Docket No. 21-56259

In the

United States Court of Appeals

for the

Ninth Circuit

JOHN DOE, *et al.*,
Plaintiffs-Appellants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
Case No. 21-cv-01809-CAB-LL,
Hon. Cathy Ann Bencivengo, District Judge

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

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REPLY TO APPELLANTS' RESPONSE TO MOTION TO DISMISS APPEAL AND REMAND

Appellants concede that this appeal is moot and should be dismissed, and that the matter should be remanded to the district court for further proceedings, but contend that this can occur only if the motions panel's order and the district court order are vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). (Response, p. 1, 5.)[1] Appellants contend vacatur of the orders is required, and that any other outcome would "tip the scales" in favor of Appellees and "would prejudice Plaintiffs-Appellants on remand." Appellees disagree.

"In the case of interlocutory appeals … 'the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from.'" *In re Tax Refund Litigation*, 915 F.2d 58, 59 (2d Cir.1990), quoting *Gjertsen v. Board of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir.1984); see also *McLane v. Mercedes-Benz of N. Am.*, 3 F.3d 522, 524 n.6 (1st Cir. 1993); *Fleming v. Gutierrez*, 785 F.3d 442, 449 (10th Cir. 2015);

[1] Prior to the filing of this motion Appellants stated that any vacatur would include the order denying rehearing en banc (Motion, Ex. A, p. 25), but Appellants now appear to contend that "keeping the motions panel's order and district court order in place" would be the only error. (*Id.* at 1.) They do not explain their change in position.

Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114, 1122 (11th Cir. 1995).) It is sufficient to simply dismiss the appeal:

> The general practice on appeal from final judgments need not carry over to interlocutory appeals or other special circumstances. The easiest illustration is provided by appeals from injunction orders that have expired or become moot; if the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated.

13A Wright, Miller, & Cooper, Federal Practice and Procedure § 3533.10.3, and fn. 10.

Thus, courts order vacatur when the case is moot, and/or to assure that an appealing party does not suffer legal consequences within the subject litigation, but *not* to remove the precedential value of a decision within the circuit or its persuasive value outside the circuit when *an appeal* of an interlocutory order is moot and the underlying decision does not have res judicata or collateral estoppel effect. In those circumstances, "there is no harm in letting an interlocutory order stand." *Gjertsen*, 751 F.2d at 202.

Appellants rely on *Camreta v. Greene*, 563 U.S. 692 (2011), wherein the issue was vacatur of a judgment below "[w]hen a civil suit becomes moot pending appeal," not the mootness of an appeal of an

interlocutory order based on changed circumstances where the civil suit is not moot and continues. *Id.* at 712-714.[2] In *Camreta* the judgment below, if not vacated, would have required action on the part of the non-prevailing party who was deprived of the opportunity to challenge that judgment on appeal. *Ibid.* Those facts bear no resemblance to where this case stands. This Court's decision in *NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065 (9th Cir. 2007) also addressed vacatur of a judgment of dismissal "[w]hen a case becomes moot on appeal," and not mootness of an appeal of an interlocutory order. *Id.* at 1068. And in *Harvest Rock Church, Inc. v. Newsom*, 981 F.3d 764 (9th Cir. 2020) vacatur was warranted on remand because remand was the result of intervening changes in the law, where it is logical to "remand to the courts of appeals 'with instructions to remand to the district court for further consideration in light of' some new Supreme Court case that influences the inquiry." *Whole Woman's Health v. Jackson*, 23 F.4th 380, 384, n. 7 (5th Cir. 2022), citing *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020).

These precedents are simply not applicable here. The district

[2] Vacatur in *Mayorkis v. Innovation L. Lab*, 141 S.Ct. 2842 (2021) was also vacatur of a judgment, on a motion to vacate the judgment.

court order is one denying a preliminary injunction based on specific facts the parties concede have changed. The three orders of this Court are a partial, temporary grant of an injunction pending appeal, a subsequent denial of an injunction pending appeal, 19 F.4th 1173 (9th Cir. 2021), and an order denying rehearing en banc of that subsequent order. 22 F.4th 1099 (9th Cir. 2022). After learning of the "changed circumstances" which the parties agree have rendered this appeal moot the Supreme Court denied Appellants' application for injunctive relief, and denied Appellants' alternative request for a writ of certiorari before judgment and a stay pending resolution. 142 S.Ct. 1099 (2022). Notably, the Court did not order vacatur of any orders or direct this Court to do so, unlike in the factually distinguishable cases relied upon by Appellants. On remand, the district court will be analyzing this case on a different factual record. There is no need or basis for vacating the interlocutory orders.

"The easiest illustration is provided by appeals from injunction orders that have … become moot; if the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated."

Respectfully submitted,

Date: March 31, 2022

Atkinson, Andelson, Loya, Ruud & Romo

/s/ Mark R. Bresee
Mark R. Bresee
Attorneys for Defendants-Appellees

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

9th Cir. Case Number(s) — 21-56259

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[✓] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains the following number of words: 883.

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ Mark R. Bresee **Date** March 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system.

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

Date: March 31, 2022

/s/ Mark Bresee
Mark Bresee