No. 19-35461
(Consolidated with Nos. 19-35460 and 19-35462)

Oral Argument Held On June 5, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF CONSERVATION VOTERS, *et al.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, in his official capacity as
President of the United States, *et al.*,
Defendants,

STATE OF ALASKA,
Intervenor-Defendant,

and

AMERICAN PETROLEUM INSTITUTE,
Intervenor-Defendant-Appellant.

On Appeal From the United States District Court For the District of Alaska
No. 3:17-cv-00101 (Hon. Sharon L. Gleason)

AMERICAN PETROLEUM INSTITUTE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Intervenor-Defendant American Petroleum Institute ("API") hereby responds to the Court's January 27, 2021 Order directing the parties to submit supplemental briefs regarding the impact on this litigation of President Biden's issuance of Executive Order 13990. That Executive Order expressly revoked the executive action that Plaintiffs challenged in this lawsuit, which the district court vacated over Federal Defendants' and API's objections. Federal Defendants, API, and Defendant-Intervenor State of Alaska noticed the instant appeals in order to reverse that district court judgment and reinstate that executive action. However, given that the executive action at issue has now been revoked by Executive Order 13990, the legal challenge to that action is now moot.

Absent an ongoing justiciable controversy, this Court lacks jurisdiction and must dismiss these consolidated appeals. API requests that this Court vacate the district court's adverse decision. Because API did not cause this lawsuit—and API's opportunity to obtain appellate review of an adverse district court decision—to become moot, such vacatur is automatic. Accordingly, this Court should vacate the district court's decision, dismiss the consolidated appeals, and remand to the district court with directions to dismiss the lawsuit.

BACKGROUND

On December 20, 2016 and January 27, 2015, President Obama used his authority under 43 U.S.C. § 1341(a) ("Section 1341(a)") to "withdraw from disposition by leasing for a time period without specific expiration" certain areas of the Alaska and Atlantic outer continental shelf ("OCS"). 2 E.R. 289, 290, 296. On April 28, 2017, President Trump issued Executive Order 13795 to "strengthen[] the Nation's security and reduce[] reliance on imported energy." 2 E.R. 285, § 1. Among other things, Section 5 of Executive Order 13795 revoked President Obama's withdrawals by "modif[ying]" the withdrawal decisions to cover only "those areas of the [OCS] designated as of July 14, 2008, as Marine Sanctuaries . . . ." 2 E.R. 286, § 5.

On May 3, 2017, Plaintiffs filed this lawsuit challenging Section 5's revocation of the prior withdrawals as purportedly beyond the authority conferred upon the President by Section 1341(a). *See* 2 E.R. 310. Plaintiffs requested, *inter alia*, (1) a declaration that "Section 5 of President Trump's . . . executive order . . . is in excess of his statutory powers"; (2) a declaration that the Secretaries of Interior and Commerce "cannot lawfully implement Section 5"; and (3) an injunction to prevent "Defendants from complying with or relying in any way on Section 5 . . . ." 2 E.R. 332–33.

The district court granted Plaintiffs' request for summary judgment, held "that Section 5 of Executive Order 13795 is unlawful and invalid," and accordingly ordered that "Section 5 of Executive Order 13795 is hereby VACATED." 1 E.R. 32. Federal Defendants, Intervenor-Defendant API, and Intervenor-Defendant State of Alaska timely noticed appeals of the district court's judgment. On June 5, 2020, this Court held oral argument on the consolidated appeals.

On January 20, 2021, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Science Crisis." *See* Exhibit 1 hereto. Among other things, Executive Order 13990 "revoked" President Trump's "Executive Order 13795 of April 28, 2017 . . . ." *Id.* § 7.

ARGUMENT

I. Executive Order 13990 Moots Plaintiffs' Lawsuit.

"The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017) (quotation omitted). *See also id.* ("[T]he doctrine of mootness has been described as the doctrine of standing set in a time frame." (quotation omitted)).

Plaintiffs challenged Section 5 of President Trump's Executive Order 13795, and requested an order declaring Section 5 invalid and preventing the Secretaries of Interior and Commerce from relying on Section 5. *See supra*. But President Biden's Executive Order 13990 "has already done" this by revoking Executive Order 13795 in its entirety. *Pub. Utilities Comm'n of the State of Cal. v. Fed. Energy Regulatory Comm'n*, 100 F.3d 1451, 1458 (9th Cir. 1996). In other words, this Court "cannot give the" Plaintiffs "any further relief because" Executive Order 13990 has "already provided the relief sought by them in this case." *NASD Dispute Resolution, Inc. v. Judicial Council of the State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007). *Cf. Jackson v. Abercrombie*, 585 F. App'x 413, 414 (9th Cir. 2014) ("A case is moot when the challenged statute is repealed, expires or is amended to remove the challenged language." (quotation and alteration omitted)).

Because Plaintiffs' lawsuit is moot, this Court "lacks jurisdiction and must dismiss the appeal[s]." *Pub. Utilities Comm'n*, 100 F.3d at 1458.

II. This Court Should Vacate The District Court's Unreviewable Decision And Direct The District Court To Dismiss The Lawsuit.

"When a case becomes moot on appeal, the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Dispute Resolution*, 488 F.3d at 1068 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)). "Without vacatur, the lower court's judgment, 'which in the statutory scheme was only preliminary,' would escape meaningful appellate

review thanks to the 'happenstance' of mootness." *NASD Dispute Resolution*, 488 F.3d at 1068 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur thus "clears the path for future relitigation of the issues between the parties, preserving the rights of all parties, while prejudicing none by a decision which . . . was only preliminary." *Pacific Gas & Elec. Co. v. Fed. Energy Regulatory Comm'n*, 829 F. App'x 751, 755 (9th Cir. 2020) (quoting *Alvarez v. Smith*, 558 U.S. 87, 94 (2009)).

As a matter of equity, "[v]acatur in such a situation 'eliminat[es] a judgment the loser was stopped from opposing on direct review.'" *NASD Dispute Resolution*, 488 F.3d at 1068 (quoting *Arizonans for Official English*, 520 U.S. at 71). *See also*, *e.g.*, *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (noting "general practice to vacate the judgment below . . . so as to 'prevent a judgment, unreviewable because of mootness, from spawning any legal consequences'" (quoting *Munsingwear*, 340 U.S. at 40–41)). Accordingly, "vacatur is generally automatic in the Ninth Circuit when a case becomes moot on appeal." *NASD Dispute Resolution*, 488 F.3d at 1068 (quotation omitted).

In determining whether automatic vacatur applies, "the pivotal question is whether the party seeking relief from the judgment below caused the nonjusticiability by voluntary action." *Mayfield*, 109 F.3d at 1427 (quotation and alteration omitted). *See also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513

U.S. 18, 24 (1994). Courts recognize an exception to automatic vacatur where the party seeking vacatur caused the mootness. *See id*. at 29; *Dilley v. Gunn*, 64 F.3d 1365, 1369–71 (9th Cir. 1995). In those exceptional circumstances, the Court will "generally remand to the district court to weigh the equities and determine whether it should vacate its own judgment." *Mayfield*, 109 F.3d at 1427. *See also*, *e.g.*, *NASD Dispute Resolution*, 488 F.3d at 1069 n.1.

This exception to automatic vacatur does not apply to API. API did not cause the mootness, and played no role in Executive Order 13990's revocation of Section 5 of Executive Order 13795 challenged by Plaintiffs in this litigation. *See supra* pp. 2–3. Vacatur of the district court's decision is therefore automatic. *See NASD Dispute Resolution*, 488 F.3d at 1068. *See also*, *e.g.*, *Pacific Gas*, 829 F. App'x at 755; *Pub. Utilities Comm'n*, 100 F.3d at 1458, 1461.

Application of the automatic vacatur rule is not impacted by the Federal Defendants' role in mooting the case. *See supra* Section I. The defendant-intervenors—API and the State of Alaska—are requesting vacatur, not the Federal Defendants. *See Mayfield*, 109 F.3d at 1427 (question is "whether the party seeking relief" caused mootness). Where, as here, government action moots an appeal, vacatur remains appropriate upon the request of intervenors that are thereby deprived of the opportunity to appeal an adverse district court judgment. *See Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1213 (10th Cir. 2005)

(vacatur appropriate where intervenors that supported federal defendants in district court litigation request vacatur after federal defendants' action mooted intervenors' appeal); *Humane Soc'y of the United States v. Kempthorne*, 527 F.3d 181, 185, 187–88 (D.C. Cir. 2008) (vacating district court decision and rejecting plaintiffs' argument that defendant-intervenors could not obtain vacatur where action of defendant federal agency mooted appeal).

The Tenth Circuit's disposition in *Wyoming v. United States Department of Agriculture* is instructive. In that case, the State of Wyoming filed suit to challenge a Forest Service regulation designed to protect roadless areas within the national forest system. 414 F.3d at 1210. "A number of environmental organizations intervened on behalf of the federal defendants in defense of the Rule." *Id*. After the district court ruled against the federal defendants and intervenors and set aside the challenged regulation, the intervenors appealed. *See id*. at 1211. While the appeal was pending, the Forest Service replaced the challenged regulation, mooting the appeal. *See id*. at 1211–13. At the intervenors' request, the Tenth Circuit applied the normal rule and vacated the district court decision because the intervenors "seeking appellate relief [were] not the party responsible for mooting the case," *id*. at 1213, and through vacatur, "the rights of the defendant-intervenors, the nonprevailing parties seeking appellate relief, are preserved," *id*. at 1213 n.6.

Likewise here, the intervenors did not cause the mootness, "nor did they fail to appeal" the adverse district court decision. *NASD Dispute Resolution*, 488 F.3d at 1070. Indeed, in these circumstances, the principles supporting automatic vacatur apply directly. *See supra* pp. 4–5. As a party to the district court proceedings that properly sought "review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance," API "ought not in fairness be forced to acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25. *See also*, *e.g.*, *In re Burrell*, 415 F.3d 994, 999–1000 (9th Cir. 2005) (explaining that party seeking vacatur had "not surrendered his claim to the equitable remedy of vacatur and should not be penalized by the unfair application of collateral estoppel, when his case has been mooted through no act of his own").

Because API "bears no responsibility for this case becoming moot . . ., vacatur of the decision[] below is mandated." *In re Pattullo*, 271 F.3d 898, 902 (9th Cir. 2001).

CONCLUSION

This Court should vacate the district court's judgment, which has become moot on appeal, and remand to the district court with directions to dismiss the lawsuit.

Respectfully submitted,

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