

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VICTOR LEAL et al.,
Plaintiffs-Appellants,
v.
XAVIER BECERRA et al.,
Defendants-Appellees.

No. 20-11083

**FEDERAL DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR RECONSIDERATION**

This suit was originally filed in Texas state court and removed to federal court by the federal defendants under [28 U.S.C. § 1442\(a\)\(1\)](#). The district court dismissed the claims against the federal defendants under the “derivative jurisdiction” doctrine, concluding that the state court lacked jurisdiction over those claims. Plaintiffs challenged that ruling, but in an order issued June 3, 2021, this Court concluded that the appeal was moot. The Court reasoned that, because plaintiffs had already filed another suit directly in federal court asserting claims that are substantially identical to the claims in this action (and the court in that second action had entered final judgment and dismissed those

claims with prejudice on other grounds),¹ a ruling on the jurisdictional question would not provide plaintiffs any further relief. *See* Order at 3. This Court dismissed the appeal as moot, vacated the district court’s order as to the federal defendants, and remanded with instructions to dismiss. *See id.* at 5.

Plaintiffs do not dispute that the question whether the district court had jurisdiction is moot. Rather, they contend that “dismiss[ing] the appeal as moot” is “logically incompatible” with “vacating the order of the district court.” Mot. for Recons. at 1 (internal quotation marks omitted). “The Court must *either* dismiss the appeal as moot and leave the district court’s order untouched, *or* it must acknowledge its jurisdiction over the appeal and vacate the district court’s order,” but “[i]t cannot do both,” plaintiffs contend. *Id.*

What plaintiffs complain about is merely an “inconsequential variation[] of terminology.” 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10 (3d ed.) (Westlaw Apr. 2021 update). As a leading treatise has observed, “[m]any of the decisions chronicled

¹ *See Leal v. Becerra (Leal II)*, No. 2:20-cv-185, [2021 WL 1163663](#) (N.D. Tex. Mar. 26, 2021).

in this section [discussing cases that become moot on appeal] simultaneously dismiss the appeal and—despite the seeming inconsistency—direct that the district court vacate its judgment and dismiss the action as moot.” *Id.* § 3533.10 n.35; *see, e.g., Thomas v. Reeves*, [961 F.3d 800, 801](#) (5th Cir. 2020) (en banc) (per curiam); *Yates v. Collier*, [677 F. App’x 915](#) (5th Cir. 2017) (per curiam) (unpublished); *Bowles v. Blue Lake Dev. Corp.*, [504 F.2d 1094, 1098](#) (5th Cir. 1974); *California Ass’n of Private Postsecondary Schools v. Devos*, No. 20-5080, [2020 WL 9171125](#) (D.C. Cir. Oct. 14, 2020) (per curiam) (unpublished); *Animal Legal Def. Fund v. USDA*, No. 18-5359, [2020 WL 4873759](#) (D.C. Cir. June 11, 2020) (per curiam) (unpublished); *Brooks v. Vassar*, [462 F.3d 341, 348-49, 360-61](#) (4th Cir. 2006); *Electronic Privacy Info. Ctr. v. Dep’t of Justice*, No. 04-5063, [2004 WL 2713119](#) (D.C. Cir. Nov. 24, 2004) (per curiam) (unpublished); *New York City Emps.’ Ret. Sys. v. Dole Food Co.*, [969 F.2d 1430, 1433-35](#) (2d Cir. 1992).²

² While the Second Circuit has simultaneously dismissed an appeal and vacated the district court’s judgment, the court has noted that “[i]t is somewhat anomalous for an appellate court to dismiss an appeal, thereby appearing to relinquish jurisdiction, and nevertheless proceed to remand to a district court with directions to dismiss the complaint, thereby appearing to exercise jurisdiction.” *Blackwelder v. Safnauer*, [866 F.2d 548, 550](#) n.2 (2d Cir. 1989).

Whatever the terminology used in its order, the fundamental point is that this Court correctly concluded that plaintiffs' appeal is moot and that the Court thus could not reach the merits of the appeal.

Nor should this Court direct that the claims against the federal defendants be remanded to state court. *See* Mot. for Recons. at 2-4. Having vacated the district court's order as to the federal defendants under *United States v. Munsingwear, Inc.*, [340 U.S. 36](#) (1950), this Court properly instructed that the claims against the federal defendants be dismissed. It would make no sense to have the claims remanded to state court, as the claims have already been dismissed with prejudice in *Leal II* and could not be relitigated—in either federal or state court. *See Procter & Gamble Co. v. Amway Corp.*, [376 F.3d 496, 499-501](#) (5th Cir. 2004); *San Antonio Indep. Sch. Dist. v. McKinney*, [936 S.W.2d 279, 281](#) (Tex. 1996) (“Because the first lawsuit at issue in this case was decided in federal court, federal law controls the determination of whether res judicata bars the present state court proceeding.”).

CONCLUSION

For the foregoing reasons, the Court should deny the motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this response complies with the requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 27(d)(2)(A), because it contains 741 words, according to the count of Microsoft Word.

/s/ Karen Schoen
Karen Schoen

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth 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/ Karen Schoen
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