Docket No. 21-56259

In the

United States Court of Appeals for the Ninth Circuit

JOHN DOE, an individual; JANE DOE, individually and as parent and next friend of JILL DOE, a minor child; and JILL DOE, a minor child, by and through her next friend, JANE DOE,
Plaintiffs-Appellants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT; RICHARD BARRERA, in his official capacity as Board President; SHARON WHITEHURST-PAYNE, in her official capacity as Board Vice President; MICHAEL MCQUARY, in his official capacity as Board Member; KEVIN BEISER, in his official capacity as Board Member; SABRINA BAZZO, in her official capacity as Board Member; and LAMONT JACKSON, in his official capacity as Interim Superintendent,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:21-cv-1809-CAB
Honorable Cathy Ann Bencivengo, District Judge

APPELLANTS' RESPONSE TO DEFENDANTS-APPELLEES' MOTION TO DISMISS APPEAL AND REMAND

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RESPONSE TO MOTION TO DISMISS & REMAND

As noted in Defendants-Appellees' motion to dismiss and remand, they have modified their COVID-19 vaccine mandate and set deadlines for its implementation in advance of the Fall 2022 semester—with the first deadline looming on June 28, 2022. Doc. 36 at ECF p.21. As further noted in that motion, Plaintiffs-Appellants John Doe, Jane Doe, and Jill Doe agree that remand is appropriate in this case due to changed circumstances. Doc. 36 at ECF pp.17, 25-26. However, this is only because Plaintiffs-Appellants believe there is enough time to file a renewed motion for a preliminary injunction with the district court and, if necessary, motions for an injunction pending appeal with the district court and this Court before the District's modified mandate takes effect and again bars students with religious objections from their classrooms and sports teams.

Where the parties differ is that Defendants-Appellees seek to tip the scales in their favor in future litigation by keeping the motions panel's order and district court order in place. That is wrong, and it would prejudice Plaintiffs-Appellants on remand. Because the District acknowledges that this appeal is moot, the District's preliminary

victories on the now-moot questions must also be vacated, rather than set in stone. Once those decisions are properly vacated, there would be no further need to continue this appeal. That is why the Supreme Court has held that "[t]he established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below[.]" *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

This is because "'a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance,' . . . 'ought not in fairness be forced to acquiesce in' that ruling." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994)). Courts have granted vacatur as an "equitable remedy" in such cases. *Id.* at 712. "Under the '*Munsingwear* rule,' vacatur is generally 'automatic' in the Ninth Circuit when a case becomes moot on appeal." *NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007).

This principle applies even when the entire case is not moot. *See Camreta*, 563 U.S. at 714 (vacating only the "part of the Ninth Circuit opinion" that addressed the mooted issue); *Mayorkas v. Innovation L.*

Lab, 141 S. Ct. 2842 (2021) ("case 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"); *Harvest Rock Church, Inc. v. Newsom*, 981 F.3d 764 (9th Cir. 2020) ("we vacate our October 1, 2020, order denying Harvest Rock Church's motion for an injunction pending appeal; vacate the district court's September 2, 2020, order denying Harvest Rock Church's motion for a preliminary injunction; and remand to the district court").

Here, Plaintiffs-Appellants sought review of an adverse ruling on a motion for a temporary restraining order and order to show cause re: preliminary injunction. Defendants-Appellees, although they prevailed below, acted unilaterally in changing their policy during the pendency of the appeal. Plaintiffs-Appellants were not consulted regarding the content or the timing of the new policy, and their ability to obtain a ruling from this Court has thus been "frustrated by the vagaries of circumstance." *Camreta*, 563 U.S. at 712. The most sensible result is thus to vacate the lower court and motions panel's orders.

This result is also required because the motions panel's order and district court order, if left unreviewed, prejudice Plaintiffs-Appellants'

ability to secure future relief from a mandate that they already know will return to harm them. Contrary to Defendants-Appellees' characterization, Doc. 36 at ECF p.14, the Supreme Court in *Tandon* did not distinguish between the case and the appeal when evaluating mootness, but focused instead on whether "the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020)).

Here, reinstatement of the District's vaccine mandate is more than a threat; it is a certainty because the District has already reinstated a mandate that will, by all accounts, bar students with religious objections from their classrooms and sports teams during the 2022-23 school year. Doc. 36 at ECF p.21 (confirming that students 16 years and older must receive vaccinations to participate in sports and in-person learning in fall 2022). Leaving the "legal consequences" of the district court's faulty ruling in place would undermine the very "point of vacatur," which the Supreme Court has recognized 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*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 40-41). In particular, a "legally consequential decision" such as "a constitutional ruling" is "rightly 'strip[ped] . . . of its binding effect" when a case becomes moot on appeal, which "clears the path for future relitigation." *Id*. Because of Defendants-Appellees' unilateral, mid-litigation policy change, this Court will not be able to review the district court's or the motions panel's orders on an important constitutional issue. And this is a legal issue that, as noted above, will be subject to future relitigation in short order. This Court should not tip the scales in Defendants-Appellees' favor by leaving the school district's unreviewed wins in a now-moot appeal in place to impact ongoing litigation below.

Therefore, this appeal may be dismissed, but only if the district court's and motions panel's orders are also vacated under *Munsingwear*.

Respectfully submitted,

Dated: March 24, 2022

/s/ Paul M. Jonna

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Fed. R. App. P. 27(d) and 9th Cir. Rules 27-1(1)(d) and 32-3. The Motion was prepared in 14-point font and, other than the certificates, contains 986 words, as counted by Microsoft Word 2016.

March 24, 2022

/s/ Paul M. Jonna
Paul M. Jonna

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2022, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Paul M. Jonna
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