support this assertion, Plaintiffs-Appellees cite nothing other than Movants-Appellants' motion to intervene in the case below. The illogic of this is apparent. Seeking intervention to protect the rights of Movants-Appellants and their members is, if anything, the opposite of participating in a settlement.

Plaintiffs-Appellees go even further. They take issue with the merits of the motion to intervene, complaining that it was "speculative," and argue that vacatur should therefore be denied as some kind of punishment for filing the motion to intervene. *See* Response at 15-16. This is an entirely spurious reading of the authority they cite, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). *U.S. Bancorp* holds that vacatur under *Munsingwear* may be denied when the litigant seeking vacatur was responsible for entering into a settlement, or taking other action, that resulted in the appeal becoming moot. *Id.* at 24. That doctrine is entirely inapplicable here. Precisely because the district court *denied* intervention to Movants-Appellants, the parties reached their settlement agreement *without* the

participation of the Movants-Appellants. The *U.S. Bancorp* exception to the *Munsingwear* doctrine therefore has no bearing here. *U.S. Bancorp,* 513 U.S at 24 (principal question under *Munsingwear* is "whether the party seeking relief from the judgment below caused the mootness by voluntary action.")

In any event, Plaintiffs-Appellees' views of the merits of the motion to intervene are not, as they seem to assume, binding on this Court. No matter how many disparaging adjectives the Plaintiffs-Appellees apply to the motion to intervene, they cannot ask this Court to deny the motion to vacate on the assumption that this Court would ultimately agree with them on the merits. That would simply eviscerate the *Munsingwear* doctrine by making it dependent on deciding the merits of the very ruling that has become unreviewable because of mootness.[1]

Compounding the error of this argument, Plaintiffs-Appellees cite *the content of the settlement agreement itself* as somehow proving that the district court's denial of the motion to intervene was correct. *See* Response at 7. Even if

[1] Movants-Appellants strongly dispute Plaintiffs-Appellees' characterization of the merits of their motion to intervene. *See* Movants-Appellants' Joint Opening Brief. Indeed, the briefing on the merits appeal challenging the district court's denial of the motion to intervene has not yet been completed, because the briefing on the merits in this Court is automatically stayed under Circuit Rule 42 when a motion to dismiss is filed. Consequently, Movants-Appellants have not yet had the opportunity to file a reply brief on the merits. This makes it all the more improper for Plaintiffs-Appellees to assume that the merits of the appeal have been decided in their favor as a predicate for their argument against vacatur under *Munsingwear*.

the merits of the motion to intervene were at issue on this motion, the motion to intervene was filed long before the settlement between the parties was reached or even mentioned publicly. Indeed, all of the parties acknowledged below that the motion to intervene was timely. The content of a settlement agreement that was concluded long *after* the timely motion to intervene was filed has no bearing whatsoever on whether the motion to intervene was wrongly denied. In any event, this Court has nothing but Plaintiffs-Appellees' self-congratulatory description of the parties' settlement on which to base any conclusions about whether it adequately protects the interests of Movants-Appellants and their members. That provides no basis for determining the merits of the motion to intervene, even if the appeal on the merits had not become moot.

III. VACATUR IS APPROPRIATE BECAUSE THE DISTRICT COURT'S DECISION DENYING INTERVENTION THREATENS TO IMPAIR MOVANTS-APPELLANTS' INTERESTS IN PARTICIPATING IN OTHER VOTING RIGHTS CASES.

Plaintiffs-Appellees misapprehend the inquiry that is appropriate in determining whether Movants-Appellants will be adversely affected by the ruling below if they cannot obtain appellate review. They mistakenly focus on the question of whether the ruling below prevents Movants-Appellants from objecting to particular kinds of purge programs in future litigations. Response at 12 ("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"). This observation is simply irrelevant to this appeal. Movants-Appellants are not seeking to appeal the terms of the settlement or the substantive relief that the settlement provides. Movants-Appellants, instead, are appealing *the denial of their motion to intervene* in the case. The relevant question is whether Judge Real's decision denying intervention, which has become unreviewable through no fault of Movants-Appellants, may hinder their ability *to intervene successfully* in other voting rights cases in the future. This point is so obvious as to raise the question whether Plaintiffs-Appellees are simply pretending not to understand this.

Movants-Appellants previously have fully explained their legitimate concern that the broad and harmful reasoning the district court used in denying intervention in this case could be used to deny intervention to Movants-Appellants in future cases in which they may seek intervention to protect their rights and the rights of their members. *See* Movants-Appellants' Motion to Dismiss Appeal as Moot and Vacate the Underlying Decision, at 8-10; *see also* Movants-Appellants' Joint Opening Brief, at 24-30. By pointing out the problems created by the district court's decision, Movants-Appellants are not, as Plaintiffs-Appellees claim, asking this Court to decide the merits of this appeal, but merely are pointing out why they are concerned about being unable to *complete* the appeal. Indeed, it is transparent

that Plaintiffs-Appellees have no reason for so desperately attempting to avoid vacatur of the decision than their desire to wield the unreviewed district court decision against potential intervenors, including Movants-Appellants, in other similar cases. As the Supreme Court noted in the context of an appeal from a ruling on qualified immunity that became moot on appeal, "[t]he point of vacatur is to prevent an unreviewable decision 'from spawning *any legal consequences*,' so that no party is harmed by what we have called a 'preliminary' adjudication." *Camreta v. Green*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S. at 40-41).

Plaintiffs-Appellees further err in arguing that vacatur of a decision when a case has become moot on appeal is restricted to movants who were full parties to the underlying litigation. Response at 13-14. Even if that is a more common context for a motion to vacate, *Munsingwear* also applies to protect the interests of litigants who are not parties to the litigation. For example, in *United States v. Krane*, 625 F.3d 568 (9th Cir. 2010), this Court applied *Munsingwear* at the behest of a defendant-intervenor appealing from a motion to compel compliance with a pre-trial subpoena. When the appeal became moot because of guilty pleas filed by the defendants, the Court dismissed the appeal and directed the district court to vacate its order. 625 F.3d at 574; *see also Harter v. Iowa Grain Company*, No. 98-7108, 1998 WL 796131 (D.C. Cir. Oct. 28, 1998) (ordering vacatur under *Munsingwear* of district court decision disposing of motion to quash subpoena and

cross-motion to compel when underlying matter became moot on appeal); *Alfa Int'l Seafood, Inc. v. Ross*, No. 1:17-CV-00031 (APM), 2018 WL 3819045 (D.D.C. Aug. 10, 2018) (applying *Munsingwear* to vacate decision denying intervention when mootness prevented appellate review of the ruling). Indeed, Plaintiffs-Appellees cite not a single case that denied the remedy of vacatur merely because the litigant was not a party to the underlying case.

Nor does it make sense to limit vacatur solely to dispositive judgments. It is fully appropriate to use vacatur when a litigant faces future harm from a decision on a motion that can no longer be appealed because of mootness. *Oster v. Wagner*, 504 Fed. Appx. 555 (9th Cir. 2013) (vacating decision granting preliminary injunction when case became moot during appeal).

The denial of a motion to intervene as of right, moreover, has the same effect as a final judgment with respect to the movant's ability to participate in the case, which is why it is immediately appealable as a "final decision" under 28 USC 1291. *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). Indeed, as noted above, the Supreme Court has applied *Munsingwear* in the similar context of an appeal granting qualified immunity. *Camreta v. Green*, 563 U.S. 692 (2011). Thus, all the reasons that argue in favor of applying vacatur when the appeal from a judgment has become moot apply equally when an appeal on an intervention motion has become moot.

As noted in *Dilley v. Gunn*, 64 F.3d 1370 (9th Cir. 1995), courts focus on "fairness" principles when deciding a motion to vacate, and "[t]he relevant inquiry 'is whether the party seeking relief from the judgment below caused the mootness by voluntary action.'" *Id.* at 1371 (quoting *U.S. Bancorp*, 513 U.S. at 24). As established by the authorities cited above and in the initial Motion, principles of fairness dictate that the parties opposing appeal, who are the same parties that decided to settle, ought not to be allowed unilaterally to insulate the district court's order from review.

CONCLUSION

The Court should grant Movants-Appellants motion to dismiss the appeal as moot and vacate the decision of the court below.

Dated: January 25, 2019

DEMOS

By: */s/ Chiraag Bains*

Chiraag Bains
Brenda Wright
Attorneys for Proposed Defendant-Intervenors Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles

Dated: January 25, 2019

DECHERT LLP

By: */s/ Anna Do*

Neil Steiner
Anna Do

Attorneys for Movants-Appellants Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles

CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-1 because it contains 2,223 words and does not exceed 10 pages. The brief also complies with the requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because it is prepared in Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

/s/ Anna Do
Anna Do

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 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 25, 2019

By: */s/ Anna Do*

Anna Do
Dechert LLP
633 West 5th Street, Suite 4900
Los Angeles, CA 90071-2032
Telephone: (213) 808-5700

Attorney for Movants-Appellants
Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles